

DECEMBER 1983

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COMMISSION DECISIONS



DECEMBER 1983

The following cases were Directed for Review during the month of December:

Secretary of Labor, MSHA v. U.S. Steel Mining Company, Docket No. PENN 83-63  
(Judge Broderick, October 25, 1983)

Secretary of Labor, MSHA v. Turner Brothers, Inc., Docket No. CENT 83-12  
(Judge Moore, November 22, 1983)

There were no cases in which review was Denied during the month of December.



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

December 7, 1983

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
v. : Docket No. WEVA 79-31  
SEWELL COAL COMPANY :

DECISION

This case requires us to examine further the relationship between modification and enforcement proceedings under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V. 1981). We have previously addressed the propriety of raising the issue of diminution of safety for the first time as a defense in an enforcement proceeding. Penn Allegh Coal Co., 3 FMSHRC 1392 (June 1981). In this case, which is before us a second time, we must examine the effect in an enforcement proceeding of findings concerning diminution of safety made by the Secretary of Labor in a modification proceeding. For the reasons that follow, we hold that under the circumstances of this case the findings in the modification proceeding are binding in the enforcement proceeding.

On January 15, 1976, Sewell Coal Company was issued a notice of violation under the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976)(amended 1977), by a representative of the Secretary of the Interior. The notice of violation charged Sewell with operating a Galis 300 roof bolter without a canopy in violation of 30 C.F.R. § 75.1710-1. Prosecution of the case was continued by the Secretary of Labor after the Mine Act was enacted. The parties agreed that under the terms of the standard a canopy was required. The day before the notice of violation was issued, however, Sewell had filed a petition for a modification of the canopy standard with respect to the roof bolter. 1/ Sewell asserted in its petition that installation of a canopy would diminish the safety of its miners.

1/ Sewell filed its modification petition under section 301(c) of the 1969 Coal Act. 30 U.S.C. § 861(c)(1976)(amended 1977). This provision was replaced by section 101(c) of the 1977 Mine Act, 30 U.S.C. § 811(c) (Supp. V 1981), which states in part:

Upon petition by the operator or the representative of miners the Secretary may modify the application of any mandatory

(footnote continued)

Prior to a decision on the merits in the modification case, the Secretary of Labor instituted this proceeding seeking a civil penalty for the noticed violation. Subsequently, in the modification proceeding, the Administrator for Coal Mine Safety and Health at the Department of Labor's Mine Safety and Health Administration ("MSHA") waived compliance with the standard at minimum mining heights of 48 inches or less in the working section. Sewell Coal Co., No. M76-131 (April 27, 1979). Thereafter, prior to hearing in the enforcement proceeding, the parties agreed to settle the case and the Secretary of Labor moved the Commission's administrative law judge to approve the settlement. The judge denied the settlement motion on the basis that there was no violation because the standard was "null, void and unenforceable." Sewell Coal Co., 1 FMSHRC 1379 (September 1979)(ALJ).

We granted the Secretary's petition for review, reversed the judge's finding that the standard was invalid, and remanded the case. Sewell Coal Co., 3 FMSHRC 1402 (June 1981). We noted that, although a modification decision had been issued, the judge had provided "no clear discussion of the interrelationship between the factual matters at issue in [the] enforcement proceeding and those at issue in the modification case." 3 FMSHRC at 1414-15. Moreover, the judge's decision had not discussed the legal effect, if any, of the granted modification on the pending enforcement proceeding. We therefore remanded the matter to afford the parties an opportunity to present arguments concerning the effect of the modification on the civil penalty case. 3 FMSHRC at 1415.

On remand, the parties again agreed to settle the matter and moved for the judge's approval. The judge issued an extensive order to show cause why the motion should not be denied and the matter dismissed. Sewell Coal Co., 3 FMSHRC 2578 (November 1981)(ALJ). The judge stated that it was more probable than not that when Sewell was issued the notice of violation it could not have installed a canopy on the roof bolter without diminishing safety. The judge expressed his tentative conclusion that an affirmative defense of diminution of safety was therefore available to Sewell, and ordered the parties to "present arguments addressing the issue of the availability of the defense of diminution of safety." 3 FMSHRC at 2590.

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footnote 1 cont'd.

safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the results of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such a mine. [Emphasis added].

Section 101(c) preserves the same bases for granting a variance that were contained in section 301(c) of the 1969 Coal Act. Under the modification provisions of the Mine Act, the decision to grant or withhold a variance is made by the Secretary of Labor. The MSHA regulations implementing section 101(c) provide for an initial decision by an Administrator of MSHA, with a right of appeal ultimately to the Assistant Secretary of Labor for Mine Safety and Health. 30 C.F.R. §§ 44.13-44.33. Sewell's modification petition was continued before the MSHA Administrator for Coal Mine Safety and Health.

The Secretary responded that the judge had improperly raised the defense of diminution of safety sua sponte and, alternatively, that the defense could not be established with respect to the roof bolter. The Secretary asserted that in the modification proceeding the Administrator had not waived compliance with the safety standard at the mining height specifically at issue in the enforcement proceeding. That height, the Secretary asserted (and the parties subsequently agreed), was 50 inches. The Secretary argued that the judge could not, in effect, overrule the Administrator's decision. Sewell responded that for the reasons stated by the judge, the settlement should be denied and the matter dismissed.

The judge again rejected the settlement. He held that he had properly raised the issue of diminution of safety, and concluded that the defense had been established. In response to the Secretary's assertion that he was attempting to overrule the Administrator's finding as to whether compliance diminished safety, the judge asserted: "[E]vidence in this record which was not before the Administrator established that, independent of the Administrator's decision, sufficient practical technology did not exist on the date of the alleged violation to warrant imposition of an obligation to install canopies." 3 FMSHRC at 2579 (footnote omitted). Accordingly, the judge dismissed the case. 3 FMSHRC at 2580. We then granted the Secretary's petition for discretionary review.

We first consider whether an operator may raise a diminution of safety defense in an enforcement proceeding where it has already received a modification decision with respect to the same condition at issue in the enforcement case. The phrase "diminution of safety" in section 101(c) of the Mine Act (n. 1, supra) serves as one of the following two bases for a determination by the Secretary that an operator may depart from otherwise mandated compliance with a standard: (1) if an alternative method of achieving the results of the standard exists with no loss in the measure of protection afforded to the miners by the standard; or (2) if application of the standard to the mine will diminish the safety of the miners.

The reasons for providing for such departures in these circumstances are obvious. As to the first, modification provides a degree of operating flexibility while accomplishing the same level of miner protection. As to the second, Congress found "an urgent need to provide more effective means and measures for improving the working conditions and practices in the nation's ... mines in order to prevent death and serious physical harm." 30 U.S.C. § 801(c). The key means for accomplishing this legislative goal was establishing a basic level of safety through statutory interim mandatory safety standards and requiring the Secretary to raise that level through the promulgation of improved standards. 30 U.S.C. § 801(g)(1). Where, due to a mine's particular circumstances, compliance with a mandatory standard would have an effect opposite to that intended -- that is, where adherence to a standard would reduce miner safety -- logic dictates and Congress provided the modification procedures.

As noted above, the decision as to whether compliance with a standard diminishes safety rests statutorily with the Secretary and his designee, in this case, the Administrator. Penn Allegh, 3 FMSHRC at 1397-98. We adhere to our previous holding that an operator is foreclosed from bypassing this statutory modification procedure and unilaterally determining to forego compliance with a mandatory standard. Id. Cf. General Electric Co. v. Secretary of Labor, 576 F.2d 558, 561 (3d Cir. 1978). <sup>2/</sup> The present case, however, concerns an operator that filed a modification petition prior to being cited and received a final modification decision from the Secretary prior to the administrative law judge's hearing in the enforcement proceeding. Cf. Florence Mining Co., 5 FMSHRC 189 (February 1983), pet. for review filed, No. 83-3134, 3d Cir., March 15, 1983. We conclude that where, as here, an operator has applied for and received a modification on the grounds of diminution of safety, recognition of a narrow diminution of safety defense in a subsequently filed enforcement action is necessary to effectuate the purposes of the Mine Act and, properly applied, is compatible with its statutory scheme.

Consequently, we hold that an operator may argue diminution of safety as a defense to the Secretary's allegation of a violation and request for imposition of a penalty under the following circumstances: (1) the operator petitioned for the modification of a standard and was subsequently cited for violating the standard; (2) the Secretary granted the modification but nonetheless continued the enforcement proceedings; and (3) the material circumstances encompassing the modification and the enforcement proceedings are identical. Therefore, where the operator's petition for modification has been granted by the Secretary, introduction of the modification decision and an unrebutted showing that the underlying conditions at issue in the enforcement proceeding are identical with those upon which the modification decision is based will establish a complete defense. If the defense is established, we will not find a violation or assess a penalty. For us to do so would be at odds with the Act's goal of assuring an improved level of safety because, under these circumstances, we would be penalizing the operator for having avoided a hazard to miners.

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<sup>2/</sup> We realize that emergency situations may arise where the gravity of circumstances and presence of danger may require an immediate response by the operator or its employees, necessitating a departure from the terms of a mandatory standard without first resorting to the Act's modification procedures. In such conditions, an exception to the Act's modification and liability provisions may be necessary in order to further the Act's primary goal, the protection of miners. Penn Allegh did not present such a situation, nor does this case. Rather, these cases involve only the operator's ability to conduct safely routine mining operations on a continuing and regular basis. Therefore, we reserve for a case appropriately raising such an issue detailed consideration of any emergency exception to the general rules on modification and liability.

The Act's modification procedures must be accorded respect (Penn Allegh, 3 FMSHRC at 1397-98), and the diminution of safety defense is therefore a narrow one. Accordingly, we hold that the findings of the Administrator in the modification proceeding are conclusive with respect to the question of diminution of safety in the enforcement proceeding. If the modification was denied, the operator should exhaust its administrative and judicial remedies concerning the denial. Also, if the modification was denied but the circumstances have changed and the operator believes compliance will diminish safety, it should again seek a modification from the Secretary rather than ask the Commission in an enforcement proceeding to vacate a citation. Similarly, if the Secretary granted a modification and subsequently cited the operator, he may refute a proffered diminution of safety by showing that the cited conditions are different from those encompassed by the modification decision.

In this case, we will consider Sewell's diminution of safety defense because Sewell instituted a proceeding to modify the standard prior to being cited for the violation and received a final decision in that proceeding granting the petition for heights at or less than 48 inches. 3/ Thus, we turn to the question of whether Sewell's defense should be upheld.

We first reject the Secretary's assertion that the issue of diminution of safety was waived because it was not pleaded initially by Sewell. We remanded this matter for the express purpose of consideration of "the legal effect of the grant of a modification petition [upon] a pending enforcement proceeding." Sewell's modification petition to which we referred was based upon an assertion of diminution of safety. Sewell Coal Co., 3 FMSHRC at 1415. The question of whether a failure to plead an affirmative defense constitutes a waiver must be decided on a case-by-case basis. A crucial consideration is whether the opposing party has been deprived of notice of the issue and thus has been hindered in its ability to prepare for and to participate in trial. We detect no lack of fair notice here. Not only did we put the Secretary on notice, but the judge also, in his order to show cause, set forth fully his views on the subject and gave the Secretary sixteen days to "present arguments addressing ... the availability of the defense of diminution of safety in this case." Sewell Coal Co., 3 FMSHRC at 2586-90.

We also reject the Secretary's assertion that the judge improperly raised the issue of diminution of safety sua sponte. In previous cases we have found that our judges, when reviewing a settlement, may examine the fundamental question of whether there is in fact a violation. Co-op Mining Co., 2 FMSHRC 3475, 3475-76 (December 1980); Olga Coal Co., 2 FMSHRC 2669, 2770 (October 1980). The Mine Act requires us to oversee penalty settlements as a means of encouraging compliance. 30 U.S.C. § 820(k). Paying a penalty where there has been no violation does not promote that goal. Co-op Mining Co., 2 FMSHRC at 3476. Here the judge properly raised the question to determine whether the violation could stand. The thrust of our inquiry therefore is whether he correctly found it could not.

3/ This case does not present the situation where an enforcement proceeding has been heard before the petition for modification has been finally resolved, and we leave for another day the question of the recognition of a diminution of safety defense under such circumstances.

In his modification decision, the MSHA Administrator found that in the 2 West section of Sewell's mine there would be inadequate clearance to permit safe use of a canopy on the Galis 300 roof bolter except where the mining height exceeded 48 inches. Thus, the Administrator waived compliance with the standard at or under mining heights of 48 inches. Despite the fact that the violation was cited at a mining height of 50 inches and the modification of the standard would appear to be inapplicable, the judge found that compliance at even 50 inches would diminish safety.

The judge, as we have noted, referred to "evidence in [the] record, which was not before the Administrator." Sewell Coal Co., 3 FMSHRC at 2579. This evidence appears to be the Secretary's representation in his first motion to approve settlement that "in some instances the use of canopies on the Galis drills had caused injuries to employees" and that when the violation was cited technology to abate it was in the experimental stage. 3 FMSHRC at 2579 n.l. 4/ The judge also relied on the fact that the original notice of violation, which referred to a mining height of 55 inches, was subsequently amended to show a minimum mining height on the section of 50 inches. Id. Finally, the judge noted his own "accumulated expertise." 3 FMSHRC at 2587-88.

We find no evidence in this record that leads us to conclude that the Administrator's finding with respect to diminution of safety should not apply. The Administrator's decision and the contested citation concern the same mine, the same section in that mine, and the same equipment. The Secretary and Sewell agree that the mining height was 50 inches. 5/ The facts upon which the Administrator based his findings are set forth in his decision: the mined height of the section, the condition of the roof and floor, and the clearance between the frame of the roof bolting machine and the bottom of the roof supports. Sewell Coal Co., No. M76-131 (April 27, 1979), at 5. As we have indicated, if Sewell believes that these conditions have changed so that compliance at heights above 48 inches diminishes safety, Sewell should petition the Secretary for modification.

Finally, to the extent the judge relied on the statement in the first settlement motion that when the notice was issued "technology was in the experimental stage," we note that the Secretary's second motion on behalf of the parties expands upon this assertion and maintains that canopies were

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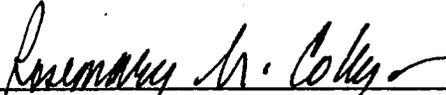
4/ In the second settlement motion, the Secretary stated that "canopies were available from the manufacturer of the Galis 300 roof bolter at the time [the violation was cited], but many operators were dissatisfied with this design and were seeking other alternatives or modifications to the design to improve its capabilities." Request for Settlement Approval, August 20, 1981, p. 1.

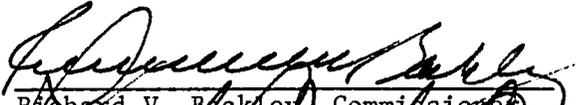
5/ The original citation stated the height on the section averaged 55 inches. The citation was subsequently modified by the inspector to state that the minimum mining height on the section was 50 inches. Sewell does not contest the accuracy of this modification. In its brief, Sewell states that the inspector modified the original citation to "show that the actual mining height was actually 50 inches."

in fact available from the manufacturer at the time of the violation. Sewell raised the feasibility issue in the modification proceeding, and the Administrator disposed of it by waiving compliance at mining heights at or below 48 inches.

In light of the foregoing, we cannot affirm the judge's conclusion that the defense of diminution of safety bars this proceeding. We therefore reverse the judge's dismissal of this matter and his denial of the motion to approve settlement. 6/

Ordinarily, we would remand to the judge for further consideration of the settlement motion. However, because the contested notice of violation was issued over seven years ago, and in view of the fact that the case has been before the judge twice and is now before us for a second time, we deem it time to end the controversy. Cf. Eastover Mining Co., 4 FMSHRC 1207, 1214 (July 1982). A penalty has been proposed for the violation. We have reviewed the record in light of the statutory penalty criteria (30 U.S.C. § 820(i)), and find the proposed penalty appropriate in light of all the circumstances. Accordingly, the parties' second motion for approval of the settlement, agreeing to the proposed \$25.00 penalty, is granted.

  
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Rosemary M. Collyer, Chairman

  
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Richard V. Beckley, Commissioner

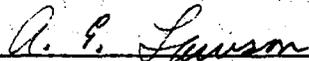
  
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Frank F. Jett, Commissioner

  
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L. Clair Nelson, Commissioner

6/ This result corresponds with that reached by the judge concerning the other violation that was originally at issue in this case. The Secretary also sought a penalty for a violation of 30 C.F.R. § 75.1710-1(a) with respect to a shuttle car, which was operating without a canopy at a mining height of 43 inches. As in the case of the roof bolter, the operator had petitioned for a modification with respect to the shuttle car prior to being cited for the violation. In the modification decision, the Administrator concluded that installation of a canopy on the shuttle car in mining heights of 48 inches or below would diminish safety. Sewell Coal Co., M76-131 (April 27, 1979), at 14. The judge held that, based upon these facts and the Administrator's conclusion, the defense of diminution of safety was established. 3 FMSHRC at 2579. The Secretary did not seek review of this portion of the decision.

Commissioner Lawson concurring:

Although I am in most respects in agreement with my colleagues, certainly as to the result reached, and substantially as to the reasoning underlying that result, I do not subscribe to their suggestion that undefined "emergency" situations may arise in which an operator is to be permitted to ignore mandatory standards. (Slip op., p. 4 n.2). Although--perhaps--dicta, the danger inherent in encouraging claims of emergency "exception(s)" to the clear mandate of the statute, including section 101(c) thereof, neither assures an "improved level of safety" (slip op., p. 4) nor, without strict adherence to the requirements necessary to establish the narrow defense of diminution of safety, "... guarantee[s] no less than the same measure of protection afforded the miners ... by such standard ...." 30 U.S.C. § 811(c).

  
\_\_\_\_\_  
A. E. Lawson, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

December 8, 1983

ROSALIE EDWARDS :  
 :  
 v. : Docket No. WEST 80-441-DM  
 :  
 AARON MINING, INC. :

DECISION

This discrimination case arises under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801 et seq. (1976 & Supp. V 1981). At issue is whether the failure to provide more suitable toilet facilities at the mine site, which failure led to the miner's resignation, constituted retaliatory action in response to repeated requests and complaints by the miner concerning existing facilities. The administrative law judge concluded that the operator had constructively discharged the miner in violation of the Mine Act. Rosalie Edwards v. Aaron Mining, Inc., 3 FMSHRC 2630 (November 1981) (ALJ). On review, the operator challenges the judge's finding of discrimination. For the reasons that follow, we reverse.

The facts are largely undisputed. The complaining miner, Rosalie Edwards, worked at Aaron Mining, Inc., as an assayer of gold samples from January 21, 1980 through about March 15, 1980. At the time that she accepted employment with Aaron there were no indoor or permanent toilet facilities on the mine site. Edwards had not inquired about such facilities when she was hired, but during her tenure she requested toilet facilities in every daily safety report she submitted, as well as in conversations with Aaron supervisory personnel.

The only toilet facility on the mine site was an outhouse located about three-quarters of a mile from the lab in which Edwards worked. (Aaron had attempted to drill for water for permanent facilities, but its repeated efforts in this regard had been unsuccessful.) In order to reach the outhouse an employee of Aaron had to travel a single-lane road on which visibility was poor. The employee then had to climb under a barbed-wired fence and walk about a half a block down a hill to reach the outhouse. Edwards described the sanitary conditions in the outhouse as appalling and used the facility only once. In response to her complaints, Edwards testified that Aaron stated that it would install a suitable restroom soon. The lack of water in the area, however, presented obvious problems.

After working at the mine for four weeks Edwards claimed to have developed a bladder infection, although no medical substantiation of this claim was provided. This apparently was linked to her determination not to use the outhouse on the mine site, but instead to wait from 6:30 a.m. to 4:00 p.m. to use a toilet. She was out of work for a week claiming this was due to the asserted infection. When she returned, she began to drive to her home and back once during each work day (a 20-mile and 70-minute round trip) to use the bathroom there. Aaron knew of the trips, did not object to her going, did not dock her pay for the time lost and, on two occasions, gave her gasoline for her car. After making this round trip for several weeks, Edwards told Aaron supervisory personnel that it was "very inconvenient" to go home daily.

Edwards' last working day was Friday, March 15, 1980. On either March 16 or 17, 1980, Edwards resigned. She did so by going to the home of Aaron's general manager, where she complained once more about the lack of permanent or indoor toilets. She also gave him a letter stating that she was willing to return when Aaron had a water supply for permanent toilet facilities, and if Aaron increased her salary. The general manager offered to meet her salary demand, but Edwards refused to stay. 1/

On April 7, 1980, Edwards wrote to the Department of Labor's Mine Safety and Health Administration (MSHA) alleging discrimination under the Mine Act because of Aaron's failure to provide suitable toilet facilities. The Secretary of Labor investigated her complaint, found no violation of the Act, and declined to proceed on her behalf. On August 21, 1980, pursuant to section 105(c)(3) of the Mine Act, Edwards filed a complaint of discrimination with this independent Commission. 30 U.S.C. § 815(c)(3).

After the hearing, the Commission's administrative law judge concluded that Edwards' complaints about the lack of required sanitary facilities were protected activity, and that Edwards was constructively discharged by the operator while engaging in that activity. He based his conclusion of constructive discharge on a finding that Edwards' only reasonable alternative to working under unsafe and unhealthful conditions was to quit. In his view, her resignation under these facts was equivalent to being discharged. 3 FMSHRC at 2633. We granted the operator's petition for discretionary review of the judge's decision.

Under the Mine Act, a complaining miner establishes a prima facie case of prohibited discrimination by proving that he or she engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. William A. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-37 (November 1982); Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d

1/ Sometime in March 1980, Edwards filed a claim for unemployment compensation with the State of Nevada. Aaron evidently claimed there was a toilet facility (the outhouse) in Edwards' work area. Although the State originally denied Edwards' claim, it awarded her benefits on appeal. The appeals referee found that Edwards left work voluntarily but with good cause, because Aaron failed to provide toilet facilities as required by federal regulation.

1211 (3d Cir. 1981); and 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 way motivated by protected activity. Haro, 4 FMSHRC at 1937; Robinette, 3 FMSHRC at 818, n. 20.

We first consider whether Edwards engaged in protected activity. The undisputed evidence shows that Edwards complained repeatedly, both orally and in writing, about what she reasonably believed were unhealthful conditions. The operator concedes that "restroom facilities at Aaron Mining were less than adequate." Therefore, we affirm the judge's conclusion that Edwards' complaints were protected and conclude that she established the first element of a prima facie case of discrimination.

We further conclude, however, that Edwards failed to establish the second element of a prima facie case, *i.e.*, she did not show that there was adverse action by the operator motivated in any part by her safety complaints. Aaron did not take any retaliatory action. The operator did not fire, demote, transfer, or harass her. Even if Aaron's failure to provide the requested toilet facilities is viewed as an adverse action, we find no evidence that this failure was motivated in any way by Edwards' protected complaints. As we noted earlier, there were no permanent toilets when Edwards was hired. According to the substantial and uncontroverted evidence of record, Aaron unsuccessfully tried to drill for water for permanent facilities and to obtain portable facilities. Further, Aaron accommodated Edwards by permitting her to leave the mine site daily for extended periods to travel to her house and, on two occasions, replaced gasoline consumed on those trips. There is no indication that Aaron tried to force Edwards to quit. To the contrary, the operator tried to persuade her to remain by offering to meet her demand for a salary increase. In our view, the record does not establish that Aaron's failure to remedy the condition complained of by Edwards was motivated in any part by Edwards' protected activity. Thus, under Mine Act discrimination analysis, the judge's finding of a violation cannot be upheld. <sup>2/</sup>

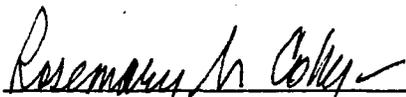
Application of the principles of "constructive discharge" does not change the result. For the reasons just stated we find no evidence that Aaron created or maintained the existing toilet facilities because of the exercise by Edwards of any rights protected by the Mine Act. No proof of an impermissible motive having been shown, a constructive discharge in violation of the Act is not established. Cf. NLRB v. Haberman Constr. Co. 641 F.2d 351, 358 (5th Cir. 1981) (en banc). Accord, Cartwright Hardware v. NLRB, 600 F.2d 268, 270-71 (10th Cir. 1979); J.P. Stevens and Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972); Montgomery Ward v. NLRB, 377 F.2d 452, 458-459 (6th Cir. 1967); see BNA 2 The Developing Labor Law 210-11 (2d ed. 1983). Thus, we hold that Aaron's failure to provide toilet facilities, and Edwards' resulting quit, do not constitute discrimination in violation of section 105(c).

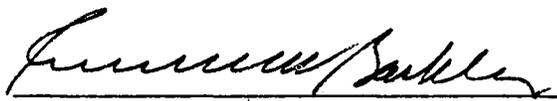
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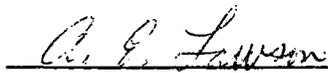
<sup>2/</sup> It is important to note that the issue in this case is not whether Aaron violated any mandatory standard by its failure to provide adequate toilet facilities. Rather, the question we address is whether that failure constituted discrimination under section 105(d) of the Mine Act.

We note that Edwards was not without a statutory remedy in the situation she faced. Section 103(g)(1) of the Mine Act affords a miner the right to obtain an immediate inspection by the Secretary of Labor's Mine Safety and Health Administration when the miner has reasonable grounds to believe that a violation of the Mine Act or of a mandatory health or safety standard exists. 30 U.S.C. § 813(g)(1). The record in this case suggests reasonable grounds for Edwards to believe that a violation of 30 C.F.R. § 56.20-8, a mandatory health standard, existed. 3/ Thus, through the procedure available under section 103(g)(1), Edwards could have obtained an MSHA inspection of Aaron's toilet facilities. Had the Secretary's representative found those facilities to be in violation, he could have utilized the full array of available statutory enforcement powers, including the issuance of citations and withdrawals orders and the proposed assessment of penalties. Here, Edwards did not set this statutory scheme in motion, but rather took the personal recourse of resigning her job. 4/

Accordingly, we reverse the judge's finding of discrimination, vacate his award of back pay, interest, and incidental expenses, and vacate his assessment of penalty.

  
\_\_\_\_\_  
Rosemary M. Collyer, Chairman

  
\_\_\_\_\_  
Richard V. Backley, Commissioner

  
\_\_\_\_\_  
A. E. Lawson, Commissioner

3/ 30 C.F.R. § 56.20-8 provides:

Mandatory. Toilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to mine personnel. The facilities shall be kept clean and sanitary. Separate toilet facilities shall be provided for each sex where toilet rooms will be occupied by no more than one person at a time and can be locked from the inside.

4/ Edwards testified that at the time of her resignation, she was not aware of the relevant mandatory standard, 30 C.F.R. § 56.20-8. However, there is no indication that she was unaware of MSHA's responsibility for inspecting mines. Indeed, she was sufficiently aware of MSHA's responsibilities to contact that agency about the alleged discrimination two weeks after her resignation.

Commissioner Jestrab, specially concurring:

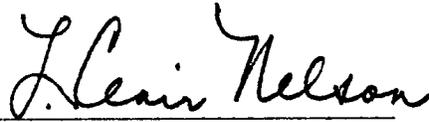
I concur in the result reached in the decision of my esteemed colleagues reversing the order of the Administrative Law Judge. In my opinion, however, the holding here does not change the Commission's rule on work refusal. Pratt v. River Hurricane Coal Company, 5 FMSHRC 1529, 1533 (September 29, 1983) and cases cited therein.

A handwritten signature in dark ink, appearing to read "Frank E. Jestrab", written over a horizontal line.

Frank E. Jestrab, Commissioner

Commissioner Nelson, concurring:

I agree with the majority's analysis of this case and I concur in its holding that Rosalie Edwards was not discharged, or in any way discriminated against, in violation of section 105(c) of the Mine Act. 30 U.S.C. §815(c). Nevertheless, I believe that under the facts of this case the majority opinion may be read by some as arriving at an overly harsh result. In my view, such a reading would be incorrect. Certainly the factual recitation elicits considerable sympathy for Rosalie Edwards; in any event, the Commission must decide cases on the bases of the law and the facts -- not on the basis of sympathy or empathy. Were it otherwise, the result in this case with good reason might be different. Thus, despite the absence of adequate toilet facilities at the mine (prior to and during the tenure of Rosalie Edwards), a case of unlawful discrimination was not established here and under the statute the operator must prevail.



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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

December 12, 1983

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
On behalf of MILTON BAILEY : Docket No. CENT 81-13-D  
 :  
v. :  
 :  
ARKANSAS-CARBONA COMPANY :  
 :  
and :  
 :  
MICHAEL WALKER :

DECISION

This discrimination case presents four issues: whether the Commission's administrative law judge abused his discretion in severing the Secretary of Labor's request for a civil penalty from the complaint of discrimination; whether the judge erred in awarding 6% interest on the back pay award; whether he erred in tolling the back pay award on the date the Secretary filed a complaint on Bailey's behalf; and whether he erred in refusing to award Bailey tuition and certain miscellaneous expenses.

For the reasons that follow, we hold that the judge did not abuse his discretion in this case when he severed the request for a civil penalty from the discrimination complaint, but we also announce our intention to amend Commission Procedural Rule 42, 29 C.F.R. § 2700.42, to end the need for such severance in future cases. We adopt as the Commission's interest rate formula for back pay awards the interest formula used by the National Labor Relations Board--that is, interest set at the "adjusted prime rate" announced semi-annually by the Internal Revenue Service for the underpayment and overpayment of taxes. We hold that the judge erred in assessing 6% interest on the back pay award and remand for recalculation of the award pursuant to the computation rules announced in this decision. We reverse the judge's order tolling back pay on the date of the Secretary's complaint on behalf of Bailey. We continue the award until the date Bailey informed the Secretary he did not wish reinstatement, and additionally remand for determination of the date when that notification occurred. Finally, we affirm the judge's holding that Bailey was not entitled to payment of college tuition and related expenses.

## I. Factual and procedural background

We briefly summarize the facts, which are undisputed, as background for our discussion of this case. Arkansas-Carbona Company, a joint venture, operated a small surface anthracite coal mine in Dardanelle, Arkansas at the relevant time. Milton Bailey was employed by Arkansas-Carbona from May 13, 1980, until his discharge on June 27, 1980. Bailey was the company's safety director and he earned \$1,000 per month. Michael Walker was the president of one of the firms comprising the Arkansas-Carbona joint venture, and after June 13, 1980, took over control of mine operations at the mine site. On June 27, 1980, Bailey complained to Walker that the mine's first aid kit, which had been moved from the main office to a screened porch, should remain in the office to prevent its exposure to dust. Walker contended the kit was in a dustproof container. An argument ensued which resulted in Bailey's discharge.

On October 20, 1980, the Secretary of Labor filed a discrimination complaint before this independent Commission on behalf of Bailey against Arkansas-Carbona and Michael Walker. <sup>1/</sup> His complaint alleged that Bailey was unlawfully discharged for exercising rights protected by section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). The relief sought included back pay with 9% interest, and reinstatement on the same shift with the same or equivalent duties at a rate of pay "presently proper" for the position. The Secretary's complaint also requested "an order assessing a civil penalty of not more than \$10,000 against [the operator] for [the] violation of section 105(c) of the Act." 30 U.S.C. § 815(c)(Supp. V 1981). On January 22, 1981, the Secretary filed a motion to amend his discrimination complaint. The motion stated in part: "Subsequent to his filing of the complaint the Secretary was informed by complainant Bailey that he did not wish to be reinstated by respondents and that in lieu of reinstatement he would accept tuition for one year of college plus an allowance for expenses."

The Commission's administrative law judge first held that Bailey's complaint concerning the first aid kit on the day of his discharge was protected activity and that Bailey's discharge was motivated in part by that protected activity. Thus, the judge held that a prima facie case of discrimination, that is, adverse action motivated in part by protected activity, was proved. 3 FMSHRC 2313, 2318-19 (October 1981)(ALJ). The judge then examined each non-discriminatory ground the operator presented as the cause of Bailey's termination and concluded, "Neither singularly nor in combination do Respondents' contentions establish that Respondents would have discharged Complainant for the reasons given." 3 FMSHRC at 2319. Therefore, the judge determined that Arkansas-Carbona's discharge of Bailey violated section 105(c)(1) of the Mine Act. 30 U.S.C. § 815(c)(1).

The judge awarded Bailey back pay with 6% interest from the date of discharge until October 19, 1980, one day before the Secretary's complaint was filed. 3 FMSHRC at 2323. Because the complaint on behalf of Bailey was amended January 22, 1981, to request one year's college tuition and related expenses in lieu of reinstatement, the judge applied

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<sup>1/</sup> We refer to the respondents collectively as "the operator."

Rule 15(c), Federal Rules of Civil Procedure, and concluded that the amendment related back to October 20, 1980, the date of the Secretary's complaint. <sup>2/</sup> Therefore, the judge concluded that Bailey did not request reinstatement from that date and that, accordingly, the obligation for back pay ceased on that date. <sup>3</sup> FMSHRC at 2321. The judge also declined to order the payment of one year's college tuition and expenses because Bailey "failed to establish any entitlement to an award of 1 year of college tuition." <sup>3</sup> FMSHRC at 2322. The judge also ordered expunging of all references to "this matter" from Bailey's employment record.

In addition, the judge severed MSHA's proposed assessment of a civil penalty from this proceeding, and he ordered MSHA to proceed under Commission Procedural Rule 25, 29 C.F.R. § 2700.25. <sup>3/</sup> At the outset of the administrative hearing, the judge explained the reason for the severance: "I will sever the civil penalty proceeding because there has not been the required administrative processing of the proposal through the notification to the respondents of the amount of the proposed penalty or the opportunity to discuss this matter with the District Manager's office." Tr. 4.

## II. Severance of the civil penalty from the proceedings involving the complaint of discrimination

We first consider the question of how civil penalties for violations of section 105(c) should be proposed and assessed in cases where the Secretary files a complaint on behalf of a miner, and then whether the judge erred in severing the penalty proceeding.

Civil penalties are assessed under the Mine Act to induce compliance with the Act and its standards. See, for example, S. Rep. No. 181, 95th Cong., 1st Sess. 40-41 (1977) ("S. Rep."), reprinted in Subcommittee on Labor, Senate Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 628-29 (1978) ("Legis. Hist."). Penalties are mandatory for violations of

<sup>2/</sup> Rule 15(c), Fed. R. Civ. P., provides in part:

Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

<sup>3/</sup> Commission Procedural Rule 25 provides:

The Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of: (a) the violation alleged; (b) the amount of the penalty proposed; and (c) that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty. If within 30 days from the receipt of the Secretary's notification or proposed assessment of penalty, the operator or other person fails to notify the Secretary that he intends to contest the proposed penalty, the Secretary's proposed penalty shall be deemed to be a final order of the Commission and shall not be subject to review by the Commission or a court.

the Act and its standards. The Act separates the procedures for civil penalty assessment between the Secretary and the Commission. The Secretary proposes the penalty he wishes assessed for a violation and the Commission assesses a penalty of an appropriate amount. See Sellersburg Stone Co., 5 FMSHRC 287, 290-92 (March 1983), pet. for review filed, No. 83-1630, 7th Cir., April 8, 1983; Tazco, Inc., 3 FMSHRC 1895, 1896-98 (August 1981). 4/

This bifurcation of functions is set forth in sections 105 and 110 of the Act. 30 U.S.C. §§ 815 & 820 (Supp. V 1981). Section 105(a) requires the Secretary to take certain steps to notify an operator of the civil penalty "proposed to be assessed under section 110(a) for the violation cited." 30 U.S.C. § 815(a). Section 110(a) provides, in turn, for penalty assessments of not more than \$10,000 per violation. 30 U.S.C. § 820(a). Section 110(i) provides, "The Commission shall have authority to assess all civil penalties provided in this Act." 30 U.S.C. § 820(i). After listing the six statutory penalty criteria, section 110(i) concludes, "In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above [six] factors." 5/

Section 105(a) states that the civil penalty proposal procedures set forth for the Secretary therein are only invoked "[i]f, after an inspection or investigation, the Secretary issues a citation or order under section 104 [30 U.S.C. § 814]." 30 U.S.C. § 815(a). 6/ The Secretary must notify an operator "within a reasonable time" of the penalty he proposes. If the operator chooses to contest a proposed penalty, the Secretary must "immediately advise" the Commission so that a hearing can be scheduled. 30 U.S.C. § 815(d). The statutory procedures for prompt notification

4/ When penalties proposed by the Secretary are not contested, however, a proposed civil penalty is not actually assessed but is deemed to be a final order of the Commission, as if the Commission had assessed it. 30 U.S.C. § 815(a). See also Commission Procedural Rule 25 (n. 3 supra).

5/ The words "shall be assessed a civil penalty by the Secretary" in section 110(a) must be read in pari materia with sections 105(a) and 110(i). Although section 110(a) uses the language "shall be assessed a civil penalty by the Secretary," the express language of sections 105(a) and 110(i) makes clear that this Secretarial function is one of proposal, not disposition. The legislative history bears out this reading of section 110(a). Conf. Rep. No. 461, 95th Cong., 1st Sess. 58 (1977) reprinted in Legis. Hist. 1336; S. Rep. 43, 45-46, reprinted in Legis. Hist. 631, 633-34. Thus, the reference to "shall be assessed" in section 110(a) means "shall be subject to a proposed assessment of a civil penalty by the Secretary." See Sellersburg Stone Co., supra.

6/ Section 104, 30 U.S.C. § 814 (Supp. V 1981), contains the procedures through which an operator's violations of the Act or its standards are enforced. Section 104(a) makes clear that citations shall be issued for violations of "this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act." 30 U.S.C. § 814(a).

and contest of a proposed civil penalty assessment reflect Congress' belief that penalty assessment had lagged under the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976)(amended 1977), and its consequent desire to speed the process. Thus, the thrust of the penalty procedures under the Mine Act is to reach a final order of the Commission assessing a civil penalty for violations without delay.

Cases involving violations of the discrimination provisions, however, are not initiated with the issuance of a citation or order under section 104 but, rather, with filing of special complaints before the Commission under sections 105(c)(2) or 105(c)(3). 30 U.S.C. §§ 815(c)(2) & (3). These two statutory subsections provide for complaint by the Secretary if he believes discrimination has occurred, or complaint by the miner if the Secretary declines to prosecute.

It is clear that a penalty is to be assessed for discrimination in violation of section 105(c)(1). The last sentence of section 105(c)(3) states, "Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 [30 U.S.C. § 818] and section 110(a)." 30 U.S.C. § 815(c)(3). 7/ Section 110(a) requires the Secretary to propose penalties to be assessed for violations of the Act. Neither section 105(c) nor section 110(a), however, states how and when the Secretary is to propose a penalty for a violation of section 105(c)(1).

The Secretary's regulations in 30 C.F.R. Part 100 set forth "criteria and procedures for the proposed assessment of civil penalties under section 105 and 110 of the [Mine Act]." 30 C.F.R. § 100.1. 8/ Section 100.5 lists a number of "categories [of violations which] will be individually reviewed to determine whether a special assessment is appropriate" including "discrimination violations under section 105(c) of the Act." 9/

In spite of this reference to discrimination cases, none of the Part 100 regulations specifies how the Secretary shall propose a civil penalty when he files the complaint of discrimination, and it does not appear that the Secretary contemplated that his administrative review procedures for proposed penalties should apply to a determination that an operator had violated

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7/ Section 108 permits injunctive relief and is not relevant to the issues presented in this case.

8/ In this analysis, for convenience, we will refer to the current Part 100 regulations, which became effective May 21, 1982. They are substantially similar to those in effect when the judge's decision issued. The changes made do not affect our analysis, and we would reach the same conclusions under either version.

9/ A review of the discrimination cases adjudicated by this Commission indicates that the Secretary has used the section 100.5 special assessment procedure in discrimination cases only when the miner has proceeded on his own behalf pursuant to section 105(c)(3) of the Act and prevailed, or when, as here, the judge has severed the penalty proceedings from the discrimination case. In other discrimination cases, the Secretary has requested a penalty in his complaint of discrimination.

section 105(c)(1). Similarly, the Commission's procedural rules do not specifically address penalty procedures for alleged violations of section 105(c)(1). Our rules more generally require the Secretary to notify the operator of "the violation alleged" and the penalty proposed and to afford the operator 30 days in which to notify the Secretary if it wishes to contest the proposal. Commission Procedural Rule 25 (n. 3 supra). See also Commission Procedural Rules 26 through 28, 29 C.F.R. §§ 2700.26 through 28. 10/

The Secretary argues that the penalty proposal procedures in section 105(a) of the Mine Act and Commission Procedural Rule 25 apply only to citations and orders issued under section 104. Violations of the discrimination section, the Secretary urges, are subject only to the provisions expressly mentioned in section 105(c) itself. The Secretary relies on the last sentence in section 105(c)(3), which states that violations of section 105(c)(1) "shall be subject to the provisions of sections 108 [injunctions] and 110(a)." 30 U.S.C. § 815(c)(3). He argues that because section 110(a) contains no reference to section 104 or to section 105(a), the assessment proposal procedures required therein need not be applied in penalty proposals under section 105(c)(3).

Thus, from the language of sections 105(c)(3) and 110(a), the Secretary argues that it is not necessary to have separate penalty proceedings in discrimination cases. Rather, he contends that penalties should be assessed by Commission judges when liability is determined--that is, when an operator is found in a discrimination proceeding to have violated section 105. The Secretary asserts he is "always" prepared to provide the information on the penalty criteria in section 110(i), and that an administrative law judge will never be more competent to decide the penalty question than at the close of a discrimination case in which the judge has determined the existence of a violation.

10/ Commission Procedural Rules 40 through 44 (29 C.F.R. §§ 2700.40 through 44) deal with discrimination complaints, but do not resolve the issue of how a penalty is to be proposed. Rule 42 requires that a discrimination complaint include, among other things, "a statement of the relief requested." The rule tracks section 105(c)(2) of the Act, which requires the Secretary in his complaint to "propose an order granting appropriate relief." 30 U.S.C. § 815(c)(2). The Secretary contends that a civil penalty is part of the "relief" he may request in the complaint, and that inclusion of such a request in a complaint conforms to Rule 42 and section 105(c)(2). We conclude, however, that "relief" as used in section 105(c) and Rule 42 indicates only those remedies available to make the discriminatee whole. Section 105(c)(3) states in part, "The Commission shall ... issue an order ... granting ... relief ... including ... rehiring or reinstatement ... with backpay and interest or such remedy as may be appropriate." 30 U.S.C. § 815(c)(3). The legislative history also supports this reading of "relief." See Secretary on behalf of Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126, 142 (February 1982), citing to S. Rep. 37, reprinted in Legis. Hist. 625. A civil penalty, on the other hand, is not intended to compensate the victim but rather to deter the operator's future violations.

We agree with the Secretary that it is desirable to adjudicate in one proceeding both the merits of the discrimination claim and the civil penalty. The Mine Act emphasizes, "Proceedings under [section 105(c)] shall be expedited by the Secretary and by the Commission." 30 U.S.C. § 815(c)(3). Because the last sentence of section 105(c)(3) references penalty proposals under section 110(a), we conclude that penalty proposals for section 105(c) violations are to be expedited as well. The express statutory intent to expedite these proceedings is furthered by having the Secretary avoid dual proceedings and incorporate his penalty proposal in his discrimination complaint.

We also conclude, however, that it is incumbent upon the Secretary in a combined proceeding to set forth in the discrimination complaint the precise amount of the proposed penalty with appropriate allegations concerning the statutory criteria supporting the proposed amount. Experience makes us somewhat skeptical about the Secretary's assertion that he has "always" been prepared to present evidence on penalty criteria. Formal penalty allegations in the complaint better afford operators adequate notice of penalty issues in discrimination cases. Because the Secretary may "rely on a summary review of the information available to him" in proposing penalties (30 U.S.C. § 820(i)), the penalty allegations in the discrimination complaint may be stated in summary fashion.

In this case, the Secretary's naked request in his complaint for a penalty of "up to \$10,000" is scarcely a penalty proposal at all. Henceforth, we shall require in these cases that the Secretary propose in his complaint a penalty in a specific dollar amount supported by information on the section 110(i) criteria for assessing a penalty. This new rule shall apply to cases pending with our judges as of the date of this decision or filed with the Commission as of, or after, the date of this decision. Leave to amend complaints to add the penalty allegations shall be freely granted. Thus, the operator will be informed not only of the dollar amount proposed, but also the basis therefor. The parties will then be better prepared to litigate at the hearing any disputes concerning the penalty sought.

Because the Secretary did not provide in his complaint sufficient notice to the operator of the amount of the penalty sought and the basis therefor, we cannot say that the judge erred in severing the penalty proposal in order to provide such notice to the operator. Nor do we see the utility of a remand to allow the Secretary to amend his complaint. The judge's approach to the Secretary's inadequate proposal is consistent with the Act's notice requirements and with the position we now enunciate. Accordingly, we affirm the judge's severance of the penalty proposal from the underlying discrimination complaint. 11/

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11/ We are presently in the process of adopting an interim amended Rule 42, which will reflect our resolution of the penalty issue. We also note that this case does not raise, and we do not reach, the question of how penalties should be proposed when the Secretary does not file a discrimination complaint on the miner's behalf and the miner files his own complaint under section 105(c)(3).

### III. The rate and computation of interest on back pay awards

The next question in this case is whether the judge erred in assessing 6% interest on the back pay award. The remedial goal of section 105(c) is to "restore the [victim of illegal discrimination] to the situation he would have occupied but for the discrimination." Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC at 142. As we have previously observed, "Unless compelling reasons point to the contrary, the full measure of relief should be granted to [an improperly] discharged employee." Secretary on behalf of Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1, 2 (January 1982), quoting Goldberg v. Bama Mfg. Corp., 302 F.2d 152, 156 (5th Cir. 1962).

Included in that "full measure of relief" is interest on an award of back pay. Section 105(c)(3) of the Mine Act expressly includes interest in the relief that can be awarded to discriminatees, while leaving it up to the discretion of the Commission to determine the exact contours of such an award. <sup>12/</sup> The Senate Committee that drafted the section which became section 105(c) stated in its report:

It is the Committee's intention that the Secretary propose, and the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination.

S. Rep. 37, reprinted in Legis. Hist. 625 (emphasis added).

Our judges have awarded interest at rates varying from 6% per annum to 12.5% per annum and have used a variety of methods to compute interest awards. At least two of our judges have adopted the NLRB's rate of interest on back pay awards. See, e.g., Bradley v. Belva Coal Co., 3 FMSHRC 921, 925 (April 1981)(ALJ) aff'd in part, remanded in part on other grounds, 4 FMSHRC 982 (June 1982); Secretary on behalf of Smith et al. v. Stafford Construction Co., 3 FMSHRC 2177, 2199 (September 1981)(ALJ) aff'd in part, rev'd in part on other grounds, 5 FMSHRC 618 (April 1983), pet. for review filed, No. 83-1566, D.C. Cir., May 27, 1983. The experience of our

<sup>12/</sup> Section 105(c)(3) provides in part:

The Commission ... shall issue an order, ... if the charges [of discrimination] are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate.

30 U.S.C. § 815(c)(3).

judges in this area has greatly aided our evaluation of different methods of assessing interest. It has also led us to the conclusion that it is time to adopt a uniform method of computing interest so that all discriminatees will be treated uniformly when they are awarded back pay under the Mine Act.

The miner has not only lost money when he or she has not been paid in violation of section 105(c), but has also lost the use of the money. As the NLRB has stated with regard to interest on back pay awards under the National Labor Relations Act, "The purpose of interest is to compensate the discriminatee for the loss of the use of his or her money." Florida Steel Corp., 231 NLRB 651, 651 (1977). Thus, in selecting an interest rate, we have considered the potential cost to the miner both as a "creditor" of the operator, and as a potential borrower from a lending institution under real economic conditions. We have therefore sought a rate of interest that compensates the discriminatee fully for the loss of the use of money. In addition, we have attempted to select a rate of interest flexible enough to reflect economic and market realities, but not so complex in application as to place an undue burden on the parties and our judges when attempting to implement it.

For all of these reasons we adopt the interest rate formula used by the NLRB: interest set at the "adjusted prime rate" announced semi-annually by the Internal Revenue Service under 26 U.S.C.A. § 6621 (West Supp. 1983) as the interest it applies on underpayments or overpayments of tax. The "adjusted prime rate" of the IRS is the average predominant prime rate quoted by commercial banks to larger businesses as determined by the Federal Reserve Board and rounded to the nearest full percent. 26 U.S.C.A. § 6621 (West Supp. 1983). Under the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, § 345, 96 Stat. 636 (to be codified at 26 U.S.C. § 6621), the adjusted prime rate must be established semi-annually: by October 15 based on the prime rates from April 1 to September 30, and by April 15 based on the prime rates from October 1 to March 31. The rate announced in October becomes effective the following January 1, and the rate announced in April becomes effective the following July 1.

We agree with the NLRB that the IRS adjusted prime rate comes closest to compensating the miner fully for loss of the use of money. On the one hand, if the miner had the money, he or she could invest it or save it and probably earn less than the prime rate. On the other hand, if the miner has to borrow money because he or she is deprived of a paycheck, the rate of interest most likely would be higher than the prime rate. In these circumstances, we concur with the NLRB that the IRS formula "achieves a rough balance between that aspect of remedial interest which attempts to compensate the discriminatee or charging party as a creditor and that which attempts to compensate for his loss as a borrower." Olympic Medical Corp., 250 NLRB 146, 147 (1980). This "rough balance" in our view achieves the goal of making the miner whole for the loss of the use of money.

The IRS adjusted prime rate is also attractive for pragmatic reasons. It is a per annum rate adjusted semi-annually, based on the prime rates for the six months preceding its calculation. In this way, the rate reflects economic conditions with reasonable accuracy. Its announcement well in advance of the effective date offers notice to all parties and our judges. Cf. Olympic Medical Corp., supra.

The relevant adjusted prime rates, which we adopt as the Commission's remedial interest rates, are:

January 1, 1978 to December 31, 1979...6% per year (.0001666% per day)  
January 1, 1980 to December 31, 1981...12% per year (.0003333% per day)  
January 1, 1982 to December 31, 1982...20% per year (.0005555% per day)  
January 1, 1983 to June 30, 1983.....16% per year (.0004444% per day)  
July 1, 1983 to December 31, 1983.....11% per year (.0003055% per day)  
January 1, 1984 to June 30, 1984.....11% per year (.0003055% per day)

Because the IRS rates of interest are announced as annual rates, it is necessary, as explained below, to convert them to daily rates to calculate interest on periods of less than one year. 13/

There must also be a uniform method of computing the interest on back pay awards under the Mine Act. We have considered a number of possible computational approaches. We are mindful of the NLRB's extensive administrative and legal experience in this area. The NLRB's general back pay methodology is sound and has met with judicial approval. The labor bar is familiar with this system. We conclude that rather than expending administrative resources in attempting to devise a new system, we will best, and most efficiently, effectuate the remedial goals of section 105(c) of the Mine Act by adopting the major features of the NLRB computational system. We are satisfied that this system will do justice to the miner, avoid unnecessary penalization of the operator, and not prove unduly burdensome for our judges and bar to apply.

We therefore announce the following general rules for the computation of interest on back pay.

Back pay and interest shall be computed by the "quarterly" method. See Florida Steel Corp., 231 NLRB at 652; F.W. Woolworth Co., 90 NLRB 289 (1950), approved NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953). 14/

13/ Prior to the passage of the Tax Equity and Fiscal Responsibility Act of 1982, the IRS announced the adjusted prime rate in the October of the appropriate year to take effect the following February. For ease of administration under the Mine Act, however, we have bounded certain interest periods at December 31 and January 1 rather than at January 31 and February 1. (The NLRB's General Counsel has followed the same simplifying approach. NLRB Memorandum GC 83-17, August 8, 1983.)

14/ Back pay is the amount equal to the gross pay the miner would have earned from the operator but for the discrimination, less his actual interim earnings. Bradley v. Belva Coal Co., 4 FMSHRC 982, 994-95 (June 1982). The first figure, the gross pay the miner would have earned, is termed "gross back pay." The third figure, the difference resulting from subtraction of actual interim earning from gross back pay, is "net back pay"--the amount actually owing the discriminatee. Interest is awarded on net back pay only.

In a discrimination case where, as here, there has been an illegal discharge, the back pay period normally extends from the date of the discrimination to the date a bona fide offer of reinstatement is made. (As we conclude below, the period may also be tolled when the discriminatee waives the right to reinstatement.)

Under this method (referred to as the "Woolworth formula," after the NLRB's decision in the case of the same name, supra), computations are made on a quarterly basis corresponding to the four quarters of the calendar year. Separate computations of back pay are made for each of the calendar quarters involved in the back pay period. Thus, in each quarter, the gross back pay, the actual interim earnings, if any, and the net back pay are determined. See n. 14.

Interest on the net back pay of each quarter is assessed at the adjusted prime interest rate or rates in effect, as explained below. Like the NLRB, we will assess only simple interest in order to avoid the additional complexity of compounding interest. Interest on the amount of net back pay due and owing for each quarter involved in the back pay period accrues beginning with the last day of that quarter and continuing until the date of payment. See Florida Steel Corp., 231 NLRB at 652. In calculating the amount of interest on any given quarter's net back pay, the adjusted prime interest rates may vary between the last day of the quarter and the date of payment. If so, the respective rates in effect for any quarter or combination of quarters must be applied for the period in which they were operative. The interest amounts thus accrued for each quarter's net back pay are then summed to yield the total interest award.

For administrative convenience, we will compute interest on the basis of a 360-day year, 90-day quarter, and 30-day month. Using these simplified values, the amount of interest to be assessed on each quarter's net back pay is calculated according to the following formula:

$$\frac{\text{Amount of interest}}{\text{number of accrued days of interest (from the last day of that quarter to the date of payment)}} = \frac{\text{The quarter's net back pay}}{\text{daily adjusted prime rate interest factor}}$$

The "daily adjusted prime rate interest factor" is derived by dividing the annual adjusted prime rate in effect by 360 days. For example, the daily interest factor for the present adjusted prime rate of 11% is

.0003055% (.11/360). The daily interest factors are shown in the list of adjusted prime rates above. A computational example is provided in the accompanying note. 15/

15/ The mechanics of the quarterly computation system may be illustrated by the following hypothetical example, in which a miner is discriminatorily discharged on January 1, 1983, and offered reinstatement on September 30, 1983. Payment of back pay and interest is tendered on October 15, 1983. After subtraction of the relevant interim earnings, the net back pay of each quarter involved in the back pay period is as follows:

First quarter (beginning January 1, 1983)	\$1,000
Second quarter (beginning April 1, 1983)	\$1,000
Third quarter (beginning July 1, 1983)	\$1,000
Total net back pay	<u>\$3,000</u>

The adjusted prime interest rates in effect in 1983 are:

16% per year (.0004444% per day) from January 1, 1983, to June 30, 1983;

11% per year (.0003055% per day) from July 1, 1983, to December 31, 1983.

The interest award on the net back pay of each of these quarters is as follows:

(1) First Quarter:

(a) At 16% interest until end of second quarter of 1983:

\$1,000 net back pay x 91 accrued days of interest (last day of first quarter plus the entire second quarter) x .0004444 = \$40.44

Plus,

(b) At 11% interest for entire third quarter through the date of payment:

\$1,000 net back pay x 105 accrued days of interest (the third quarter plus 15 days) x .0003055 = \$32.07

(c) Total interest award on first quarter:

\$40.44 + \$32.07 = \$72.51

(2) Second Quarter

(a) At 16% interest for the last day of the second quarter

\$1,000 x 1 accrued day of interest x .0004444 = \$.44

Plus,

(b) At 11% interest for the entire third quarter through date of payment:

\$1,000 x 105 accrued days of interest x .0003055 = \$32.07

(c) Total = \$.44 + \$32.07 = \$32.51

(3) Third Quarter:

At 11% interest for the last day of the third quarter through date of payment:

\$1,000 x 16 accrued days of interest x .0003055 = \$4.88 total

(4) Total Interest Award:

\$72.51 + 32.51 + 4.88 = \$109.90

This amount is added to the total amount of back pay (\$3,000), for a total back pay award of \$3,109.90.

The major alternative computational approach would involve awarding interest on the total lump sum of net back pay from the date of discrimination to the time of payment. We recognize that this method would involve less complex calculations. We reject the lump sum method, however, because it would penalize the operator by assuming that the entire amount of the back pay debt was due and owing on the first day of the back pay period. We will carefully monitor the experience of our judges and parties in applying the computational system announced in this decision. We will modify the system if that experience over time demonstrates the desirability of adjustment.

In discrimination cases, our judges should advise the parties of the methodology for calculating back pay and interest. The parties shall submit to the judge the requisite back pay figures and calculations, and are urged to make as much use of stipulation as possible. The burden of computation of interest on back pay awards should be placed primarily on the parties to the case, not the judge, in order to comport with the adversarial system.

We apply the foregoing principles in this proceeding because the issue of the appropriate rate of interest in discrimination cases arising under the Mine Act was squarely raised on review. As a matter of discretionary policy in judicial administration, we will otherwise apply these principles only prospectively to discrimination cases pending before our judges as of the date of this decision or filed with the Commission as of, or after, the date of this decision. We do not mean to intimate that any previous awards of interest by our judges in other cases, based on different computational methods, are infirm.

Applying our formula to the present case, we conclude that reversal is necessary. The judge's award of 6% interest is so disparate from the adjusted prime rates in effect from the date of Bailey's discharge on June 27, 1980, as to raise questions concerning whether the complainant would truly be made "whole" if the judge's award stands. Accordingly, we hold that the judge erred in awarding 6% interest, and will remand for recalculation of interest pursuant to the interest formula and computational methods announced in this case.

#### IV. Tolling of the back pay award

The judge concluded that Bailey was not entitled to back pay after October 20, 1980, the date on which Bailey's complaint was filed. That complaint requested reinstatement, but it was amended January 22, 1981. The amended complaint sought back pay and requested the Commission to "order respondents to pay Mr. Bailey \$900.00 for one year college tuition plus \$400.00 book and maintenance expense allowance in lieu of reinstatement at respondents' mine." The accompanying motion to amend stated:

Subsequent to his filing of the complaint the Secretary was informed by complainant Bailey that he did not wish to be reinstated by respondents and that in lieu of reinstatement he would accept tuition for one year of college plus an allowance for expenses.

The judge granted the motion to amend and, when determining the back pay award, applied Rule 15(c), Fed. R. Civ.P., and tolled the award on October 20, 1980. Rule 15(c) provides that where a claim or defense in an amended pleading arises out of the same circumstances set forth in the original pleading, the amendment relates back to the date of the original pleading. Relation back has been generally permitted where the movant seeks to enlarge the basis or extent of a demand for relief. See, for example, Goodman v. Poland, 395 F. Supp. 660, 682-86 (D. Md. 1975) (change of theory of recovery from equity to law permitted); Wisbey v. Amer. Community Stores Corp., 288 F. Supp. 728, 730-32 (D. Neb. 1968) (amendment seeking additional damages in FLSA action permitted). We do not believe that the restrictive application of relation back by the judge was appropriate in this case.

Rather, in determining when back pay should terminate, we look to the date when Bailey informed the Secretary he no longer sought reinstatement at Arkansas-Carbona. We agree with the judge's related conclusion: "It would be unfair and improper to require a mine operator to pay a former employee back pay for a period of time when the employee has unequivocally stated that he does not want to return to his former employment." 3 FMSHRC at 2321. In a case involving similar issues, this judge compared a miner's lack of desire to be reinstated to a rejection of an offer of reinstatement under the National Labor Relations Act. Secretary on behalf of Ball v. B&B Mining, 3 FMSHRC 2371, 2378 (October 1981) (ALJ). We concur with the NLRB rule that an employer is released from his back pay obligations when the employee rejects an appropriate offer of reinstatement, and consider the analogy to the facts of this case appropriate. See, for example NLRB v. Huntington Hospital, 550 F.2d 921, 924 (4th Cir. 1977); NLRB v. Winchester Electronics, Inc., 295 F.2d 288, 292 (2d Cir. 1961); Lyman Steel Co., 246 NLRB 712 (1979).

Tolling the back pay award on the date Bailey informed the Secretary that he no longer desired reinstatement effectuates the preceding principles, while the judge's relation back to the original complaint needlessly and unfairly penalizes Bailey. Therefore, we reverse the judge's relation back to the date of the original pleading. The present record does not reveal the date Bailey informed the Secretary of his waiver of reinstatement. Accordingly, we additionally remand for determination of that date in order that the back pay period may be established and the necessary computations properly made.

#### V. College tuition and related expenses.

Bailey's remaining contention concerning the award is that the judge erred in not granting him tuition and miscellaneous college expenses. The judge held, "Complainant failed to establish any entitlement to an award of 1 year of college tuition plus \$400 book and miscellaneous expense allowance." 3 FMSHRC at 2322. We affirm the judge on this point.

The Secretary argued in his brief before the judge that Bailey would not have paid tuition and expenses, but for his accepting the position at Arkansas-Carbona. 16/ The judge found that, prior to his employment with

16/ The Secretary did not raise this issue on review and, although Bailey briefly raised it in his petition for review, he did not file a brief before us.

Arkansas-Carbona, Bailey worked as a campus security guard at Arkansas Tech, and as a fringe benefit of that campus job did not pay tuition. 3 FMSHRC at 2315. (The judge made no finding on whether Bailey's campus job also entitled him to college expenses.) After Bailey accepted a position at Arkansas-Carbona, and resigned from his campus job, he paid his own tuition.

The remedial goal of section 105(c) of the Act is to return the miner to the status quo before the illegal discrimination. Secretary on behalf of Dunmire and Estle v. Northern Coal, 4 FMSHRC at 142. Had Bailey not been discharged illegally, he would have been working at Arkansas-Carbona and would have had to pay tuition for his classes. We do not see how Arkansas-Carbona can be held responsible for a fringe benefit Bailey did not receive from that company. Although at times we may need to seek alternative remedies to make a miner whole for illegal discrimination (for example, where reinstatement is impossible or impractical), such considerations are not present in this case.

Accordingly, we affirm the judge's refusal to award tuition and college expenses.

#### VI. Conclusion

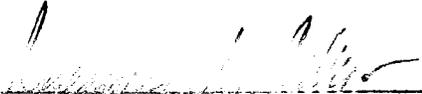
For the foregoing reasons, we affirm the judge's severing of the request for a civil penalty from the merits of the discrimination case, and hold that in future cases the Secretary must propose in his discrimination complaints a specific penalty supported by allegations relevant to the statutory penalty criteria. As we have stated above, we are accordingly in the process of amending our Procedural Rule 42 to provide for unified proceedings in the future.

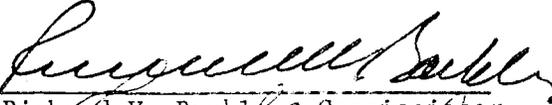
We reverse the judge's assessment of 6% interest on back pay, and remand to the Chief Administrative Law Judge for assignment to a judge for calculation of back pay and interest according to the principles and methodology announced in this decision. 17/ We reverse the judge's tolling of the back

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17/ The judge who decided this case has left the Commission.

pay award on the date the complaint was filed, and additionally remand for determination of the date Bailey informed the Secretariate he no longer wished reinstatement. Finally, we affirm our approval of Bailey's request for college tuition and related expenses.

  
\_\_\_\_\_  
Rosemary M. Collyer, Chairman

  
\_\_\_\_\_  
Richard V. Backley, Commissioner

  
\_\_\_\_\_  
Frank P. Jestrab, Commissioner

  
\_\_\_\_\_  
A. E. Lawson, Commissioner

  
\_\_\_\_\_  
L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

DEC 7 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 83-116  
Petitioner : A.C. No. 15-12725-03502  
: :  
v. : No. 8 Mine  
: :  
CYNTHIA COAL CO., INC., :  
Respondent :

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for Petitioner;  
Byron W. Terry, Safety Director, Cynthia Coal  
Company, Beaver Dam, Kentucky, for Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment in the amount of \$20 for an alleged violation of mandatory health standard 30 CFR 71.208(a) as noted in a Section 104(a) Citation No. 9949426, served on the respondent by an MSHA inspector on August 12, 1982.

The respondent contested the citation, and the case was scheduled for a hearing in Evansville, Indiana, along with several other cases during the term November 1-3, 1983. However, respondent's counsel decided not to pursue the matter and agreed to pay the full amount of the proposed civil penalty assessment. In this regard, petitioner's counsel presented a proposed settlement on the record for my consideration.

Discussion

In support of the proposed settlement disposition of this case petitioner's counsel agreed that the respondent no

longer wished to pursue the matter and he confirmed that the respondent's mine has been abandoned and closed and is no longer mining coal. Counsel also stated that the operator was a small operator, that the \$20 penalty is reasonable in the circumstances, that the negligence level for the citation ranged from "little to none", and that the respondent's history of prior citations consisted of two prior citations. Counsel was of the opinion that the proposed settlement constituted a reasonable resolution of the case.

After careful consideration and review of the pleadings and the arguments presented by the petitioner's counsel in support of the proposed settlement of this case I find that it is reasonable and in the public interest, and pursuant to Commission Rule 30, 29 CFR 2700.30 it is APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of \$20 within thirty (30) days of the date of this decision, and upon receipt of payment by MSHA this matter is dismissed.

  
George A. Koutras  
Administrative Law Judge

Distribution:

Darryl A. Stewart, Esq., U.S. Department of Labor, Office of the Solicitor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Byron W. Terry, Safety Director, Cynthia Coal Co., Inc., P.O. Box 431, Beaver Dam, KY 42320 (Certified Mail)

/slk

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

DEC 7 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 83-216  
Petitioner : A.C. No. 15-00672-03508  
: :  
v. : Retiki Mine  
: :  
WEBSTER COUNTY COAL CORP., : Docket No. KENT 83-259  
Respondent : A.C. No. 15-02132-03513  
: :  
: Dotiki Mine

DECISIONS

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for Petitioner;  
Nick Carter, Esq., MAPCO, Inc., Lexington, Kentucky,  
for Respondent.

Before: Judge Koutras

Statement of the Cases

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 CFR 820(a), seeking civil penalty assessments for two alleged violations of mandatory health standard 30 CFR 70.100(a).

The respondent contested the citations, and pursuant to notice the cases were docketed for hearings in Evansville, Indiana during the term November 1-3, 1983. These cases were scheduled for trial on November 3, 1983. However, prior to the commencement of the hearings, respondent's counsel advised me that the respondent had decided not to litigate the cases further and counsel sought leave to dispose of the cases by tendering full payment of MSHA's proposed civil penalties. Under the circumstances, the parties were afforded an opportunity to present their proposals on the record, and

petitioner's counsel presented arguments in support of a proposed settlement disposition of the cases pursuant to Commission Rule 30, 29 CFR 2700.30. The citations, initial assessments, and the proposed settlement amounts are as follows:

Docket KENT 83-216

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>	<u>Settlement</u>
9949525	1/24/83	70.100(a)	\$227	\$227

Docket KENT 83-259

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>	<u>Settlement</u>
2075782	3/3/83	70.100(a)	\$213	\$213

Discussion

The parties stipulated to the following:

1. At all times pertinent to these proceedings, Webster County Coal Corporation, was owner and operator of the Dotiki Mine in Webster County, Kentucky, and the Retiki Mine in Henderson County, Kentucky, and the mines are subject to the Federal Mine Safety and Health Act of 1977.
2. The presiding Administrative Law Judge has jurisdiction to hear and decide these cases.
3. The inspectors who issued the citations which are the subject of these proceedings are designated authorized representatives of the Secretary of Labor.
4. True and correct copies of the citations were served upon the operator.
5. The copies of the citations (Exhibits G-1 through G-2) are authentic copies and may be admitted as such, but not for the truth or relevance of the statements made therein.
6. Payment of the penalties assessed in these proceedings will have no effect on the operator's ability to continue in business.
7. The Dotiki Mine produces approximately 1,500,000 tons per year and the Retiki Mine produces approximately 690,000 tons per year.

8. The operator demonstrated good faith in abating the conditions alleged in the citations which are the subject of these proceedings, as is credited in the proposed assessment.

In support of the proposed settlement disposition of these cases, petitioner's counsel asserted that after consideration of the statutory criteria found in Section 110(i) of the Act, as well as his consultation with the inspectors who issued the citations, he was of the view that the respondent's payment in full of the proposed penalty settlements is a reasonable disposition of these dockets and that the proposed settlements are in the public interest. Counsel also presented a computer print-out summarizing the respondent's history of prior citations.

After careful consideration and review of the pleadings filed in these cases, including the arguments submitted on the record in support of the proposed settlement dispositions by the parties, I find that they are reasonable and in the public interest, and pursuant to Commission Rule 30, 29 CFR 2700.30, they are APPROVED.

ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above within thirty (30) days of the date of these decisions, and upon receipt of payment by MSHA, these proceedings are dismissed.

  
George A. Koutras  
Administrative Law Judge

Distribution:

Darryl A. Stewart, Esq., U.S. Department of Labor, Office of the Solicitor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Nick Carter, Esq., MAPCO, Inc., 181 N. Mill St., #9, Lexington, KY 40507 (Certified Mail)

/slk

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**DEC 7 1983**

RAY WARD, : DISCRIMINATION PROCEEDING  
Complainant :  
 :  
 : Docket No. SE 82-55-D  
v. :  
 :  
 : BARB CD 81-38  
VOLUNTEER MINING CORPORATION, :  
Respondent :

FINAL ORDER

Before: Judge Fauver

My decision on liability was entered on July 29, 1983, holding that Respondent discriminated against Complainant in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., and granting leave to the parties to propose an order of relief.

On December 1, 1983, the parties filed a settlement agreement on relief. This agreement is APPROVED as a just and appropriate settlement consistent with the decision on liability and the purposes of the Act.

WHEREFORE IT IS ORDERED that this proceeding is CONCLUDED.

*William Fauver*  
William Fauver  
Administrative Law Judge

Distribution:

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Joseph H. Van Hook, Esq., Drawer M., Oliver Springs, Tennessee 37840 (Certified Mail)

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

DEC 7 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 83-42-M  
Petitioner : A.C. No. 09-00265-05501  
v. :  
: Junction City Mine  
BROWN BROTHERS SAND COMPANY, :  
Respondent :

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor,  
U.S. Department of Labor, Atlanta, Georgia, for  
Petitioner;  
Carl W. Brown and Steve Brown, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

This case involves a single citation charging Respondent with a violation of 30 C.F.R. § 50.30(a) for failing to file quarterly man-hour reports for the third and fourth quarters of 1982. Pursuant to notice, the case was heard in Talbotton, Georgia, on November 15, 1983. Ronald Grabner, a federal mine safety and health inspector testified for Petitioner. No witnesses were called by Respondent. The parties made oral arguments on the record but each waived its right to file written posthearing briefs. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the owner and operator of a sand dredging operation in Talbot County, Georgia, known as the Junction City Mine.
2. Respondent is a small family owned business. It employed approximately nine employees at the time of the violation alleged herein.

3. The operation of Respondent's business affects interstate commerce.

4. During the 2 years immediately preceding the violation alleged herein, Respondent had no paid violations of the Act or regulations promulgated thereunder.

5. Respondent did not file the quarterly man-hour reports for the third and fourth quarters of 1982, prior to March 15, 1983, when the citation involved herein was issued.

6. The citation was terminated on the day it was issued when the reports in question were filled out and submitted.

7. Respondent has not filed the quarterly man-hour reports for any of the first three quarters of 1983.

#### CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 and the regulations promulgated thereunder in the operation of the Junction City Mine.

2. Respondent's failure to submit quarterly employment reports for the third and fourth quarters of 1982 is a violation of 30 C.F.R. § 50.30.

#### DISCUSSION

Respondent does not deny that he failed to submit the reports in question. He apparently challenges the necessity and value of the reports. Clearly, however, the reports are legitimate requirements of the Secretary who is charged with the responsibility of promoting health and safety in the nation's mines. Preparing statistical analyses of injury rates and injury causes is an integral part of that responsibility. The fact that Respondent thinks the reports are onerous or unnecessary is no defense to a petition for a penalty for a violation.

3. The violation was in itself not serious, since the failure or refusal to file the required reports is not likely to result in injury or occupational disease.

4. The violation was deliberate.

#### DISCUSSION

A citation was issued on June 26, 1980, to the Respondent charging it with failure to file the quarterly man-hour report

for the first quarter of 1980. Respondent contested the violation and a hearing was held before Judge Koutras on April 13, 1981. Judge Koutras issued a decision affirming the citation and assessing a civil penalty on May 1, 1981. 3 FMSHRC 1203. In his decision he said:

Therefore, I believe that respondent had prior notice of the requirements of the regulation in question, and while his subsequent failure to file borders on gross negligence, I have considered the fact that respondent may have been confused as to what was required and find that the citation in question here resulted from respondent's failure to exercise a reasonable care amounting to ordinary negligence.

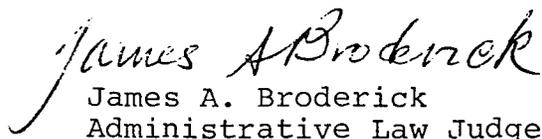
In the case before me, there is no question that Respondent was aware of the filing requirements and its failure to observe them. As I stated above, Respondent apparently believes the requirement to be onerous and unnecessary. In fact the reporting requirement is simple to observe, and it has a legitimate public purpose. Carl Brown's statements on the record exhibited a contemptuous attitude toward the requirement. No mine operator, whether Brown Brothers Sand Company or United States Steel Company, may decide for itself whether it will observe the duly promulgated standards. The penalty assessed in this case will reflect my conclusion that the violation was deliberate.

5. Respondent did not exhibit good faith in abating the violation after the citation was issued. Although the citation was abated, it was done so grudgingly, and the violation has apparently been repeated since then. The penalty assessed in this case will reflect my conclusion that Respondent did not exhibit good faith in complying with the regulation after the citation was issued.

6. Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation found is \$100.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that Respondent shall within 30 days of the date of this decision pay the sum of \$100 for the violation found herein to have occurred.

  
James A. Broderick  
Administrative Law Judge

Distribution:

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Mr. Carl W. Brown, Brown Brothers Sand Company, P.O. Box 32, Howard, GA 31039 (Certified Mail)

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

December 12, 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 83-61-M  
Petitioner : A.C. No. 23-00113-05501  
v. :  
INDEPENDENT GRAVEL COMPANY, : Webb City Chat Plant  
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The parties have filed a motion to approve settlement in the above-captioned proceeding. The original assessment for the one violation was \$54. The proposed settlement is \$27.

Citation No. 2095336 was issued for a violation of 30 C.F.R. § 56.5-1/5 because the South Mill operator was exposed to an excessive level of respirable silica-bearing dust. The parties advise that the gravity of the violation is not as severe as originally was rated. The parties advise that overexposure to silica-bearing dust for short periods will not result in permanent disability. This may be so, but exposure over long periods is a serious matter, and each individual exposure adds to the total. I view this as a violation with gravity. I approve the recommended settlement because the operator is small in size and has a small history of prior violations. In the future, the operator should exercise care over the dust levels.

ORDER

The operator is ORDERED to pay \$27 within 30 days from the date of this decision.



Paul Merlin  
Chief Administrative Law Judge

Distribution:

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

Mr. Gene Hatfield, Independent Gravel Company, 223 West 3rd Street, P. O. Box 1423, Joplin, MO 64801 (Certified Mail)

/ln

2069

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**DEC 12 1983**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 83-9
Petitioner	:	A.C. No. 34-01317-03502
v.	:	
	:	Docket No. CENT 83-13
TURNER BROTHERS, INC.,	:	A.C. No. 34-01317-03503
Respondent	:	
	:	Heavener No. 1 Mine

DECISION

Appearances: Allen Reid Tilson, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;  
Robert J. Petrick, Esq., Turner Brothers, Inc., Muskogee, Oklahoma, for Respondent.

Before: Judge Melick

Hearings were held in these cases on October 27, 1983, in Fort Smith, Arkansas. A bench decision was thereafter rendered and essentially only the amount of penalties have been changed. That decision, as modified herein, is now affirmed.

Waiver of Right to Presence at Hearing

As a preliminary matter, I find that Turner Brothers, Inc., has waived its right to be present at this hearing today and to cross examine witnesses and present evidence on its own behalf. It is clear that the operator received adequate notice well in advance of hearing. It is also clear from the last minute telephone calls made late yesterday by the operator's representative and received by the Solicitor and by my office after I had already departed for this hearing, that the operator did not request and did not want a continuance of this hearing.

Indeed, the telephone calls to the Solicitor's Office and to my office were to the effect

that the operator's representatives had more important business to attend to elsewhere and that it would go ahead and pay whatever penalties were imposed. This determination by the operator was made, I find, after having been fully informed by the Solicitor's Office that the penalties that had been proposed initially by the Secretary could be modified by the Administrative Law Judge and indeed could be increased as well as decreased after hearing the evidence in the case. Accordingly, I find that the operator has waived its right to be present and to participate at this hearing.

### The Merits

These cases are, of course, before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, which I will refer to hereafter as the "Act". The Secretary, in the petitions filed, is seeking civil penalties for seven violations of regulatory standards.

The general issues before me are whether the operator, that is, Turner Brothers, Inc., which I will refer to hereafter as "Turner", has committed the violations charged and, if so, the amount of civil penalty to be assessed. In determining the amount of civil penalty to be assessed I must, of course, independently consider the criteria under Section 110(i) of the Act. This is a de novo determination and I am not bound in any way by the proposed assessment or findings previously made by the Secretary pursuant to his own regulations. Section 110(i) requires consideration of the operator's history of previous violations, the appropriateness of any penalty assessed to the size of the business of the operator charged, whether the operator was negligent, the effect of the penalty on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

According to MSHA Inspector Donalee Boatright, the mine in this case had an annual coal production of about 350,000 tons and had 51 employees. Total annual production at all of Turner's mines was about one million tons. The mine and the operator are accordingly of medium size.

Now, the Secretary of Labor has also submitted, and it has been admitted in evidence, a print-out of prior violations. This print-out shows a minimal history of violations and does not show any violations of standards cited in the particular cases before me. There is no evidence that the operator would be unable to pay the penalties that I impose in this case or that they would affect its ability to stay in business. It appears, moreover, that the violations in this case were abated in a timely fashion and in good faith.

Now, proceeding to the individual citations, I consider first of all Docket No. CENT 83-13, Citation No. 2007396. The citation reads as follows: "An unplanned ignition of explosives occurred at this mine sometime in late August of 1982, and the mine operator did not notify MSHA of the accident. The operator did not have a report of his investigation of the accident at the mine office, so the exact date in August could not be determined. The accident occurred when an unexpected electrical storm came up and ignited 16 charged holes while the employees were being removed from the blasting area. No injuries occurred."

The citation charges a violation of the standard at 30 CFR Section 50.10. That standard states as follows: "If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, toll free at (202) 783-5582."

The evidence before me is that Inspector Boatright received information from his supervisor on December 6, 1981, concerning an explosion at the Heavener No. 1 Mine, operated and owned by Turner. Inspector Boatright thereupon went to the mine and talked to the mine superintendent, Jim Payne. Mr. Payne at first denied that there had been any ignition of explosives or any other accident but upon further inquiry admitted that some time the previous August, they did have a pre-ignition of explosives caused by an electrical storm.

Although Mr. Payne allegedly had made an investigation of the incident, he admittedly did not report it to the Mine Safety and Health Administration, as required. His excuse was that he did not think he had to report it to MSHA because there had been no injuries.

The incident in question involved a premature detonation by an electrical storm of a number of charged holes. It appears that a number of the drilled holes, each approximately 50 feet deep and five inches in diameter, had been fully charged, i.e., explosives had been placed to within approximately eight feet of the surface. Each of the charged holes had also been provided with a detonator and wires were protruding from the holes in preparation for final wiring for detonation. At this time an electrical storm passed through the area setting off a number of the holes depicted in Petitioner's Exhibit No. 2, causing explosions to within approximately 88 feet of an individual who was operating the high wall drill. Indeed, there were charged holes to within 22 feet of the driller operator, and if these holes had also detonated, he could very well have been killed.

The evidence shows that the miners in the vicinity of the charged holes had previously withdrawn from the site upon the approach of an electrical storm, but had prematurely returned after some 35 minutes on the belief that the storm had passed. Apparently no citation was issued for the incident itself, but only for the failure to report it. Now the operator would no doubt contend, as it appears from the Answer filed in the case, that he looks upon this violation as non-serious -- a mere failure to file some paperwork. I look upon the violation somewhat more seriously. Here there was an accident of a particularly serious nature. Without a sufficient deterrent penalty, it would be too easy for the operator to avoid a Mine Safety and Health Administration inspection and investigation of such incidents and it would just be too simple for the operator to cover up his misdeeds. Moreover, without the impetus of MSHA, it would be too easy for an operator to fail to take corrective action to avoid future accidents of a similar nature. This could very well lead to future fatalities and serious injuries. I therefore find that there must be a stronger disincentive than a mere \$10 or \$20 penalty for the

intentional or negligent failure of mine operators to notify MSHA in this regard. Under the circumstances, I believe a penalty of \$175.00 is appropriate.

The second violation relating to this incident appears in Citation No. 2007397. That citation charges and the evidence shows that the mine operator did not have a report of his investigation of the unplanned explosion available for MSHA examination. The cited standard, 30 CFR Section 50.11(b), requires that such investigation must be completed by the operator after each accident at the mine and a copy must be submitted upon request to MSHA. The standard also sets forth the specifics that must be included in any such report. While the Mine Superintendent alleged that he had sent such a report to the mine office, apparently no such report was produced. Under the circumstances there is some question as to whether the proper report had indeed been completed. Accordingly, I find that a penalty of \$175.00 is appropriate for the violation.

Moving now to the citations in Docket No. CENT 83-9, Citation No. 2007386 alleges a violation of the standard at 30 CFR Section 77.208(d). It reads as follows: "[f]ive compressed gas cylinders (1 acetylene, and 4 oxygen) were not secured in a safe manner in that they were laying on the ground near the cylinder storage rack near the mine office."

The standard cited reads as follows: "[c]ompressed and liquid gas cylinders shall be secured in a safe manner."

According to the undisputed testimony of Inspector Boatright, upon the initiation of his regular inspection of the Heavener Mine No. 1, on November 1, 1982, and in fact as he was leaving the mine office after making his initial contact with the superintendent, he observed five compressed gas cylinders lying on the ground in front of the mine office. The cylinders were within view of anyone entering or leaving the office or parking adjacent to the office. The cylinders were exposed to vehicles parking in an area where pick-up trucks, mechanics trucks, and a lube truck regularly parked.

It was not unlikely therefore for a truck to strike one of those cylinders and to rupture the cylinder or its valve. Inspector Boatright pointed out that if such an event should occur, the cylinder could act like an uncontrolled rocket. The cylinders weighed approximately 70 to 80 pounds and could kill a person under those circumstances. Superintendent Payne explained that the cylinders had apparently been left by the delivery man earlier that morning, or the mechanic. I find that the superintendent should have seen the cylinders lying exposed on the ground right outside of his office, and that he was therefore negligent in failing to have them secured in a timely fashion. Under the circumstances, I find that the violation warrants a penalty of \$175.00.

Citation No. 2227387 charges a violation of the standard at 30 CFR Section 77.1605(b), and alleges in particular that the Caterpillar rock haulage truck No. 915, operating at Pit 001-0 was not equipped with a parking brake in operating condition.

The cited standard requires that mobile equipment shall be equipped with adequate brakes and all trucks and front end loaders shall also be equipped with parking brakes. It is implicit in that standard that when the equipment is equipped with parking brakes, that the brakes must also be in operating condition.

It is undisputed in this case from the testimony of Inspector Boatright that the cited haulage truck did not have an operating parking brake. As pointed out by the inspector, ordinarily these trucks are not parked in areas where there would be an incline but are parked on level ground. However, there could very well be occasions where the truck might break down and have to be stopped and parked. Indeed, without an adequate parking brake, the truck could roll out of control and strike another vehicle or pedestrians in the area, and of course cause fatalities or serious injuries.

The superintendent stated that the brakes were checked as a matter of routine each morning and the equipment operator stated that he, as a matter of practice on that morning before working

at 7:00 a.m., had checked the brake and found it to be operating.

It is noted that this violation was discovered some several hours after the start of the shift at 7:00 a.m. that morning. While it is possible that the parking brake did become defective during that short period of time, I do not find the explanation to be credible. Accordingly, I find that a penalty of \$175.00 is appropriate for this violation.

Citation No. 2007388 charges a violation of the standard at 30 CFR Section 77.1605(d). It appears from that citation that the same rock haulage truck that had a non-operating parking brake also did not have an operating audible warning device, i.e., a front horn.

The standard cited requires that mobile equipment shall be provided with audible warning devices. It is undisputed that this vehicle did not have a front horn, that is, an audible warning device, just as charged in the citation. The inspector pointed out that without such an audible warning device, the haulage truck could not warn other vehicles or pedestrians of its approach, and this indeed could foreseeably result in fatalities or serious injuries.

Again the equipment operator stated that when he had checked the equipment that morning before his shift at 7:00 a.m., all systems, presumably including the front horn, were in functioning condition. While again it is certainly possible that the horn as well as the parking brake could have become defective in the few hours between the beginning of the shift and the discovery of this defect by the inspector, I find the explanation to be lacking in credibility. Under the circumstances, I find that a penalty of \$175.00 is appropriate for this violation.

Citation No. 2007389, charges another violation of the standard at 30 CFR Section 77.1605(b). It appears that the front end loader did not have an operating parking brake. As pointed out by the inspector, the hazard in this situation was similar to that involving the haulage truck. The machine operator in this case also said that he had checked the brake before the beginning of the

shift at 7:00 a.m., and that it was functioning at that time. The citation was issued at 10:20 that morning. The explanation is not credible. Under the circumstances, I find that a penalty of \$175.00 is appropriate for the violation.

Citation No. 2007390, charges a violation of the standard at 30 CFR Section 48.29(a). In particular, the citation reads that "[t]raining certificates (MSHA Form 5000-23) for 14 employees were not available at the mine site for inspection. The mine superintendent (Jim Payne) stated that the 14 employees had been trained within the last year by Frank R. Pasteur."

The standard at Section 48.29(a) requires not only the individual miner's completion of MSHA approved training but also requires that training certificates for the miners who have completed the training must be available at the mine site for examination by MSHA, the miners, the miners' representatives, and State inspection agencies.

It turns out in this case that indeed the 14 miners for whom the certificates were not available at the mine office did, in fact, have the training but that apparently the contractor, Mr. Pasteur, had not forwarded the proper forms back to the mine office.

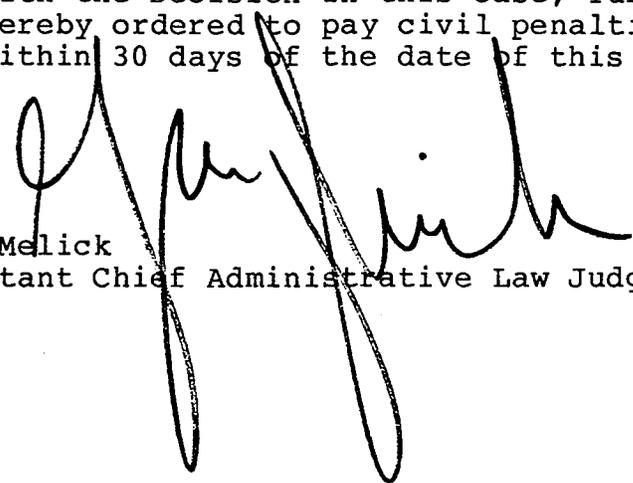
Under the circumstances, I find that only a nominal penalty of \$20.00 is appropriate for that particular violation.

ORDER

In accordance with the Decision in this case, Turner Brothers, Inc., is hereby ordered to pay civil penalties in the amount of ~~\$970~~ within 30 days of the date of this decision.

#1,070  
order  
Amending  
Decision  
3/22/84

Gary Melick  
Assistant Chief Administrative Law Judge



Distribution:

Allen Reid Tilson, Esq., Office of the Solicitor, U.S. Department of Labor, 555 Griffin Square Building, Suite 501, Dallas, TX 75202 (Certified mail)

Robert J. Petrick, Esq., Turner Brothers, Inc., P.O. Box 447, Muskogee, OK 74401 (Certified mail)

nw

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 12, 1983

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 83-32
Petitioner	:	A.C. No. 12-01890-03502
v.	:	
	:	Lengacher Mine No. 1
EARTH COAL COMPANY, INC.,	:	
Respondent	:	

## ORDER OF DISMISSAL

Before: Judge Merlin

On April 26, 1983, the operator was ordered to send an Answer to this Commission within 30 days or show good reason for the failure to do so. The order advised that failure to respond would result in default. No response was received despite receipt of the order. On June 28, 1983, an order of default was issued ordering the operator to pay \$763.

On July 27, 1983, the operator filed a request for review of the order of default. By an order dated August 4, 1982, the Commission granted review and remanded the case to me to ascertain and evaluate the operator's reasons for failing to respond to the show cause order dated April 26, 1983. On August 9, 1983, the operator was ordered to furnish information within 45 days sufficient for me to evaluate the reason for its failure to respond to my show cause order. No response to the August 9, 1983 order was received despite receipt of the order. On October 13, 1983, the operator was ordered to furnish the necessary information within 45 days or show good reason for the failure to do so.

The operator has now responded to the order of October 13, 1983. The operator states that the cited mine is no longer operational and the operator does not wish to pursue this matter any further.

Accordingly, the order of default is reinstated, the operator is ORDERED to pay \$763 within 30 days from the date of this order and this case is hereby DISMISSED.

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive, flowing style.

Paul Merlin  
Chief Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U. S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604 (Certified Mail)

Mr. Byron W. Terry, Safety Director, Earth Coal Company, Inc., P. O. Box 431, Beaver Dam, KY 42320 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 12 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 83-5  
Petitioner : A.C. No. 36-00856-03503  
v. :  
: Rushton Mine  
RUSHTON MINING COMPANY, :  
Respondent :

DECISION

Appearances: Agnes Johnson-Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Joseph T. Kosek, Jr., Esq., Ebensburg, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the Petition for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," for one violation of the regulatory standard at 30 CFR § 75.202. The general issue before me is whether the Rushton Mining Company (Rushton) has violated the cited regulatory standard and, if so, whether that violation was "significant and substantial" as defined in the Act and as interpreted by the Commission in Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981). If it is determined that a violation has occurred, it will also be necessary to determine the appropriate penalty to be assessed. Evidentiary hearings on these issues were held in Philipsburg, Pennsylvania.

On April 15, 1982, MSHA Inspector Donald Klemick issued a combined withdrawal order and citation under sections 107(a) and 104(a) of the Act, respectively. The validity of the order is not in itself at issue in this civil penalty proceeding. See Secretary v. Wolf Creek Collieries Company, PIKE 78-70-P (March 26, 1979); Pontiki Coal Corporation v. Secretary, 1 FMSHRC 1476 (October 1979). The Order/Citation alleged as follows:

Loose, unsupported and drummy ribs, and in several areas, loose overhanging ribs, were present throughout the number thirteen, fourteen, fifteen, and sixteen left side rooms, and adjacent number seventeen room being mined off the first left north mains 013 section under the supervision of Tom Smith, section foreman. The ribs had sloughed in several areas and was [sic] on the mine floor, a heavy slate binder varying in width was present near the roof which would fall or had fallen when the ribs bump or roll-out, a violation of section 75.202.

The cited standard provides in relevant part that "[l]oose roof and overhanging or loose faces and ribs shall be taken down or supported."

The expertise of MSHA Inspector Donald Klemick in mine safety is not disputed. He has twelve years experience as a coal mine inspector for MSHA, he conducts frequent underground coal mine inspections of roof and rib conditions and he has had periodic training in roof and rib control. Inspector Klemick also has had six years experience as a coal mine owner and in that capacity performed his own roof and rib examinations on a daily basis. According to Klemick, the determination of the soundness of roof and ribs in a coal mine is more of an art than a science. In this regard, an important technique recognized in the mining industry for determining the safety of roof and ribs is known as "sounding". A "drummy" sound emitted from roof or ribs upon tapping by a wooden handled or other similar implement signals a hollowness, separation, or fracturing that may not be visible. These are indications of potentially dangerous roof or rib conditions.

During the course of his regular inspection of the Rushton Mine on April 15, 1982, Inspector Klemick observed that the ribs were slabbing throughout the Number 13, 14, 15, 16, and 17 rooms in the first left north mains, 013 section of the mine. The upper ten to eighteen inches of the rib consisted of a fractured rock "binder" and "bony" coal which was overhanging up to twenty inches in some places. There were about two hundred feet of ribs with such overhangs and some were visibly cracked and loose. Many of the ribs also sounded "drummy", indicating a separation, fracture, and lack of adhesion in the ribs. More than half of the ribs had also sloughed in the area cited. According to Klemick, some of this overhanging material can be seen in the photographic evidence (Operator's exhibits 0-1, 0-11, and 0-16). In

particular, because of the fracturing in the overhanging "binder", he thought it was highly likely that such material could fall on the miners working in the area, resulting in serious and possibly fatal injuries. He observed that mining equipment was operating in the cited area continuously over three shifts. Under the circumstances, the inspector concluded that an imminent danger of death or great bodily harm existed.

There is no dispute that ribs in the cited area were protruding from the vertical and that some were visibly fractured and drummy sounding. Mine Superintendent Raymond Roeder accompanied Inspector Klemick during this inspection and agreed with Klemick that the ribs sounded drummy and that protrusions did exist in some locations. Roeder does not, however, consider such "protrusions" to be "overhanging ribs" within the meaning of the cited standard unless they protrude from the vertical more than six or eight inches. Rushton's safety inspector, Robert Crain, also agreed that some of the ribs were fractured and produced a drummy sound. He also saw one protrusion of more than eight inches.

Within this framework of essentially undisputed evidence, it is clear that the violation is proven as charged. Ribs in the cited area were clearly protruding from the vertical or "overhanging" and were admittedly loose and drummy in many locations. There was also a reasonable likelihood that the hazard of a rib or roof fall would occur under the circumstances, resulting in death or injuries of a serious nature. The violation was, accordingly, "significant and substantial" and of high gravity. National Gypsum, supra.

Klemick also concluded that the operator was negligent for allowing the condition to exist. He observed that the operator was required to perform three onshift and three preshift examinations each day and that Mine Superintendent Roeder and the mine foreman, Mike Rapaski, concurred that the ribs were in fact loose in the cited area. The cited conditions were abated after the operator provided additional roof and rib support by adding timbers in some areas and by abandoning other areas.

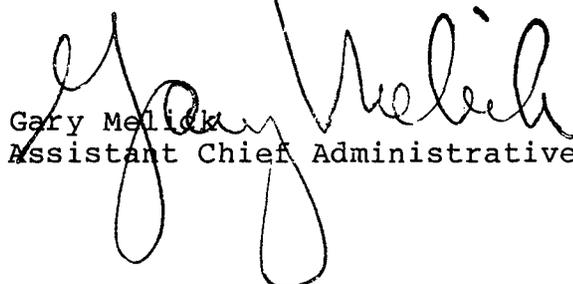
The operator maintains that in spite of the described conditions, the cited area was nevertheless a safe place to work. In particular, it points to the evidence that Inspector Klemick was in the cited mine section only two days before the withdrawal order under essentially the same conditions and Klemick not only failed to cite the conditions but did not see fit to even mention them. It is not disputed that Klemick was indeed present in the same mine section two days before, as alleged, but he claims not

to have noticed the rib conditions because he was concentrating on another violation. I find it difficult to believe, however, that an experienced miner and mine safety inspector would be so oblivious to conditions he characterized as "an imminent danger" if they were as obvious and dangerous as he alleges. Thus while there is no doubt that overhanging rib conditions did exist with detectable fractures, I do not find that the conditions were as obvious as now alleged by MSHA. Accordingly, while I find the operator to have been negligent in allowing the cited conditions to exist, I do not find it to have been grossly negligent.

In determining the appropriate penalty to be assessed in this case, I have also taken into consideration the evidence herein that the operator is medium in size and has a modest history of prior violations. Under the circumstances, I find that a penalty of \$500 is appropriate.

ORDER

The Rushton Mining Company is hereby ordered to pay a civil penalty of \$500 within 30 days of the date of this decision.

  
Gary Melick  
Assistant Chief Administrative Law Judge

Distribution:

Agnes Johnson-Wilson, Esq., Office of the Solicitor, U.S.  
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Philadelphia, PA 19104 (Certified mail)

Joseph T. Kosek, Jr., Esq., Rushton Mining Company, P.O. Box 367,  
Ebensburg, PA 15931 (Certified mail)

nsw

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**DEC 12 1983**

GLEN MUNSEY, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. NORT 71-96  
: :  
SMITTY BAKER COAL CO, INC., : IBMA 72-21  
P&P COAL COMPANY, and :  
RALPH BAKER, :  
Respondents :

DECISION

Appearances: Steven B. Jacobson, Esq., DeCastro, West & Chodorow, Inc., Los Angeles, California, for Complainant;  
J. Edward Ingram, Esq., Robertson, Williams, Ingram, Faulkner & Overbey, Knoxville, Tennessee, for Respondents Smitty Baker Coal Company, Inc. and Ralph Baker.

Before: Judge Melick

This proceeding is before me on remand from the United States Court of Appeals, District of Columbia Circuit, Munsey v. Federal Mine Safety and Health Review Commission, 701 F.2d 976 (1983), cert. denied, 52 U.S.L.W. 3235 (October 3, 1983) (No. 83-182); for a determination in accordance with the standard set forth in National Treasury Employees' Union v. U.S. Department of the Treasury, 656 F.2d 848 (D.C. Cir. 1981), of the amount of costs and attorneys' fees to be awarded counsel for Complainant Munsey for the period during which Mr. Munsey received free representation by staff counsel of his union, the United Mine Workers of America (UMWA).

There is no need to restate here the lengthy history of this case. In sum, the individual complainant, Glen Munsey, has been awarded damages of \$2,858.26 plus interest for lost wages as a result of unlawful discrimination under section 110(b)(2) of the Federal Coal Mine Health and Safety Act of 1969. In addition, for services rendered by counsel for Mr. Munsey, Steven B. Jacobson, Esq., attorneys' fees of \$26,462.50 and expenses of \$335.16 have been awarded. Counsel is petitioning herein for additional fees of \$42,040.00. No hearing has been requested on this matter and none has been held.

In the amended petition filed by Mr. Jacobson, a request is made for attorneys' fees for work done (a) by Mr. Jacobson himself, from the inception of the case until September 1976, while Mr. Jacobson was staff counsel for the UMWA, (b) by two other UMWA staff attorneys, Charles P. Widman and Willard P. Owens, from the inception of the case until September 1976, and (c) by Mr. Jacobson (and a paralegal in Mr. Jacobson's law firm) for work done since the award of attorneys' fees by former Commission Administrative Law Judge Forrest Stewart in his decision dated September 4, 1981.

a. Attorney's fees for work performed by Mr. Jacobson while employed by UMWA. Mr. Jacobson seeks fees totalling \$3,793.75 for this representation. The recognized method of computing reasonable attorneys' fees begins by multiplying a reasonable hourly rate by the number of hours reasonably expended. Hensley v. Eck-erhart, \_\_\_\_\_ U.S. \_\_\_\_\_, 76 L.Ed.2d 40, (1983); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). The resulting figure has been termed the "lodestar." The lodestar fee may then be adjusted to reflect a variety of other factors. Copeland, supra.

Counsel for the Complainant submitted the following information with respect to the hours spent representing Mr. Munsey during the period of time he was employed as staff attorney for the UMWA. The information was attached as Exhibit A to the affidavit of Mr. Jacobson accompanying his current petition for attorney's fees.

Preparation for and attendance at first 1973 D.C. Circuit oral argument	20.25
Preparation for and attendance at second 1973 D.C. Circuit oral argument	16.50
	<u>36.75</u>
1973 - 36.75 hours at \$50.00/hr. = \$1,837.50	
Preparation of Motion to Add P&P as a Respondent	2.75
Preparation of Motion to Add Ralph & Smitty Baker as Respondents	2.00
Preparation of Report on Remand Procedures	3.75
	<u>8.50</u>
1975 - 8.50 hours at \$60.00/hour = \$510.00	
Preparation of exceptions and reply to opposing exceptions to ALJ's decision	22.25
1976 - 22.25 hours at \$65.00/hr. = \$1,446.25	

Total

\$3,793.75

In his affidavit, counsel explained in connection with the noted activities that he maintained a contemporaneous record of time spent on the instant case while he was a UMWA staff attorney. The hours of work performed were noted on sheets of legal size paper kept in his desk or in the case file. "The task performed, and the hours spent on them on the day they were begun, were noted on the sheets the day they were begun. Hours spent on the same task on subsequent days were noted as such. \*\*\* The hours were totaled when each task was completed, and then were transferred to handwritten summary sheets. The summary sheets showed all tasks completed, and the total hours spent on each of them."

While it must be recognized that motivation for maintaining detailed and complete time records by a salaried staff attorney who apparently was not required to do so by his employer may be somewhat lacking, I nevertheless find the submissions herein to be sufficient to permit a determination of reasonableness. Accordingly, I find that said counsel reasonably expended 36.75 hours in 1973, 8.50 hours in 1975, and 22.25 hours in 1976. Mr. Jacobson stated in his affidavit that based on conversations with attorneys at six law firms and court decisions awarding fees for work performed during that period, the fair market value of his services in the Washington, D. C. area was \$50 per hour in 1973, \$60 per hour in 1975, and \$65 per hour in 1976. While Respondents, Smitty Baker Coal Company, Inc. and Ralph Baker, object to the method of calculating fair market value of services based on comparable hourly rates as hearsay, they offer no contradictory evidence. Under the circumstances, I find that the rates represented by Mr. Jacobson are reasonable in the community for similar work and that those rates accurately reflect the value of the time spent given the uncontested statement of counsel's background and expertise.

The number of hours reasonably expended by Mr. Jacobson multiplied by reasonable hourly rates result in a lodestar figure for the period at issue of \$3,793.75. No increase in that amount is warranted.

b. Claim for attorney's fees for work by UMWA staff attorneys Widman and Owens. Mr. Jacobson asserts a claim on his own behalf for market-value attorneys' fees for UMWA staff attorneys Charles P. Widman (\$15,600.00) and Willard P. Owens (\$8,625.00) on the grounds that when he left employment with the UMWA he reached an agreement with that union to continue legal representation in certain cases including this case in return for the assignment by the union to Jacobson of "any and all rights it had to fees recoverable in said actions, both as to work [Jacobson] had performed, and as to work performed by Messrs. Widman and Owens."

In accordance with the National Treasury Employees' Union decision, however, the UMWA is not itself entitled to any above-cost fee allowance in cases of this nature for work performed by its salaried staff attorneys. The UMWA is limited to recovery of the expense to which it was put in supplying the legal services in question. National Treasury Employees' Union, supra, at 855. Accordingly the UMWA has no right to assign to Mr. Jacobson an above-cost allowance of fees that might be awarded as a result of work performed by other staff attorneys. At most the UMWA could assign only the recovery to which it would be legally entitled, i.e., recovery of the expense to which it was put in supplying the legal services in question. No evidence has been presented in this case however concerning such expenses. Under the circumstances it is impossible to determine the UMWA interest that might be assignable to Mr. Jacobson.

Clearly, however, those staff attorneys could assign their interest to Mr. Jacobson. Such an assignment of an above-cost fee allowance in combination with the UMWA agreement with Jacobson would justify the payment of the fees to Mr. Jacobson. Since there is no evidence before me, however, of any assignment by either of those former UMWA staff attorneys, payment of their fees to Mr. Jacobson must be contingent upon sufficient evidence of such an assignment. The final order in this case reflects that contingency requirement.

The amount of fees requested on behalf of Widman and Owens is challenged by Respondents because of the absence of contemporaneous time records and a delineation of non-productive/unsuccessful time. Messrs. Widman's and Owens' reconstructed time was formulated by reference to the pleadings they prepared and the length of transcripts of the hearings they attended "recognizing that it takes a certain amount of time to prepare a complaint, to locate and prepare witnesses, to otherwise prepare for trial, etc.". In addition, apparently because his whereabouts were unknown, Mr. Owens' time was reconstructed without any input from him.

I find that the lack of specificity and the absence of contemporaneous documentation and verification in the fee application warrants a downward adjustment in the estimate of hours reasonably expended. Copeland, supra. Accordingly, I find that Mr. Widman's time should be reduced to 150 hours and that Mr. Owens' time should be reduced to 50 hours. Based upon the proffered reasonable hourly rates of \$75/hour and 100/hour respectively, the lodestar for Mr. Widman is therefore \$11,250.00 and the lodestar for Mr. Owens is \$5000.00. No further adjustment in the lodestars is warranted.

c. Attorneys' fees for the period September 1981 through October 1982. Fees of \$14,021.25 are also requested for work performed subsequent to the decision of Judge Forrest Stewart on September 3, 1981. This work was performed by Mr. Jacobson while in private practice located in Los Angeles, California. Fee application is also made for work performed during this period by a paralegal in Mr. Jacobson's law firm, Merna Figoten. The fee petition (Exhibit A) discloses the following information:

a. Steven B. Jacobson

1. September 1981 - September 1982

Review and Analysis of ALJ's Decision	.75
Preparation of Petition for Commission review	9.25
Prepare petition for D.C. Circuit review	.50
Prepare Motion to Transfer Baker Appeal from Fourth Circuit to D.C. Circuit	16.00
Prepare Opposition to Motion to Transfer Munsey Appeal to Fourth Circuit	2.00
Preparation of Reply to Baker Opposition to Munsey Motion to Transfer	2.25
Prepare Motion for Leave to Intervene in Baker Appeal	.75
Prepare Motion to Set D.C. Circuit Briefing Schedule	3.25
Prepare D.C. Circuit Brief and Appendix	25.00
Analyze Baker Brief and Prepare D.C. Circuit Reply Brief	20.25
Prepare Extension Motions	1.00
Court, Commission and Labor Department Correspondence	1.50
Client Correspondence	.50
Total September 1981 - September 1982	<u>83.00</u>

83.00 hours at \$115.00/hour = \$9,545.00

2. October 1982 to Present

Prepare Opposition To Baker Motion To Strike Preparation For and Attendance At D.C. Circuit Oral Argument	3.75
Review of D.C. Circuit Decision	18.25
Prepare D.C. Circuit Bill of Costs and Review of Opposition Thereto	.25
Client Correspondence	1.50
Preparation of Petition for Attorney's Fees	2.50
Total October 1982 - Present Time	<u>5.00</u>
	31.25

31.25 hours at 125.00/hour = \$3,906.25

Total September 1981 - October 1982 Attorney Time \$13,451.25

b. Merna B. Figoten

Preparation of D.C. Circuit Briefs

9.50

9.50 hours at \$60.00/hour = \$570.00

Total September 1981 - September 1982 Paralegal Time

\$570.00

Exhibit B attached to the fee petition was represented to be a copy of computerized time records maintained by Mr. Jacobson's current law firm for work performed in this case subsequent to the September 3, 1981, decision. It is explained in the accompanying affidavit that it is the practice of attorneys and paralegals in this law firm to prepare handwritten time sheets of the work performed each day. The time sheets are then typed up and turned in to the computerized central billing facility on a daily basis. That facility prepares and keeps a running statement of all work performed on each matter in the law firm from its inception, and prepares periodic bills which are sent to clients. Exhibit B is represented to be the portion of the running statement for this case covering the period for which fees are sought. Both Mr. Jacobson's and Ms. Figoten's credentials are set forth in the affidavit accompanying the fee petition and are not disputed.

Respondents object to the requested fees primarily on the grounds that the fees should be reasonable in relation to the results obtained. In particular, Respondents object to alleged non-productive/unsuccessful time for the period after September 1981. They note that the Petition for Commission Review raised five issues and that two of those issues involved reinstatement and two involved interest and increasing the "lodestar" fee determined by Judge Stewart. The Commission denied review of all four of these issues and the Circuit Court affirmed that decision. Respondents further note that the fifth issue (allowance of fees during counsel's tenure with UMWA) represented only a small segment of the Petition. They also point out that the appeal was successful on only that one issue in proceedings before the Circuit Court and was unsuccessful in any matter of benefit to Mr. Munsey. Further objections are based upon alleged unnecessary procedural matters and excessive time spent upon preparation of the second petition for attorneys' fees which duplicated in large part the earlier fee petition filed with Judge Stewart.

Certainly to the extent that there has been but limited success in the review process there is indeed merit to the Respondent's allegations. It is apparent moreover that the limited

claim which was successful did indeed relate to an issue of no direct benefit to the victim of discrimination in this case. Under all the circumstances, I find that Mr. Jacobson is entitled to compensable time for the period September 1981 - September 1982 of 40 hours and for the period since October 1982 of 15 hours. I further find that compensable time of 4 hours for paralegal Figoten is appropriate. Hensley, supra.; Copeland, supra. at pp. 891-892.

Mr. Jacobson stated that his billing rate was \$115 per hour for work performed during the period September 1981 through September 1982 and \$125 per hour for work performed since October 1982. According to the affidavit, these rates were based upon "exhaustive surveys of rates charged by law firms in the Los Angeles area and are, if anything, somewhat low, given my experience and expertise." It is further represented that Ms. Figoten's billing rate was \$60 per hour during the time she worked on this case. Ms. Figoten's billing rate "was likewise set after an exhaustive survey of rates charged by Los Angeles law firms, and is likewise no greater than the average rate charged here." While these rates are again challenged by Respondents as based upon hearsay, they submit no contradictory evidence. Accordingly, I find the rates quoted to be reasonable in the community for similar work. I also find that the quoted rates accurately reflect the value of Mr. Jacobson's and Ms. Figoten's time, given their backgrounds.

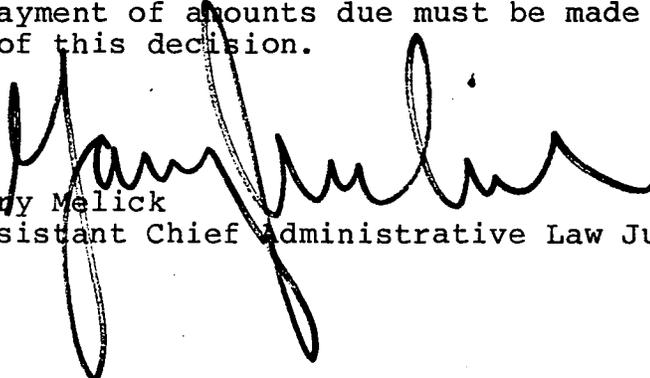
The number of hours reasonably expended by Mr. Jacobson during the period at issue multiplied by the corresponding hourly rates results in a lodestar figure of \$5225.00. The number of hours reasonably expended by Ms. Figoten multiplied by the reasonable hourly rate result in a lodestar figure for the paralegal of \$240.00.

While the overall attorney fee award in this case is more than seventeen times the damages awarded the actual victim of discrimination, it is well recognized that market value fee awards in cases such as this take into account the need to assure that miners with bona fide claims of discrimination are able to find capable lawyers to represent them. In addition, the success in this case represents a vindication of societal interests incorporated in the mine safety legislation above and beyond the particular individual rights vindicated in the case. Accordingly I do not find the substantial fee award in this case to be excessive or in the nature of a "windfall".

#### Order

Under prior decisions rendered in this matter, the Respondents, namely Ralph Baker, Smitty Baker Coal Company, and P&P

Coal Company, were ordered jointly and severally to pay the total amount of \$2,858.26 plus interest "computed on the total amount at a rate of 8% until the date of payment". It has also been previously ordered that Respondents jointly and severally pay attorney's fees in the amount of \$26,462.50 and expenses in the amount of \$335.16 to Steven Jacobson, Esq. In addition to payment of the above amounts, it is further ordered that the Respondents, jointly and severally, pay (a) the additional amount of attorneys' fees in the amount of \$9,018.75 to Steven Jacobson, Esq., and fees to the law firm of De Castro, West & Chodorow, Inc. for the services of paralegal Merna Figoten in the amount of \$240.00; and, (b) attorney's fees in the amount of \$16,250.00 to Steven Jacobson, Esq., upon presentation to Respondents and the undersigned of an assignment to Mr. Jacobson of the respective interests of Charles P. Widman, Esq., and Willard P. Owens, Esq., in such attorneys' fees. Payment of amounts due must be made within 30 days of the date of this decision.



Gary Melick  
Assistant Chief Administrative Law Judge

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nsw

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

DEC 13 1983

UNITED MINE WORKERS OF AMERICA, : DISCRIMINATION PROCEEDING  
LOCAL UNION NO. 1197, :  
Complainant : Docket No. PENN 83-234-D  
v. :  
: PITT CD 83-8  
BETHLEHEM MINES CORPORATION, :  
: No. 60 Mine  
and :  
: :  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Respondents :

ORDER OF DISMISSAL

Before: Judge Broderick

On September 23, 1983, a complaint was filed under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (the "Act"), alleging that Respondent Bethlehem has discriminated against Complainant and the miners represented by Complainant by utilizing a longwall mining machine in the subject mine which produces more than the level of dust permitted under 30 U.S.C. § 842, and that Respondent MSHA has discriminated against Complainant and the miners represented by Complainant by failing to enforce the dust standards in the statute and regulations against Bethlehem. The complaint further alleges that the use by Bethlehem of the machinery complained of, when it knew of MSHA's failure or refusal to enforce the Act concerning the machinery "prevents [Complainant] from exercising its statutory rights . . . in that if [Complainant] or its individual members were to refuse to work because of a hazardous condition created by the offending machinery, the employee asserting that right would be subject to discharge . . . ." As relief, Complainant seeks an order to withdraw the machine from the mine or an order limiting the time miners are exposed to the resulting respirable dust.

On October 20, 1983, Respondent Bethlehem filed a motion to Dismiss on the grounds that the complaint does not allege that Complainant (or its members) were engaged in activity protected by the Act and that adverse action was taken against them on account of such activity.

On October 27, 1983, Respondent MSHA filed a motion to dismiss on the grounds that the complaint failed to state a cause of action under section 105(c) of the Act and that the Commission does not have authority to grant the relief sought.

On December 6, 1983, Complainant filed a Memorandum in Opposition to the Motions to Dismiss and affidavits from two members of Complainant Local Union who work at the subject mine and are members of the Safety Committee.

#### ISSUES

1. Does the complaint state a cause of action under section 105(c) of the Act?
2. Is MSHA a "person" under section 105(c) and subject to its prohibition against discrimination?
3. Does the Commission have jurisdiction to grant the relief sought in the complaint?

#### THE STATUTE

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 this Act.

The provision prohibits adverse action ("discharge or in any manner discriminate against") against a miner or representative of miners because of activity protected under the Act. Such protected activity includes filing or making a complaint under the Act, instituting or testifying in a proceeding under the Act, requesting an inspection, accompanying an inspector as a miner's representative, receiving adequate training, and refusing to perform work in conditions reasonably believed to be unsafe or unhealthful.

The complaint herein alleges that Bethlehem utilizes a long-wall mining machine which causes excessive concentrations of respirable dust and that MSHA has failed to enforce the dust standards in the Act and Regulations. Does this allege protected activity on the part of Complainant? The activity described in the complaint as protected is not the complaints made to Bethlehem or MSHA, but rather seems to be that Bethlehem continues to violate the dust standards and that MSHA refuses to enforce the standards against Bethlehem. However, illegal and reprehensible this alleged situation may be, by itself it can hardly be converted to the exercise by Complainant of rights protected by the Act. Complainant, as a representative of the miners, is given special responsibility under the Act. Certainly, it has the right and duty to report unsafe or unhealthy mine conditions to MSHA, and is protected under 105(c) in making such reports. See UMWA Local 9800 v. Secretary and Dupree, 3 FMSHRC 958 (1981) (ALJ). However, that is not the activity alleged in this case. I conclude that the complaint does not allege that Complainant was engaged in activity protected under the Act.

Further, the adverse action alleged is merely the speculation that the members of Complainant would be discharged if they refused to work because of hazardous conditions. This is not adverse action, but only the possibility of future adverse action. The complaint also seems to allege that being required to work in an unhealthy environment is adverse action. But Complainant and its members are not required to work in an environment reasonably believed to be unhealthy, and they would be protected if they refused to work under such conditions. I conclude that no past or present adverse action has been alleged here.

Therefore, I conclude that the complaint does not state a cause of action under section 105(c) of the Act.

#### IS MSHA SUBJECT TO 105(c)

Section 105(c) is directed to "any person." I have previously held that MSHA is a person under section 105(c) prohibited from discriminating against a miner or representative of miners and affirm that conclusion here. See Local 9800 UMW v. Secretary and Dupree, 2 FMSHRC 2600 (1980) (ALJ).

COMMISSION JURISDICTION TO GRANT RELIEF

Section 103(g) of the Act gives the miners' representative the right to call for an immediate inspection by giving MSHA notice of an alleged safety or health violation or an imminent danger in a mine. If MSHA determines that a violation or danger does not exist it must so notify the representative in writing.

Under 30 C.F.R. § 43.7, the representative of the miners may obtain an informal review by the MSHA District Manager or his agent who is required to furnish a written statement of the reasons for the final disposition of the matter.

The Act does not provide for Commission review of such disposition and MSHA argues that the Commission has no jurisdiction in such cases. In view of my holding that the complaint herein does not state a cause of action, it is unnecessary to rule on this issue, and I do not do so at this time.

ORDER

Therefore, IT IS ORDERED that this proceeding is DISMISSED for failure to state a cause of action under section 105(c) of the Act.



James A. Broderick  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

December 14, 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 82-306  
Petitioner : A.C. No. 36-05018-03502  
v. :  
: Cumberland Mine  
U. S. STEEL MINING CO., INC., :  
Respondent :

DECISION APPROVING SETTLEMENT

Appearances: Thomas A. Brown, Esq., Office of the Solicitor,  
U. S. Department of Labor, Philadelphia,  
Pennsylvania, for Petitioner;  
Louise Q. Symons, Esq., Pittsburgh,  
Pennsylvania, for Respondent.

Before: Judge Merlin

This case is before me upon a Petition for Assessment of Civil Penalty under Section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act). The Petitioner has made a motion to approve a settlement agreement. Payment of the original penalties of \$217 was proposed. At the hearing I determined that the proffered settlement was appropriate under the criteria set forth in Section 110(i) of the Act. I now affirm that determination.

WHEREFORE, the motion for approval of settlement is GRANTED and it is ORDERED that Respondent pay \$217 within 30 days from the date of this decision.



Paul Merlin  
Chief Administrative Law Judge

Distribution:

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Louise Q. Symons, Esq., U. S. Steel Mining Co., Inc., 600 Grant Street, Room 1580, Pittsburgh, PA 15230 (Certified Mail)

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

December 14, 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 83-221  
Petitioner : A.C. No. 36-00970-03527  
v. :  
 : Maple Creek No. 1 Mine  
U. S. STEEL MINING CO., INC., :  
Respondent :

DECISION

Appearances: Thomas A. Brown, Esq., Office of the Solicitor,  
U. S. Department of Labor, Philadelphia,  
Pennsylvania, for Petitioner;  
Louise Q. Symons, Esq., Pittsburgh,  
Pennsylvania, for Respondent.

Before: Judge Merlin

Statement of the Case

This case is a petition for the assessment of civil penalties filed under section 110(a) of the Act by the Secretary of Labor against U. S. Steel Mining Company, Inc. for three alleged violations of the mandatory safety standards. 30 C.F.R. §§ 75.1704, 75.200 and 75.1725(c).

The hearing was held as scheduled and documentary exhibits and oral testimony were received from both parties. At the conclusion of the hearing, I directed the filing of written briefs simultaneously by both parties within 21 days of receipt of the transcript (Tr. 137). The briefs have been received and reviewed.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 6-8):

1. U. S. Steel Mining Company, Inc. is the owner and operator of the Maple Creek No. 1 Mine.

2. The Maple Creek No. 1 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The presiding administrative law judge has jurisdiction over this proceeding.
4. The subject citations, modifications and determinations were properly served on the operator by a duly authorized representative of the Secretary. The citations, modifications and determinations may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of the statements asserted therein.
5. The authenticity of all exhibits is admitted, but not the relevancy or the truth of the matters asserted therein.
6. The alleged violations were abated in a timely fashion.
7. The operator has annual production of 10,943,308 tons.
8. The subject mine has annual production of 482,015 tons.
9. All witnesses are accepted generally as experts in coal mine health and safety.
10. There were 3 assessed violations of 30 C.F.R. § 75.1704 in the 24-month period prior to the subject § 75.1704 alleged violation but some of the prior violations may have been contested.
11. There were 28 assessed violations of 30 C.F.R. § 75.200 in the 24-month period prior to the subject § 75.200 alleged violation but some of the prior violations may have been contested.
12. There were 2 assessed violations of 30 C.F.R. § 1725(c) in the 24-month period prior to the subject § 75.1725(c) alleged violation but some of the prior violations may have been contested.
13. The payment of the penalties will not affect the operator's ability to continue in business.

Citation No. 2011053

The Mandatory Standard

Section 75.1704 of the mandatory standards, 30 C.F.R. § 75.1704, provides as follows:

§ 75.1704 Escapeways.

[Statutory Provisions]

Except as provided in §§ 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

The Cited Condition or Practice

Citation No. 2011053 cites a violation of 30 C.F.R. § 75.1704 for the following condition:

There was no directional sign provided where the designated intake escapeway from 53 room enters the main intake escapeway to Park [Shaft]. Persons could make a mistake and go inby to 56 room.

## Discussion and Analysis

The inspector who issued the subject citation testified that there was no directional signal for the designated escapeway from the 53 room at the main intake escapeway to Park Shaft. The inspector expressed the opinion that miners could make a mistake and go inby (Tr. 11). The inspector testified that the operator marks its escapeways with reflectors and that reflectors were present in the escapeway on the day the citation was issued (Tr. 15). According to the inspector, the reflector nearest the cited intersection was 50 feet outby the intersection (Tr. 26-27). The inspector admitted that miners coming to the intersection would see a green reflector when looking to the left (outby) and would not see any reflector if they looked to the right (inby) (Tr. 16). The inspector stated that the reflector was readily visible when the miners got into the escapeway (Tr. 27). The inspector further agreed that there was a considerable volume of air coming up the intake escapeway at the cited intersection and that if a miner were knowledgeable of the air in the mine he would know which direction was outby based on the direction of airflow (Tr. 19). It was the inspector's position that an intersection should have a directional arrow marking the exit route even when a reflector is used. He acknowledged the operator was never put on notice an arrow was required in addition to the reflector (Tr. 23-24).

The assistant mine foreman who accompanied the inspector during the inspection testified that the intake escapeways are marked with green reflectors, the return escapeways are marked with red reflectors and the alternate return escapeway is marked with white reflectors (Tr. 31, 34). The reflectors are usually hung from the roof in the middle of the entry (Tr. 32). Contrary to the inspector's testimony, the assistant mine foreman stated that in this instance there was one reflector about 20 feet outby the cited intersection and another one approximately 85 feet outby (Tr. 32). He said that miners would see green reflectors if they looked to the left at the intersection and the miners were trained to follow the reflectors (Tr. 35-36). While admitting that miners must come into the intersection to see the reflector 20 feet away, the assistant mine foreman noted that the miners have to enter the intersection in order to escape (Tr. 37). He also stated that reflectors are a better indicator than arrows when smoke is present because the

arrows are on porcelainized metal signs that are not reflective (Tr. 33, 38). Additionally, the assistant mine foreman testified that in traveling to the shaft bottom in the intake escapeway miners simply keep the air current to their faces. He stated that the air velocity at the cited intersection is 24,000 cubic feet per minute, which is sufficient to enable miners to feel the air current on their faces (Tr. 33, 36).

The subject standard mandates only that escapeways be "properly marked." The term "properly marked" is not defined. Specific types of markings and their placement are not delineated. The evidence is clear that the operator used green reflectors in the cited escapeway. I accept as more persuasive the operator's evidence regarding the distance of the reflector from the intersection. Based upon the record I find that the reflector was clearly visible when looking left from the intersection and that miners were properly trained as to what the reflectors meant. I am unpersuaded by the Solicitor's argument that reflectors are inadequate because miners must enter the intersection before observing the reflector since miners must enter the intersection to make use of the escapeway. Also, there is no merit to the argument that the reflectors are inadequate because smoke would obscure miners' vision of the reflectors. The testimony shows that where there is smoke reflectors are more visible than arrows.

In light of the foregoing, I conclude the escapeway was properly marked within the meaning of the mandatory standard. If the Secretary believes something more or different than reflectors should be required, he must undertake to change the standard. He cannot accomplish such a result merely by issuing a citation on an ad hoc basis in an individual situation. Accordingly, I conclude there was no violation and the citation is Vacated.

I have reviewed the briefs. To the extent they are inconsistent with the findings and conclusions set forth above they are rejected.

Citation No. 2012693

The Mandatory Standard

Section 75.200 of the mandatory standards, 30 C.F.R.  
§ 75.200 provides as follows:

§ 75.200 Roof control programs and plans.

[Statutory Provisions]

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

### The Cited Condition or Practice

Citation No. 2012693 cites a violation of 30 C.F.R. § 75.200 for the following condition:

No. 33 room intersection in "A" heading was 35 feet from corner to corner both diagonals. Total distance 70 feet. One part of 33 room intersected at a 52° angle. The roof control plan stipulates if either diagonal or a total of both diagonals exceed 32 feet or 62 feet, respectively, additional support posts and/or crib will be installed. Section was supervised by R. Franks.

### Discussion and Analysis

The inspector who issued the subject citation testified that the cited intersection was wider than allowed by the roof control plan (Tr. 44-45). Drawing No. 4 of the plan contains the statement that if the diagonal distances in an intersection exceed 32 feet each or if the sum of the diagonals exceeds 62 feet, additional support shall be provided (MSHA Exh. 3). According to the inspector's measurements, each diagonal distance in the cited intersection was 35 feet (Tr. 45). These measurements are not disputed. Drawing No. 4 itself is a four-way intersection with the entries meeting at right angles. The cited intersection was not created by four entries joining at right angles. One of the entries joined the intersection at a 52° angle ("B" on Op. Exh. 1, Tr. 60).

The existence of a violation depends upon whether the statement on Drawing No. 4 applies to this case. The operator contends it does not because the statement only applies when entries meet at right angles as they do in the drawing. I must reject this argument. I find the drawing illustrative rather than exclusive and conclude that the statement applies to all four-way intersections where the entries come together at the same place regardless of the precise angles at which they meet. The title of Drawing No. 4 is "Minimum Permanent Roof Support for Intersections." Moreover, the plan contains no other provision concerning minimum diagonal lengths for intersecting entries. To limit the general statement requiring additional supports to the precise configuration depicted by the drawing would render

the plan wholly inadequate by leaving untreated a large and crucial portion of roof control. Accordingly, I find that in this case additional bolting should have been provided as required by the plan. Because there was no such additional bolting I conclude a violation existed.

I further conclude the violation was significant and substantial. The inspector testified that there was a slip running down the center of the roof of the 33 room which went across the intersection and into the rib where entry "B" entered the intersection (Tr. 46). The inspector sounded the top of the roof with a metal-capped walking stick and noted that the top was heavy. The heavy top indicated to the inspector that the roof could change at any time, especially where, as here, the intersection was larger and the diagonals greater than allowed by the plan. I conclude that based on the foregoing factors the violation was "significant and substantial" within the meaning of that term as defined by the Commission in Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981).

I further find the operator was negligent. The operator drove entry "B" at a 52° angle because track was going to be put down. Although driving the entry at such an angle is permissible, additional roof support should have been provided as required by the plan because more coal had been cut away than in normal situations. The slip added to the hazard. There is no dispute that the operator knew of all these things.

The remaining statutory criteria are set forth in the stipulations. After consideration of all the criteria a penalty of \$250 is assessed for this violation.

I have reviewed the briefs. To the extent they are inconsistent with the findings and conclusions set forth above they are rejected.

Citation No. 2012695

The Mandatory Standard

Section 75.1725(c) of the mandatory standards, 30 C.F.R. § 75.1725(c) provides as follows:

§ 75.1725 Machinery and equipment; operation and maintenance.

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

The Cited Condition or Practice

Citation No. 2012695 cites a violation of 30 C.F.R. § 75.1725(c) for the following practice:

Men were observed in the boom at the continuous miner, working on the conveyor chain and the power source for CM-12 S/N JM 3226 was not disconnected at the power source. Section supervised by R. Franks.

Discussion and Analysis

The inspector who issued the subject citation testified that he saw men in the boom of a continuous miner and beside the boom beating with a sledge hammer on what appeared to be a flight chain. The power was cut off at the machine rather than disconnected at the source (Tr. 102-103). The inspector took the position that the miners might be seriously injured or killed if the machine became energized and that power had to be cut off not only at the machine but at the power source (Tr. 103-104). However, he was not certain what the miners were doing at the machine (Tr. 107-108). He did not appear to be familiar with how the cited continuous miner actually worked (Tr. 106-107, 110-113, 115-116, 136).

The operator's maintenance foreman who testified demonstrated familiarity and knowledge about the operation of the continuous miner. He explained that in order for power to reach the tail section of the conveyor where the miners were located, someone would have to set the main power breaker

and the control breaker on the left side of the machine, walk around to the right side of the machine and turn on a control switch in the cab, turn on the pump motor and then start the conveyor (Tr. 118, 121-123). The maintenance foreman admitted that equipment can malfunction, but stated that in this instance five different pieces of equipment would have to malfunction at the same time for power to extend to the area in question (Tr. 120).

The maintenance foreman stated that the miners were repairing a broken conveyor chain when the citation was issued and that the machine's power must be used to repair the chain (Tr. 123-124). He further explained that the conveyor has to be raised, lowered, and swung to one side; that the conveyor is swung to one side and brought back to the normal position to slacken the chain; that the chain is then recoupled and put back on the drive sprocket; and that the chain comes off the drive sprocket every time it breaks (Tr. 125). According to the foreman machine power is necessary to make all these various adjustments because the pump motor must be running to raise the conveyor, swing it and drop it (Tr. 126-127).

I accept the foregoing testimony from the foreman. Indeed, as already noted the inspector did not know how the machine operated or even what repair work was being done. I am constrained to decide this case on this record where the evidence submitted by the operator is manifestly superior to that offered by the Solicitor who barely cross-examined the operator's witness and whose inspector did not know much at all about the machine he cited.

Accordingly, I conclude that machinery motion was necessary to make adjustments and that under the circumstances the operator should not have been required to cut the power at the source and necessitate frequent trips back and forth from it to the continuous miner in order to effectuate the necessary repairs to the broken chain. I conclude there was no violation. This citation is Vacated.

I have reviewed the briefs. To the extent they are inconsistent with the findings and conclusions set forth above they are rejected.

ORDER

In light of the foregoing, it is hereby ORDERED that Citation Nos. 2011053 and 2012695 are VACATED.

It is further ORDERED that with respect to Citation No. 2012693, the operator shall pay \$250 within 30 days from the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin  
Chief Administrative Law Judge

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/ln



These cases were heard in the Commission's Falls Church hearing room on September 20, 1983. Representatives of the government, the company, and the United Mine Workers of America all presented evidence and the government and company filed briefs. There was a prehearing conference at which the United Mine Workers of America was not represented. At that conference certain drawings were presented, and while there are minor differences the photographic and sketch material attached to Vesta's answer to the government's motion to dismiss and the exhibit presented at the pre-trial conference and government Exhibit R-4 all describe the electrical connections used in Vesta's transformers. In the testimony, these transformers are sometimes referred to as power centers or load centers, or in one case, as rectifiers. This last term was a misnomer as a rectifier is a device which converts alternating current into direct current.

The knife switch referred to hereinafter is sometimes referred to in the testimony as a "load brake switch" or as a "visible disconnect switch".

Because of the electrical configuration of the transformers, which will be described later, MSHA first issued a citation as to one of those transformers. It later decided that there was no violation and vacated that first citation. MSHA then issued 26 citations, being one for each transformer. Notices of contest were filed with a request for an expedited hearing.

Shortly after the conference mentioned earlier, and because MSHA believed there had been procedural errors in the way the 26 citations were issued, it vacated those citations and moved to dismiss the notices of contest. Vesta objected to the dismissals because it contended it had a right to a decision on the merits but stated that if I did dismiss the cases it should be with prejudice against MSHA issuing citations concerning the particular transformers involved. The United Mine Workers of America then intervened and objected to the vacation of the citations and pointed out that I did not have to approve that action.

Shortly thereafter MSHA decided that Vesta was not being cooperative and issued another citation covering all 26 transformers. Vesta then filed another notice of contest with a request for an expedited hearing and a request that all of the cases be consolidated.

Vesta's response to the Secretary's motion to dismiss the first 26 notices of contest contains an affidavit of Julian Guthrie which has attached diagrams and pictures of one of the 26 transformers. A drawing of that transformer was presented at the afore-mentioned prehearing conference.

and there is no dispute as to the essential facts regarding that transformer. The transformers in question convert high voltage alternating current into low voltage alternating current. At the high voltage or outby end of the transformers there is a visible disconnect knife-type switch that clearly shows whether the transformer is energized or not. At the low voltage end of the transformers there are two circuit breakers, (not counting 110-V circuits) one of which is used in connection with the solid power line to the belt motors and the other is in connection with an auxiliary plug which can sometimes be used for other equipment such as a belt vulcanizing device. Any equipment hooked up to the auxiliary plug is either plugged in or not, so there is no question that the disconnect device assures a visual check. In a circuit breaker, on the other hand, the disconnect is inside of the housing and there is no way to visually check and be sure that a circuit is disconnected. The solid connection going to the belt drive motors on the low voltage side contains only the circuit breaker as a means of disconnecting the transformer from the motors.

The question is whether the standard allows the type of arrangement described. 30 C.F.R. 75.903, a statutory provision, provides

"disconnecting devices shall be installed in conjunction with the circuit breaker to provide visual evidence that the power is disconnected."

Vesta's transformers clearly contain the knife-switch on the high voltage end which provides visual evidence that the transformer itself, is disconnected. At the low voltage end however, only the auxiliary plug provides visual evidence of a disconnection.

While I have stated that there is no substantial disagreement as to the electrical connections in and around the transformers some of the witnesses did not interpret government exhibit R-4 in the same way. Mr. Lester, MSHA's top electrical expert, thought there was a circuit breaker controlling the belt drive motor that is not shown on the drawing. Other witnesses said that the box marked "breaker main low side" controlled the belt drive motor. One witness said that the "breaker main low side," when disconnected, would also disconnect the vulcanizing plug which has its own circuit breaker as shown on government exhibit R-4. Mr. Paine, the vice president of Vesta, testified that all of the transformers had been modified so that the vulcanizing plug and its circuit breaker were hooked into the outby side of the "breaker main low side" box. He said that this had been done before the hearing. His testimony, taken together with the testimony of Mr. Carnathan, an electrician at the Vesta

mine, shows that at the time the citations were issued at least some of the transformers were connected internally in such a way that the vulcanizing plug could not be used if the main lowside breaker was disengaged. The vulcanizing plug was being used on occasions at the time the citations were issued, to vulcanize the belt. Vulcanization of a belt is not electrical work and there is no requirement that a visual disconnect be provided. There is a requirement, however, that the power be taken off of the belt drive motor when non-electrical work is being done and as I understand government exhibit R-4 as amplified by Mr. Carnathan and Mr. Paine, that could not be done with respect to at least some of the transformers. If the vulcanizing (auxiliary) plug circuit is hooked to the inby side of the motor circuit breaker you could not have power in the vulcanizer and no power on the drive motor circuit. It could be done now, according to Mr. Paine. But whether there was a violation of some other standard is not the question before me. A step-down transformer, such as the one involved in these cases, contains 2 physically separate windings or coils. High voltage electricity passing through the primary winding, by the process known as electro-magnetic induction, causes low voltage current in the secondary or low voltage coil. It is the government's position, as expressed by its leading electrical inspector, that the low voltage side is a separate circuit, and thus requires its own visual disconnect blade. When Mr. Lester was on the stand, he mentioned the two breaker boxes, one designated a belt starter and the other merely designated breaker box on the lower of the two rectangles depicted on government exhibit R-4. The lower rectangle is designated Westinghouse, and there is no explanation as to what that means. Since Mr. Lester did not indicate that a visual disconnect was necessary with respect to the "breaker box" and the "belt starter box" it is obvious that the government is not contending that there need be a visual disconnect with respect to each circuit breaker. The government's contention insofar as Mr. Lester is concerned, is that since the high voltage circuit in the transformer and the low voltage circuit are separate circuits, that each needs its own visual disconnect switch. Counsel, by questions and arguments indicated that it was also a matter of the physical distance between the visual disconnect switch on the high voltage side of the transformer and the breaker box on the low voltage side. The distance in fact, was about twenty feet but there were questions concerning whether one hundred feet would be close enough or several hundred feet.

Mr. Blackburn, the president of Tee Engineering Company is an electrical engineer and formerly worked under Mr. Lester as the district electrician for MSHA's Pikeville district. He has designed power centers that are similar to the one depicted in government exhibit R-4. It is his opinion, directly contrary to that of his former boss, Mr.

Lester, that the power center depicted in government exhibit R-4 is in full compliance with 30 C.F.R. 75.903. <sup>1/</sup> Vice president Paine, also an engineer, but not electrical, is of the same opinion.

When qualified experts disagree to the extent they have in this case, a close question is presented. Before getting to the basis of my decision I will announce that I have consolidated all these cases for hearing, I reaffirm my refusal to grant MSHA's motion to dismiss the first 26 cases and I admit in evidence the documents attached to Vesta's opposition to MSHA's motion to dismiss those 26 cases. While admitting the drawings and photographs referred to above, I am basing this decision primarily on government's exhibit R-4. In this respect the two wires leading from the "breaker main low side"-one designated fire suppression and the other designated pilot check cable-are 110-V circuits single-phase power and have nothing to do with the requirements of 30 C.F.R. 75.903. In questioning Mr. Lester, I asked him, MSHA's leading electrician, whether the system would be in compliance if the two 110-volt lines were eliminated and if the vulcanizer plug and its breaker box were eliminated. His answer was No. He said the high voltage side of the transformer was a separate circuit from the low voltage side and that the visual disconnect switch on the high voltage side did not satisfy the regulation. <sup>2/</sup> In the simplified hypothetical that I was asking about there would be 7200 volts going into the high voltage side of the transformer and there would be a visual disconnect switch at that point. There would be a breaker box on the low voltage side of the transformer and through that box, 480 volts would go to the belt drive motor. In my view, even though it is 20 feet away, the visual disconnect switch is "in connection with" the breaker, even though there is no physical connection between the high voltage side of the transformer and the low voltage side.

I do not think the safety arguments made by the parties affect this result. On the one hand, the argument is that with a visible disconnect plug such as the vulcanizer plug on government exhibit R-4, you could easily verify that the circuit is broken. The other argument is that in a dark and wet mine mistakes in tracing lines are made and it is much easier to simply go to the transformer and use the visual disconnect switch knowing that everything downstream of that

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<sup>1/</sup> I am not giving consideration to the affidavit attached to the government's brief. If the government thinks it has evidence of perjury it should consult the United States Attorney's Office.

<sup>2/</sup> Without objection Mr. Heenan altered government exhibit R-4 to show that the "breaker main low side" controlled the power to belt drive motor.

switch would be safe to work on. I can not say which safety argument has the most weight, but I can say that if MSHA wants the visual disconnect switch on the low voltage side of the transformer or if it wants a visual disconnect switch for every circuit breaker box, it can so state in its standard. It is obvious from this record that the MSHA electrical inspectors have not all agreed with Mr. Lester.

I hereby VACATE all 27 citations. These cases are DISMISSED.

Proposed findings not included herein are REJECTED.

*Charles C. Moore, Jr.*

Charles C. Moore, Jr.,  
Administrative Law Judge

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DEC 15 1983

ALBERT J. DICARO, : COMPLAINT OF DISCRIMINATION  
Complainant :  
 :  
 : Docket No. WEST 82-113-D  
v. :  
 :  
 : MSHA Case No. DENV CD 82-3  
UNITED STATES FUEL COMPANY, :  
Respondent :

DECISION ON DAMAGES AND OTHER RELIEF

Before: Judge Fauver

Complainant filed his complaint on February 15, 1982, alleging he was discharged on October 23, 1981, for engaging in protected activities in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

The matter was heard on the issue of liability in July, 1982. My decision on liability was entered on May 26, 1983, holding that Complainant was unlawfully discharged on October 23, 1981. The hearing on damages and other relief was held on August 9, 1983.

Counsel for the parties have stipulated:

1. Had Complainant not been discharged, the maximum amount of his wages and overtime in Respondent's employment from October 23, 1981, through August 9, 1983, would have been \$44,613.00.
2. Interest is to be calculated on back pay on a calendar quarter accrual basis.
3. The rate of interest to be applied shall be twelve percent (12%).
4. The instant case is the Complainant's attorney's first case involving the Federal Mine Safety and Health Act.
5. Complainant's attorney's law firm has never represented clients in a matter involving the Federal Mine Safety and Health Act prior to the instant case.
6. Complainant's attorney's law firm has a fee schedule range of \$75.00 per hour to \$125.00 per hour.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

### FINDINGS OF FACT

1. Complainant attempted to mitigate the damages suffered by him as a result of his wrongful discharge by the Respondent by applying for other employment. The Complainant applied for employment at the following companies:

- (a) as a coal miner at Tower Resources on November 9, 1981;
- (b) as a coal miner at Price River Coal Company on November 12, 1981;
- (c) at Plateau Mining Company on December 2, 15, and 17, 1981;
- (d) at Coastal States Mining on December 21, 29, 1981 and January 19, 1982;
- (e) as a coal miner at Emery Mining Corporation in March of 1982 and was told he did not get the job because of a recommendation of the Respondent, United States Fuel Company;
- (f) as a coal miner with Valley Camp on March 22, 24, 29, April 23, 26, May 3, 7, 12, 1982;
- (g) at Dinosaur Tire in Price, Utah on several occasions;
- (h) at State Department of Employment Services in Price, Utah;
- (i) at Carbon County Sheriff's Department for the position of Deputy Sheriff;
- (j) at H & J Supply Company in Price, Utah;
- (k) at Gemco Corporation, Price, Utah.

2. Complainant was employed by Terry Fry, a contractor of Plateau Mining during the period at issue. Complainant earned \$1,000 at such employment. He was also employed by One Stop Video Shop on a piecework basis during that period.

Complainant's duties included cleaning video machines on a piecework basis and he earned a maximum of \$200 from said employment.

3. Complainant also worked for Western States Hydraulics during the same period. The Complainant's earnings were a maximum of \$200 from Western States Hydraulics. The total received by Complainant from employment during the interim period in question was \$1,400.

4. As of the date he was discharged by Respondent, Complainant had a 5% permanent partial disability because of an accident in Respondent's mine. Later Complainant filed a petition with the Industrial Commission of Utah seeking additional permanent partial disability and temporary total disability for a period beginning November 5, 1982. Complainant filed the petition on his own behalf and without the aid of counsel. At the hearing, Complainant testified in response to a question from counsel for Respondent, United States Fuel Company, "I think I can perform as a roof bolter." Complainant's allegation of temporary disability was based upon his doctor's opinion, and in his (Complainant's) opinion, he could have worked.

5. The Industrial Commission of Utah referred Complainant to its medical panel which consisted of Dr. Thomas D. Rosenberg in Salt Lake City, Utah. Dr. Rosenberg examined Complainant and concluded that there was no temporary total disability. He also concluded that the permanent partial disability in Complainant's knee had increased from 5 percent to 15 percent. The Industrial Commission adopted the findings of the medical panel and found:

[T]he applicant (referring to Complainant) was not temporarily totally disabled after November 5, 1982 and the percentage of permanent physical impairment attributable to the applicant's industrial injury is 15 percent of the right lower extremity. This percentage has changed from 5 percent (torn medial meniscus meniscectomy) to 15 percent in view of the significant associated disease of articular cartilage in the medial compartment of the patient's right knee.

6. In this proceeding, Counsel for Complainant has spent 195 hours representing Complainant.

DISCUSSION WITH FURTHER FINDINGS

The general issue is the amount of the recoverable damages sustained by Complainant as a result of his unlawful discharge on October 23, 1981.

In particular, the issues are:

(1) Was Complainant physically able to work for Respondent on and after November 5, 1982? If not, should his back pay award be reduced for any period in which he was unable to work for Respondent?

(2) Should Complainant's back pay award be reduced by an amount representing Complainant's rate of absenteeism while employed by Respondent?

(3) Should the decision on liability be reconsidered and resolved against Complainant because of new evidence on Complainant's credibility introduced at the August 9, 1983, hearing on damages?

(4) What hourly rate should be applied in awarding an attorney's fee for Complainant's legal representation in this proceeding?

Section 105(c)(2) of the Act states, among other things:

The Commission shall have authority...to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. \*\*\*

The legislative history shows a Congressional intent to have section 105(c) interpreted and applied liberally to achieve its broad, remedial purposes. See, e.g., Sen. Rep. No. 95181, reprinted in Leg. Hist. 625, in which the Senate Committee reporting the bill stated as to relief:

It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative. Thus, for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for the posting of notices by the operator.

In Secretary on behalf of Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 at 142 (1982), the Commission stated that the "broad remedial charge [of section 105(c) (2)] was designed not only to deter illegal retaliation but also to restore the employee, as nearly as possible, to the situation he would have occupied but for the discrimination" and that "back pay [is] a term of art encompassing not only wages, but also any accompanying fringe benefits, payments, or contributions constituting integral parts of an employer's overall wage-benefit package."

Back pay is "ordinarily the sum equal to the gross pay the employee would have earned but for the discrimination less his actual net interim earnings." Dunmire, above, at 144.

Ability To Work  
Since November 5, 1982

Respondent contends that Complainant's claim before the Utah Industrial Commission establishes that he was not physically able to work for Respondent on and after November 5, 1982. However, the Utah Industrial Commission ruled, after having Complainant medically examined, that Complainant was not entitled to temporary disability and was capable of working on and after November 5, 1982. Before his discharge on October 23, 1981, Complainant had a 5% lower extremity impairment because of a knee injury in Respondent's employment. The Utah Industrial Commission found, based on its medical panel report, that after November 5, 1982, this impairment increased from 5% to 15%. However, there was no finding that he was unable to perform work as a miner in Respondent's employment. I find that the preponderance of the evidence in the instant case does not establish

that Complainant has been physically unable to work as a miner in Respondent's employment since November 5, 1982.

#### Absenteeism

Respondent proposes that the back pay award be reduced by Complainant's rate of absenteeism while employed by Respondent. I find no precedent for this contention. Use of this extreme and speculative approach to back pay relief would not be consistent with the broad, remedial charge of the statute.

#### Attorney's Fee

I agree with Respondent's contention that Complainant's attorney's fee should be set at \$75 an hour, i.e., the lower rate in the law firm's schedule of fees. In reaching this decision I have considered the following factors, among others:

1. This proceeding is the first case involving the Mine Act that Complainant's attorney has handled as an attorney.
2. Complainant's attorney's law firm has never represented clients in matters involving the Mine Act before this proceeding.
3. Complainant's attorney's law firm has a fee schedule range of \$75 to \$125 an hour.

#### The Motion to Reconsider

Respondent has moved to reconsider my decision on liability (May 26, 1983) based on "serious questions concerning the credibility of the Complainant" which Respondent contends were raised by "new evidence" at the hearing on damages (August 9, 1983). I have fully considered the August 9, 1983, transcript and exhibits and conclude that credibility issues on damages do not warrant reconsideration of the decision on liability.

#### ORDER

WHEREFORE IT IS ORDERED that, within 15 days of the date of this decision:

1. Respondent shall offer Complainant, in writing, reinstatement in its employment upon Complainant's providing written medical evidence of his physical ability to work as a miner in Respondent's employment, in such position as Complainant would have been employed, with the pay rate and all seniority, shift and overtime rights, employer contributions, and other fringe benefits that Complainant would have obtained had Respondent not discharged Complainant on October 23, 1981. Evidence of his physical ability to work may be satisfied by a written release to work in a coal mine by Thomas D. Rosenberg, M.D.

2. Respondent shall pay Complainant back pay of \$43,213.00 for the period from October 23, 1981, through August 9, 1983 (i.e., \$44,613.00 less \$1,400.00 for interim outside earnings) and an additional amount of back pay based upon the maximum amount of wages and overtime he would have received in Respondent's employment from August 9, 1983, until either (a) his reinstatement under paragraph 1, above, or (b) 15 days from the date of this decision if Complainant does not accept reinstatement or does not medically qualify for reinstatement.

The back pay in the period since August 9, 1983, is subject to reduction by any interim earnings since August 9, 1983. If back pay since August 9, 1983, cannot be stipulated by counsel for the parties, counsel shall submit their respective proposed amounts to the judge not later than 20 days from the date of this decision and for that purpose jurisdiction is retained by the judge for 20 days from this date and until a ruling on any counter-proposals filed in such period. Interest on the total award of back pay shall be at 12%, calculated on a calendar quarter accrual basis.

3. Respondent shall pay Complainant's attorney a fee of \$14,625.00, i.e., 195 hours X \$75 per hour.

4. Respondent shall pay Complainant litigation expenses of \$350.00.

5. Respondent shall post a copy of the decision of May 26, 1983 and a copy of this decision and order at the subject mine, at a place where notices to its miners are normally posted, and keep them so posted, unobstructed and protected from the weather, for a consecutive period of 60 days.

*William Fauver*  
William Fauver  
Administrative Law Judge

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**DEC 16 1983**

BILLY K. DEEL, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. VA 82-62-D  
D. O. & W. COAL COMPANY, : MSHA Case No. NORT CD-82-17  
Respondent : No. 5 Mine

DECISION

Appearances: Michael A. Genz, Esq., and Barbara A. Samuels, Esq., Client Centered Legal Services of South-west Virginia, Inc., Castlewood, Virginia, for Complainant;  
Louis Dene, Esq., Abingdon, Virginia, for Respondent.

Before: Judge Steffey

A hearing was held in the above-entitled proceeding on February 15, 16, 17, and 18, and April 26, 1983, in Abingdon, Virginia, pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3), of the Federal Mine Safety and Health Act of 1977. The complaint was filed on September 23, 1982, and supplemented on October 12, 1982, and October 27, 1982. The complaint was filed under section 105(c)(3) of the Act after complainant had received a letter from the Mine Safety and Health Administration advising him that MSHA's investigation of his complaint had resulted in a finding that no violation of section 105(c)(1) of the Act had occurred.

Counsel for complainant and respondent filed simultaneous initial posthearing briefs on July 15, 1983, and July 18, 1983, respectively. Counsel for respondent and complainant filed on August 31, 1983, and September 2, 1983, respectively, letters stating that they were waiving the filing of reply briefs.

Issues

Complainant's brief contends that complainant was engaged in activities protected from acts of discrimination by section 105(c)(1) of the Act, that his discharge by respondent was motivated by that protected activity, and that respondent would not have terminated complainant had it not been for his protected activity.

Respondent's brief renews its motion for dismissal of the complaint made at the hearing on the ground that complainant has failed to establish a prima facie case.

### Findings of Fact

Based on my observations of the witnesses' demeanor and the preponderance of the credible evidence, the following findings of fact are made:

1. D. O. & W. Coal Company (hereinafter referred to as "DOW") operates a one-unit mine in Southwest Virginia. Coal is produced from a single working section having seven entries. The mining process, prior to July 1982, consisted of shooting coal from the solid, that is, without using a cutting machine to undercut the coal seam prior to setting off explosives. The coal was transported from the working face to the belt conveyor by means of battery-powered scoops. DOW employs about 34 miners on two production shifts. In July 1982 the mining system was changed to use of a continuous-mining machine and shuttle cars equipped with trailing cables were substituted for the scoops which had previously been utilized to transport coal to the belt conveyor.

2. A fire occurred in the mine in February 1982 and, as a result of the fire, the Mine Safety and Health Administration placed the mine on a 10-day spot inspection which was still in effect at the time the hearing was held in this proceeding in February and April of 1983. The inspector regularly assigned to examine the mine was William H. Strength who testified in this proceeding that he made spot inspections of both the belt lines and working faces on April 5, 6, 15 through 22, and May 5, and 6, 1982. He also conducted a complete regular inspection on May 24 through June 3, 1982.

3. Complainant Billy K. Deel was first employed by DOW on or about January 17, 1980. The mine encountered some uneconomic producing conditions which resulted in DOW's laying off of all miners on the 3-to-11 p.m. shift about July 17, 1981, including Deel. At the time of Deel's lay-off, he held the position of a mine committeeman. Prior to the second shift's lay-off, Deel brought to DOW's attention the fact that the miners were upset because DOW had changed the date of issuance of their pay checks from Thursday to Friday. DOW claimed that the change in date for issuance of checks had resulted from a time lag in a computer used by a bank in Pikeville, Kentucky, and DOW refused to reverse its decision to issue the checks on Friday. When the miners heard that DOW had refused to revert to a Thursday pay day, they declined to go into the mine to work, claiming illness, although they had been well enough to report to work and well enough to await the outcome of their complaint about the change in date of delivery of their pay checks.

4. DOW was mining about 1 mile from the surface when it encountered the uneconomic conditions which caused it to lay off all miners on the second shift. DOW subsequently withdrew its equipment from the mile-deep location and moved the working section close to the surface by commencement of production in a new area off to the left of the mine's main entries. When Deel heard that DOW was recalling miners, he made some telephone calls and visited the mine. He was so anxious to obtain work to support his wife and child, that he volunteered to sign a statement to the effect that he would not cause DOW's management further trouble if they would rehire him (Exh. A). DOW's mine foreman did not believe that Deel had waived any of his rights under the Act or the UMWA wage agreement by having signed the statement.

5. Deel was recalled to work on the day shift on or about March 5, 1982, and was told that he would be paid top contractual wage rates, but that there was no specific job available and he would be required to operate the scoop, the roof-bolting machine, or to shovel coal along the belt line, although at the time of his lay-off on July 17, 1981, he claims to have successfully filed a bid for the job of an operator of a roof-bolting machine.

6. On April 3, 1982, about a month after being recalled to work, Deel was elected by the union to the position of safety committeeman to replace Chann Fields, a shotfirer, who had previously held that position for about 4 years. DOW was notified of Deel's election as safety committeeman on April 5, 1982, and Deel continued to hold that position for 32 days, or until he was discharged on May 7, 1982.

7. The drilling of coal in DOW's mine was performed by use of a hand-held drill which received its hydraulic power from the roof-bolting machine or a scoop. When the section foreman had a full crew of miners, he would assign two men to operate the roof-bolting machine. One of them would install roof bolts and the other one would drill holes in the face so that the shot firer could prepare the heading for another explosive charge. DOW used two roof-bolting machines. Deel and Randy O'Quinn normally operated one roof-bolting machine and associated drill and Kyle Turner and Lee Grizzle normally operated the other roof-bolting machine and drill. Randy O'Quinn hurt his shoulder in February 1982 and was not able to work at the time Deel was recalled to work on March 5, 1982. At times, the section foreman was unable to assign another miner to work with Deel on the roof-bolting machine. Deel's section foreman, Tivis Stiltner, on at least one occasion was unable to obtain a miner to assist Deel in running the roof-bolting machine and asked Deel to operate the machine by himself with the result that Deel was required to install both roof bolts and drill holes for explosives.

8. The miners normally left the surface to go underground at 7 a.m. and it took about 25 minutes to get to the working section. When Stiltner examined the face area about 8:30 a.m. on the day when he had ordered Deel to roof bolt and drill, he found that Deel had drilled holes in only one place and had not installed any roof bolts. Stiltner believed that Deel should have been able to accomplish more than the drilling of one place by 8:30 a.m. and asked Deel why he was not working. Deel replied that Stiltner could make Deel perform two jobs, but couldn't make him "run at it". Stiltner claims that Deel refused to perform both jobs and that he told Deel he was suspending him with intent to discharge for refusing to operate the roof bolter and drill. Deel, however, asked to talk to the mine committeeman, Kyle Turner, and Turner was able to persuade Stiltner to put Deel back to work after Deel had agreed to perform both jobs. After Deel had returned to work, Stiltner again went to the place where Deel was supposed to be working and he still had not installed any roof bolts. Therefore, Stiltner told Deel that he would help him on the roof-bolting machine for the rest of the day. Stiltner then proceeded to install roof bolts for the remainder of the shift and Deel operated the coal drill.

9. On May 5, 1982, one of the spot inspections referred to in Finding No. 2, supra, was conducted by Inspector Strength who issued three withdrawal orders at that time citing DOW for failure to install temporary supports as required by its roof-control plan, for firing 24 charges from a detonating device which was rated for firing no more than 20 charges, and for failing to have the line curtains installed to within 10 feet of the working faces (Exh. 1). The miners spent the remainder of the day performing the work necessary to abate the violations, but they had not completed the abatement work by the end of the shift and Stiltner asked Deel and Randy O'Quinn to come in 1 hour early on May 6 to finish abating the violations. Strength returned to the mine on May 6 and terminated the orders so that DOW could resume mining operations.

10. On May 7, 1982, the day after the withdrawal orders had been terminated, Floyd O'Quinn, the regular scoop operator, was absent. Stiltner asked Deel to get the large scoop that Deel had been operating from time to time and hook it to the mantrip so that Deel could transport the men into the mine. Stiltner also told Deel that he himself was going to drive the little scoop into the mine because he had an internal bleeding illness and that operating the little scoop aggravated his condition less than operating the large scoop. Deel objected because he also preferred to operate the little scoop, but Stiltner insisted that Deel get the large scoop and take the mantrip in. Deel hooked the mantrip to the large scoop, but went over to Stiltner who was cleaning water out of the little scoop and

reminded Stiltner to make sure he had the safety chain hooked on the scoop's dipper since Stiltner had indicated that Chann Fields was going to ride into the mine with Stiltner in the little scoop.

11. It is customary for all of the miners to gather near the door of the parts trailer and mine office before going into the mine. While they were gathered in the vicinity of the parts trailer on May 7 (Exh. M), Randy O'Quinn and Kyle Turner heard Stiltner assign Deel the job of pulling the mantrip with the scoop, but they did not hear any of the argument between Stiltner and Deel as to which one would be operating the little scoop as opposed to the large scoop. The mine foreman, Joe Taylor, also heard Stiltner assign Deel the job of pulling the mantrip.

12. When Stiltner reached the working section, he parked the little scoop near the tailpiece where he had some work to do on the controls to the conveyor belt. Deel dropped miners from the mantrip at their various working places and drove the large scoop to the vicinity of the roof-bolting machine which he, Randy O'Quinn, and Clayton Justice had been taking turns in operating. Justice had been hired as a prospective foreman on the assumption that DOW's plan to open a new section would materialize. In the meantime, because of absenteeism by union workers, Justice had been performing jobs which are normally done by union employees. Specifically, Justice had been drilling holes from the hydraulic power provided by the roof-bolting machine to which Deel and Randy O'Quinn were normally assigned. Justice had sharpened about 16 bits near the parts trailer just before they came into the mine on the morning of May 7 and the noise of the grinder prevented Justice from hearing Stiltner assign any work to anyone. Nevertheless, both Randy O'Quinn and Justice were already preparing the roof-bolting machine and drill for operation before Deel parked the large scoop near the roof-bolting machine.

13. When Deel came to the roof-bolting machine, Justice immediately realized that three men were more than could be justified to operate one roof-bolting machine. Therefore, Justice asked Deel what job he was planning to do that day and Deel said he was planning to run the roof-bolting machine. Justice replied that he guessed that meant he would have to operate the large scoop which Deel had driven into the mine and Deel agreed that Justice had made a correct conclusion. Justice, who had not operated a scoop in DOW's mine for transporting coal to the belt conveyor, was not comfortable with the unorthodox manner in which he had become assigned to be the scoop operator. Consequently, Justice got on the large scoop and drove it about 120 feet to the place where Stiltner was working on the tailpiece. When Justice advised Stiltner that Deel had decided to

run the roof-bolting machine, Stiltner told Justice to go back to the roof bolter and tell Deel that he wanted Deel to operate the scoop and for Justice to work on the roof bolter with Randy O'Quinn. When Justice conveyed Stiltner's message to Deel, Deel refused to follow Stiltner's instructions and told Justice to go back and tell Stiltner to come and tell Deel in person if operating the scoop was what Stiltner wanted him to do that day. Justice again returned on the scoop to Stiltner's location at the tailpiece and stated that Deel had refused to run the scoop and wanted Stiltner to come up there and tell Deel in person if Stiltner wanted Deel to operate the scoop. Stiltner then told Justice to park the large scoop and return to the roof-bolting machine and wait until he could finish the repairs on the belt conveyor and come up to talk to Deel. Justice dutifully parked the large scoop and returned to the site of the roof-bolting machine. This time Justice just sat down and waited for Stiltner to show up after he had advised Deel that Stiltner would be there in a little while.

14. After Stiltner had repaired the tailpiece, he got on the little scoop and drove it to the roof-bolting machine where Deel, Justice, and Randy O'Quinn were gathered. Stiltner asked Deel what was wrong and Deel replied that nothing was wrong. Stiltner then asked Deel why he was not operating the scoop and Deel wanted to know why he should run the scoop and let someone else run "his" roof-bolting machine. Stiltner explained that they had not been producing very much coal lately and that Stiltner believed that Deel could do a better job on the scoop than Justice and that he, therefore, preferred that Deel run the scoop for the day. When Deel made no immediate reply, Stiltner then said that if Deel was not going to run the scoop, he should get in the dipper of the scoop Stiltner was operating and Stiltner would take him outside the mine. Deel got his lunch bucket and got into the scoop's dipper.

15. After Stiltner had finished talking to Deel, he looked at Randy O'Quinn who was doing nothing and asked him why he was not working. Randy replied that the auger barrel was bent and he needed a new one before he could begin drilling coal. Stiltner told Randy to go get a new auger barrel. Randy, who is 6 feet 2 inches tall and was working in a mine which ranges from 4-1/2 to 5 feet in height, did not want to walk a few breaks to get an auger barrel which Chann Fields had already gone on a tractor to get. Therefore, Randy said that he was sick and believed he would just go home, so Randy got into the dipper with Deel and Stiltner started to the surface with both men in the scoop's dipper.

16. After Stiltner had started to the surface, Deel asked Stiltner to stop the scoop so that Deel could talk to the mine committeeman, Kyle Turner, who was operating the other roof-bolting machine. Stiltner reluctantly stopped the scoop and

Deel got out of the dipper and went to talk to Turner. After Turner had obtained Deel's version of the incident, he asked Stiltner to allow Deel to go back to work. Stiltner remained adamant and Turner was unable to persuade Stiltner to put Deel back to work. In the meantime, Chann Fields had returned with the new auger barrel and Randy O'Quinn decided to go back to work and got out of the scoop's dipper and returned to the roof-bolting machine. Chann Fields, who had heard Turner's intercession on Deel's behalf and who believed the conversation was at an impasse, spoke up and asked Stiltner to bring him a new shot-firing battery from outside the mine. Fields also suggested that Stiltner go ahead and take Deel out of the mine as there was no use in engaging in further arguments. Stiltner told Turner that he could go outside with Deel and they could discuss the matter with the mine foreman, Joe Taylor.

17. When Deel, Turner, and Stiltner reached the surface, Stiltner went to the mine office while Deel and Turner went to the house where they kept their miner's cap lights. Stiltner told Taylor that he was suspending Deel for refusing to run the scoop. Taylor asked Stiltner to have Deel and Turner come to the office to discuss the matter, but they entered the mine office about the time Stiltner was going after them. Taylor expressed surprise that Deel had refused to operate the scoop that day, especially since Taylor had already heard about Deel's near discharge by Stiltner for refusing to operate the roof bolter and the drill by himself, as described in Finding No. 8, supra. Deel told Taylor that he had not refused to run the scoop, but Taylor felt that he had to support his section foreman and advised Deel that he was suspended with intent to discharge pending the holding of a 24/48-hour meeting at which they could further discuss the matter.

18. The above-described suspension occurred on Friday, May 7, 1982, and Deel and Turner came to a 24/48-hour meeting on Monday, May 10, 1982, at which time the suspension was converted to a discharge. Deel filed a grievance under the National Bituminous Coal Wage Agreement of 1981 and the matter went to arbitration which resulted in a decision by an arbitrator sustaining the discharge. The decision was issued on June 8, 1982, in Arbitration Case No. 81-28-82-96 in a proceeding entitled The United Mine Workers of America, Local Union #7170 v. D. O. & W. Coal Company by Arbitrator Peter Judah.

19. On July 14, 1982, Deel was denied unemployment compensation on the ground that he had been discharged for misconduct. Deel appealed that unfavorable ruling to the Virginia Employment Commission and the Appeals Examiner held a hearing and issued a decision on October 22, 1982, upholding the refusal to award Deel unemployment compensation. The examiner's decision was, in turn, appealed to the Commission which issued a

decision on January 14, 1983, reversing the examiner's decision and holding that Deel was entitled to receive unemployment compensation. The Commission's decision recognized that its examiner and an arbitrator had already issued decisions adverse to Deel, but held that DOW had failed to sustain its burden of proof in showing that Deel had refused to carry out reasonable instructions given by his employer. The Commission emphasized that the hearing before its examiner had not been as extensive as the hearing before the arbitrator and the Commission stressed the fact that Clayton Justice, the person who had relayed Stiltner's instructions to Deel about operating the scoop, had not testified at the hearing before the Commission's examiner (Virginia Employment Commission's Decision in Billy K. Deel v. D. O. & W. Coal Co., Decision No. 19888-C, January 14, 1983, pages 3 and 4).

### Consideration of the Parties' Arguments

#### Contentions in Deel's Brief

The first six pages of Deel's brief are devoted to a statement of facts which shows that everything alleged by Deel in this proceeding has been convincingly contradicted by DOW's witnesses, or is the subject of several different versions by Deel during cross-examination. My findings of fact above are based on credibility determinations which will hereinafter be explained. The first six pages of Deel's brief are rejected as being nothing more than a summary of disputed facts.

#### Deel's Protected Activity

Pages 6 through 42 of Deel's brief are properly placed under the heading, "Contentions of Law" because Deel can only argue the law in this proceeding since none of the credible evidence supports his factual allegations.

Deel's brief (p. 6) properly begins with a reference to the Commission's decision in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799 (1980), rev'd on other grounds sub nom. Consolidation Coal Co., v. Marshall, 663 F.2d 1211 (3d Cir. 1981), 1/ in which the Commission stated that a complainant in a discrimination case, in order to make a prima facie case, must show that he engaged in protected activity and that the protected activity

1/ Some of the Commission's language about the parties' burden of proof in discrimination cases was rejected in Wayne Boich d/b/a W. B. Coal Co. v. F.M.S.H.R.C., 704 F.2d 275 (6th Cir. 1983), but on October 14, 1983, in Case No. 81-3186, the Sixth Circuit vacated its decision reported at 704 F.2d 275, except as to back-pay issues, and held that the Commission's Pasula decision properly specifies the parties' burden-of-proof requirements in discrimination cases.

was a motivating factor in his termination. Inasmuch as Deel was elected by the union as a safety committeeman on April 3, 1982, he necessarily, in that capacity, had to bring safety complaints to management's attention. Therefore, Deel successfully proved the first part of the requirement for establishing a prima facie case when he correctly alleged that he acted as safety committeeman for about a month before his discharge. Deel, however, completely failed to show that his discharge was in any way motivated by the fact that Deel was a safety committeeman who had brought safety complaints to DOW's attention.

#### Contentions in DOW's Brief

DOW's brief correctly argues throughout 87 pages that the facts do not support Deel's allegation that his discharge was motivated by the fact that he had engaged in the protected activity of acting as safety committeeman. DOW's brief (p. 6) quotes a portion of section 105(c)(1) of the Act, but fails to quote the last part of section 105(c)(1) on which Deel relies, viz., the portion which provides that a miner may not be discriminated against for having exercised "\* \* \* on behalf of himself or others of any statutory right afforded by this Act." Since Deel accompanied MSHA's inspector when he was making inspections of DOW's mine, Deel is alleging that he was exercising his rights under section 103(f) of the Act when he accompanied an MSHA inspector. It is true that Deel accompanied an inspector, but the evidence does not show that Deel's discharge was motivated in any way by the fact that he was for a very short time the miners' representative to accompany inspectors at DOW's mine.

DOW's brief (p. 6) renews its motion to dismiss which was denied at the hearing (Tr. 364). DOW correctly argues that the preponderance of the evidence in this proceeding fails to show that Deel was discharged for having engaged in any activities which are protected under the Act. Therefore, DOW's motion to dismiss will hereinafter be granted.

DOW's brief (pp. 6-85) considers Deel's alleged grounds for arguing that his discharge involved a violation of section 105(c)(1) of the Act and shows that all of them are unfounded. It is quite obvious that if I were to paraphrase all of DOW's factual arguments from pages 6 through 85 of its brief and then were to explain why I agree with most of them, and that if I were to paraphrase in detail all of Deel's legal arguments from pages 6 through 42 of his brief and then explain why I disagree with all of them, my decision would be about 200 pages long.

In order to reduce the length of this decision to a reasonable length, I shall hereinafter consider all of the parties' arguments without giving specific page references and detailed summaries of the parties' arguments before a given subject is

discussed. My discussion of the evidence and the parties' arguments, however, will be made under numerous headings which will clearly show that I have considered all of the contentions of both parties. Additionally, my decision gives immediately below a Table of Contents to show exactly where my discussion of the factual and legal arguments may be found so that the parties, or the Commission, if it should grant a petition for discretionary review, may easily find the page or pages on which the various subjects are considered.

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No Dates and Length of Deel's Tenure as Safety Committeeman

Deel took pride in not being able to give the date on which any event occurred (Tr. 86; 115; 122; 168; 189). He did not know for certain when he was laid off during a reduction in force in 1981 (Tr. 7). He did not know the date on which he was recalled to work in 1982 (Tr. 7). He did not know when he was elected as safety committeeman (Tr. 52). He objected during cross-examination when DOW's counsel repeatedly tried to establish when certain alleged discriminatory acts were supposed to have occurred (Tr. 168). It was necessary for DOW's counsel to make a concerted effort to establish that Deel was elected safety committeeman on April 3, 1982 (Tr. 391) and that is one of the few dates which was ever established for certain in this proceeding.

Deel's brief (p. 1) purports to state with certainty that Deel was laid off on July 16, 1981, and was recalled to work on March 4, 1982, but the transcript references (Tr. 123 and 50, respectively) given in support of those alleged dates show that the dates were included in lawyers' questions and in the first instance Deel's own counsel used the dates of both July 15 and July 16 in asking the question, so there is no reason whatsoever to select July 16 over July 15. In the other transcript reference (Tr. 50), DOW's counsel used the date of March 4, 1982, in asking the question, but Deel's direct testimony (Tr. 7) shows that he was uncertain as to the date of March 4, 1982. Joe Taylor, the mine foreman, did not know for certain when Deel was laid off and guessed that he was recalled about March 3, 1982 (Tr. 389). DOW's brief (pp. 2-3) states that Deel was laid off on July 17, 1981, and was recalled on March 5, 1982, but DOW's brief does not provide any transcript references for either date. Therefore, I have used the word "about" in Finding Nos. 3 and 5, supra, in connection with Deel's dates of employment because the record does not support a finding as to any precise dates for Deel's dates of lay off and reemployment.

During his direct testimony (Tr. 8), Deel stated that he was made safety committeeman a "few days" after he was recalled, but he was called back to work no later than March 5, 1982, and did not begin acting as safety committeeman until April 5, 1982, which was only 32 calendar days before his discharge on May 7, 1982. After he became safety committeeman, he did not work for from 7 to 13 calendar days because of some bruised ribs (Tr. 189; 873). Consequently, Deel actually acted as safety committeeman for only 25 or 19 calendar days.

#### Hauling Explosives on Tractor

Fields, the shot fireman, was hauling explosives on top of a battery-powered tractor at the time Deel was called back to work about March 5, 1982. Deel contends that an accident in a coal mine in Kentucky occurred because explosives were being handled in a similar fashion. The accident in the Kentucky coal mine caused DOW's employees to ask that Fields be required to stop hauling explosives on the tractor. Deel claims that he brought the hazardous powder-hauling practice to DOW's attention and that the mine foreman, Taylor, told him that DOW had always done it that way (Tr. 10). Deel contends that he gave Taylor 2 weeks within which to get the powder off the tractor and that, when that was not done, he complained again. After Deel's second complaint, he alleges that Taylor ordered Randy O'Quinn and Kyle Turner to carry or drag the powder into the face area by use of permissible powder bags. The powder was carried in bags for only 1 day and then Fields resumed the practice of hauling explosives on the tractor (Tr. 11). Fields claims that he did not revert to hauling explosives on the tractor until the

miners had discussed the matter and had agreed that he could haul the powder on the tractor, provided he would cut a piece of conveyor belt and place the belt on top of the tractor so as to provide insulation between the metal frame of the tractor and the powder, and provided Fields would not haul more than four cases of powder at any one time (Tr. 713-714; 737).

Fields also claims that the Kentucky mine explosion occurred in December 1981 or January 1982 and that the miners complained to him about hauling explosives on the tractor while he was safety committeeman and that the mine foreman had a permissible explosives car constructed so that the powder could be hauled with explosives and detonators placed in separate compartments as required by the mandatory safety standards (Tr. 731; 739; 741). Clayton Justice was hired as a trainee section foreman on April 19, 1982, and he stated that the explosives were still being hauled on the tractor for about a week after he was hired (Tr. 705; 770; 1027-1028). Fields also testified that he had asked an MSHA inspector whether there was any way a permissible box for carrying explosives could be installed on the tractor and that, while the inspector doubted that such a box could be constructed in compliance with the safety standards, he would make a special inquiry about the matter. After Fields subsequently learned from the inspector that it would not be possible to obtain permission to continue hauling the explosives on the tractor (Tr. 715-716), Taylor had an old pump cart removed from the mine and the wheels and frame from the pump were used to accommodate the construction of a permissible powder car (Tr. 675-676; 762).

Taylor testified that neither Deel nor Randy O'Quinn brought the matter of hauling explosives on the tractor to his attention and that the powder car was constructed and placed in the mine solely on the basis of Fields' having reported the matter to him before Deel ever became safety committeeman (Tr. 407-411; 670-671). Since Deel did not challenge Fields' statement that the Kentucky mine explosion occurred in December 1981 or January 1982, there is no obvious reason why the miners would wait until Deel became safety committeeman in April 1982 to bring up a hazardous practice which had been brought to the miners' attention in December 1981 or January 1982 before Deel was recalled about March 5, 1982.

Randy O'Quinn claimed that Deel brought the matter of hauling powder on the tractor to Stiltner's attention and claimed that Stiltner agreed to bring the matter to Taylor's attention and that management had a box made for hauling the powder. O'Quinn said the box was apparently satisfactory because Inspector Strength did not say anything adverse about their use of the box (Tr. 215-216). O'Quinn also admitted that the matter of hauling explosives on the tractor was brought up while Fields was safety committeeman (Tr. 921).

Deel and Randy O'Quinn claim that when O'Quinn and Kyle Turner were asked to drag the explosives into the mine in permissible bags, they were ordered to do so because Taylor wanted to retaliate against them for having been among the persons who wanted Fields to stop hauling the powder on the tractor (Tr. 11; 40; 955). Deel claims that Taylor should have ordered Fields himself to drag the explosives in bags because it was a part of his job as shot fireman to bring in the powder (Tr. 11; 40; 54-55). On the other hand, DOW claims that Randy O'Quinn and Kyle Turner were asked to drag the powder because there are two roof-bolting crews in the mine and that there are two people on each crew, whereas Fields, the shot firer, works by himself and is responsible for shooting from 16 to 20 places per shift (Tr. 760; 830). Deel himself stated that the roof-bolting crews remained caught up all the time and were ready to start bolting in each place as soon as the scoops had finished cleaning up a cut of coal (Tr. 33-34).

Deel's claim that Taylor objected to changing the method of hauling the explosives on the tractor on the ground that they had always done it that way was refuted by Fields and Randy O'Quinn. Fields said he began hauling powder on the tractor after their permissible powder car was demolished when it was run over by a scoop (Tr. 731). Randy O'Quinn testified that he and Deel had worked on the second shift in 1981 before the reduction in force occurred and that, during that time, Deel and he worked on the same roof-bolting machine and did their own shot firing and that they hauled the explosives at that time on top of the roof-bolting machine (Tr. 963-964). Hauling explosives on a roof-bolting machine would cause the explosives to be very close to the face prior to the installation of permanent roof supports, whereas Fields' tractor did not need to be close to the working face until after permanent supports had been installed.

In view of the circumstances described above, I find that DOW's claim that the hauling of powder was brought to the mine foreman's attention by Fields is more credible than Deel's claim that he was the person who first brought up the matter of hauling powder on the tractor. Moreover, I find that the roof-bolting crews were chosen for sound reasons as the persons who should drag the powder in permissible bags because they remained caught up with their work and would have had more time to drag powder than Fields would have had because he had to prepare all the explosives in each heading, whereas the roof-bolting crews were able to divide the work of installing bolts among four persons.

#### Belt-Bridging Incident

Deel alleges that one day the roof-bolting machine became inoperative and that Stiltner, the section foreman, ordered him

and Randy O'Quinn to go down to the belt and shovel up any loose coal which might have accumulated along the belt (Tr. 13). It was necessary for them to get on the opposite side of the belt from the side on which they were traveling, but when they asked the person assigned to work at the belt head to cut off the power, he told them the switch had been bypassed or bridged out and that he could not turn the belt off at the belt head (Tr. 14). Deel contends that he returned to the section foreman and told him they couldn't work along the belt because it had been bridged out (Tr. 15). The matter was then reported to the mine foreman who came underground and tried to replace the fuse, but was unable to do so. Deel claims that he was advised that the belt had been repaired, but when he and Randy returned to the belt head, they found that the switch was still bridged out. Deel claims that he reported back to Stiltner that the switch was still bridged out and that Stiltner told him to call Taylor again (Tr. 16). During Deel's second conversation with Taylor, the safety of the miners was raised and Taylor told Deel to have the miners come out of the mine if they were afraid to work in the mine while the switch was bridged out. Stiltner talked to Taylor and ordered all the miners to leave (Tr. 16). Deel contends that they were told when they left that they would not be paid for the remainder of the shift, but Taylor contends that the belt-bridging incident occurred on April 16, 1982, and DOW presented as Exhibit I an attendance sheet showing that the miners were all paid for 8 hours of work on that day (Tr. 57; 412-415).

Deel also claims that when he and Randy O'Quinn came out of the mine on the day of the bridge-out that Taylor told him DOW had a right to run the belt with the switch bridged out provided someone was stationed at the power center to turn off the power in case of an emergency (Tr. 16). Deel claimed that no one was stationed at the power center, as alleged by Taylor, but Deel gave conflicting statements about how far the power center was from the belt head (Tr. 14; 60) and it is doubtful that either Deel or O'Quinn really looked to see if anyone had been stationed at the power center (Tr. 931).

Another claim by Deel in connection with the belt-bridging incident is that he personally called Inspector Strength and reported the bridge-out to him and that the inspector came to the mine on the next working day in response to the complaint (Tr. 17). When Inspector Strength testified, however, he stated that he had come to the mine in response to a complaint forwarded to him by his supervisor, but he said that Deel had not called him personally to complain about the bridge-out (Tr. 1056). The control switch for the belt head had been repaired by the time Inspector Strength came in response to Deel's alleged complaint and since both Deel and Taylor advised the inspector of that fact, the inspector was not even asked to go underground to check the switch (Tr. 382-383; 415).

Deel, as usual, did not know when the belt-bridging incident occurred, but Deel's attorneys tried to prove that it occurred on April 5, 1982, because Kyle Turner had a calendar on which Turner had written that he had been paid for only 7 hours on April 5, 1982, and he claimed that the reason he was not paid was that April 5 was the day they were withdrawn when the belt head was bridged out (Tr. 308; 1005-1006). Turner's calendar, however, contained no actual notation that the belt-bridging had anything to do with his being paid only 7 hours on April 5, 1982. Moreover, Inspector Strength testified that he performed spot inspections at the mine on April 5 and April 6, 1982, and on each day he checked both the belt lines and the faces (Tr. 1260). Therefore, it would not have been necessary for Deel to have called the inspector on April 5 to report a bridged-out belt because Strength would have been present at the time the bridging out occurred. The inspector also testified that he was at the mine on April 15 through April 22 (Tr. 1060). Therefore, Deel should not have had to call the inspector about a bridged-out belt on April 16 either, except that the inspector was not certain that he was present at the mine on each day from April 15 through April 22 (Tr. 1079).

Regardless of whether the mine foreman was correct in contending that he had a right to bridge out the belt so long as he stationed someone at the control center, the fact remains that no one ordered either Deel or Randy O'Quinn to work along the belt after the bridged-out switch was called to DOW's attention. The miners were withdrawn and there is no convincing evidence to show that DOW failed to pay them for 8 hours of work. The belt-head switch was repaired before the miners reported for work on the next shift and DOW was cited for no violations by MSHA in connection with the belt-bridging incident. Therefore, the preponderance of the evidence fails to support a finding that DOW's management would have been motivated to discharge Deel because he reported to management that the belt-control switch had been bridged out.

#### Cleaning of Mainline Conveyor Belt

Deel claims that he had been telling Inspector Strength about trying to get DOW to clean up along the mainline belt conveyor, but DOW would not do so. Deel alleged that when Inspector Strength came to the mine the day after the belt-bridging incident, Strength asked him if the belt had been cleaned up yet and Deel replied that it had not. Deel claims that the inspector and he then went into the mine and found the belt in such bad condition that Strength issued a withdrawal order as soon as they came out of the mine after inspecting the belt (Tr. 17).

Strength testified that the walk-around miners at DOW's mine did not point out violations to him (Tr. 1091). Additionally,

Deel introduced as Exhibit 1 copies of the citations and orders which were issued while Deel was employed at the mine. Exhibit 1 shows that the only violation of section 75.400 for failure of DOW to prevent accumulations of loose coal and coal dust along the main beltline was alleged in Citation No. 930855 issued on April 15, 1982. That citation gave DOW until April 19, 1982, to clean up the loose coal and coal dust. The inspector then extended the compliance time to April 21, 1982, and issued Order No. 922763 on April 21, 1982, when DOW failed to clean up along the belt by April 21, 1982.

Deel, therefore, was shown to be mistaken about all the details alleged in connection with DOW's being cited for loose-coal accumulations. First, Deel had nothing to do with Strength's checking of the mainline belt conveyor as Strength had received no complaint from Deel requesting that a special examination of the beltline be conducted (Tr. 1093). Second, the inspector did not issue any order immediately after finding loose-coal accumulations along the beltline, as alleged by Deel. The order of withdrawal was written 6 days after the citation was issued and the order was issued for DOW's failure to clean up the loose coal within the time given by the inspector and not because Strength considered the violation to be unwarrantable or an imminent danger which would have required immediate action under either section 104(d) or 107(a) of the Act, respectively.

When Deel, for a second time, discussed his role in the citing of DOW for loose-coal accumulations along the mainline belt conveyor, he claimed that he had specifically called Strength and asked him to make a special inspection of the mainline belt conveyor (Tr. 37). The inspector testified that no one had made a complaint to MSHA with respect to loose-coal accumulations along the main conveyor belt (Tr. 1056; 1081). If a complaint as to the main conveyor belt had been made, the inspector would have had to have advised DOW of that fact when he reported to the mine because section 103(g)(1) of the Act requires MSHA to report to the operator that an inspection is being conducted in response to a complaint. Since Strength only went to the mine in connection with a complaint about the bridging out of the belt-head switch, there is no reason to believe that Deel ever made a complaint to MSHA about loose-coal accumulations along the main conveyor belt.

#### Pay for Accompanying Inspector

Deel claimed that DOW discriminated against him because he was advised by Taylor, the mine foreman, that DOW would pay him when he accompanied the inspector in the face areas underground, but would not pay him for coming outside the mine to meet the inspector and take him underground and would not pay him for going back outside after the underground inspection was over

and for staying outside until the inspector had completed the writing of any citations which the inspector might believe were appropriate (Tr. 24; 78). As a matter of fact, the section foreman, Stiltner, had continued to give Deel full credit for any time he accompanied the inspector, regardless of whether it was for underground inspections or for being with the inspector on the surface of the mine (Tr. 419; 842).

Deel, however, contends that he was given disparate treatment because DOW had always paid Fields, the other safety committeeman, when he accompanied the inspector. Therefore, Deel contends that just the threat by Taylor that DOW would not pay him for accompanying the inspector on the surface showed disparate treatment of him as compared with Fields. The preponderance of the evidence fails to support Deel's allegations. Fields testified that he was safety committeeman for about 4 years as compared with Deel's 24 days as an active safety committeeman (Tr. 716). Fields said that he did not go out to greet the inspector and bring him underground and that he did not accompany the inspector on his trip out of the mine after he had completed his inspection. Fields additionally testified that if he were behind in his work as shot fireman, he would just tell the inspector to let him know what he had found when he was leaving and that he did not even accompany the inspector underground on such occasions (Tr. 724-725).

Inasmuch as Taylor advised Deel that DOW would pay him when he accompanied the inspector in the face areas, but not on the surface (Tr. 78), Taylor was treating Deel exactly as DOW had treated Fields in that Fields had been paid for accompanying the inspector only when the inspector was making an underground inspection at the faces and DOW was planning to pay Deel for the same portion of the time he spent accompanying the inspector. While Deel was entitled to be paid for the entire time he spent with the inspector, Taylor was unaware of that fact until Inspector Strength advised him that DOW was required to pay Deel for the entire time he spent accompanying the inspector. Since Taylor immediately paid Deel upon being advised that Deel had to be paid for all time spent with the inspector (Tr. 419), and since Stiltner had never deducted a single minute of time from Deel's attendance sheet for time spent accompanying the inspector (Tr. 842), there is nothing in the record to support a finding that DOW engaged in disparate treatment in advising Deel that he would be paid only for the time he spent accompanying the inspector in the face areas of the mine because that is exactly what DOW had done with respect to the previous miners' representative who had accompanied inspectors at DOW's mine.

Neither DOW's brief nor Deel's brief makes any reference to the fact that Deel accompanied inspectors only when they were engaged in making spot inspections because that is the only type of inspection which was made by Inspector Strength while Deel

held the position of the miners' representative who was entitled to accompany inspectors under section 103(f) of the Act (Tr. 1060). The Commission majority held in The Helen Mining Co., 1 FMSHRC 1796 (1979), that operators have to pay miners for accompanying inspectors only when the inspectors are engaged in making one of the regular quarterly inspections required under section 103(a) of the Act. The Commission's decision was reversed by the District of Columbia Circuit in UMWA v. FMSHRC, 671 F.2d 615, in a decision issued February 23, 1982. Since Deel testified in this proceeding during the week ending February 19, 1983, he was technically incorrect in stating that he was required to be paid by DOW for accompanying an inspector who was engaged only in making spot inspections.

A final day of hearing was held in this proceeding on April 26, 1983, but the Supreme Court did not deny petitions for certiorari with respect to the D. C. Circuit's reversal of the Commission's Helen Mining decision until October 10, 1983. The matter of paying miners for spot inspections is still being contested in current cases before the Commission. See, e.g., a notice issued by the Commission on September 2, 1983, indicating that the Commission had declined to vote for the grant of a petition for discretionary review of my decision issued July 28, 1983, in Consolidation Coal Co. v. Secretary of Labor, Docket No. PENN 82-221-R, in which I had held that Consolidation, under the D. C. Circuit's decision in the UMWA case, supra, had to pay a miner who accompanied an inspector who was engaged in making a spot inspection.

#### Inspection of Face Areas on May 5, 1982

It is a fact that Inspector Strength made a spot inspection of the face areas and the beltline in DOW's mine on May 5, 1982, and that inspection occurred just 2 days before Deel was discharged on May 7, 1982 (Tr. 1040; 1060). The inspector recalls no unusual delay before beginning his inspection (Tr. 1047). The inspector arrived at the mine about 8:30 a.m., called for the miners' representative (Deel) to meet him on the surface, spent about 30 minutes examining DOW's record books before going underground, took about 25 minutes in traveling to the working section, and began his inspection in the No. 1 entry about 10 a.m. (Tr. 1069). On May 5 the inspector wrote three withdrawal orders (Nos. 922773, 922774, and 922775) under section 104(d)(2) of the Act citing DOW for violations of section 75.316, 75.200, and 75.1303, respectively (Exh. 1). Deel did not point out any violations to the inspector in his capacity as the miners' representative (Tr. 1091).

Deel, however, claims that Strength was coming on May 5 to make an inspection only of the beltline and that DOW knew that he was coming that day to inspect only the beltline. Deel claims

that he told Strength that the face area was in a terrible condition and that he was specifically requesting Strength to inspect the face area in addition to the beltline because Deel wanted to prove to Strength that conditions in the mine were as bad as he had been telling Strength they were (Tr. 24).

Deel thereafter claims to have advised both the mine foreman, Taylor, and the section foreman, Stiltner, that Strength was going to make an inspection of the face areas and that they asked him to stall the inspector until they could improve conditions in the face area prior to the inspection (Tr. 25; 195). Deel claims that when he advised Strength that they wanted him to stall the inspection for a while, Strength stated, "If there's that much wrong in there, there ain't no way they're going to get it done; \* \* \* let's give them their time" (Tr. 195-196). For the foregoing reason, Deel said that "\* \* \* we were about a half hour to an hour late going in" (Tr. 196).

As indicated above, the inspector stated that he inspected both the beltline and the face every time that he made a spot inspection and he specifically stated that it was not possible that he failed to check the face areas when he made any of the spot inspections (Tr. 1040; 1060). Additionally, section 110(e) of the Act provides for a fine of up to \$1,000 and up to 6 months imprisonment as punishment for anyone "\* \* \* who gives advance notice of any inspection". There is no likelihood, therefore, that the inspector would have stated, as Deel alleges, that "\* \* \* we'll give them advance warning" (Tr. 195) of the fact that he was going to inspect the face areas.

When Deel was being cross-examined about his claim that he persuaded the inspector to make an inspection of the face areas which he would not otherwise have made, Deel stated that he was so positive of the allegation, that he would lay his hand on the Bible and swear on his mother's grave that the inspector had come on May 5, 1982, only to check the beltline (Tr. 170). Deel at first stated that he knew the inspector was coming on May 5 to make a follow-up examination to see if DOW had corrected some beltline violations previously cited and that he and everyone else knew the inspector was coming only to check the beltline (Tr. 128). The citations and orders in Exhibit 1, however, show that the inspector had written no citations requiring that violations be abated by May 5, 1982. Deel later realized that he could not specify an exact abatement date given by the inspector and changed his testimony to say that the inspector had given DOW an oral warning to get the belt cleaned up by a certain date and had advised DOW's management that he would issue a citation or order if DOW had failed to clean up the belts by that time (Tr. 166).

Another reason for doubting Deel's claim that Strength would not have inspected the face areas on May 5 if Deel had not made a special request that such inspection be made, is that the violations which Strength found on May 5 included DOW's failure to set any temporary supports in the Nos. 1 and 2 headings and failure to set one temporary support in the No. 3 heading. The inspector also cited violations for DOW's failure to hang reflectors or warning devices outside the Nos. 1, 2, and 3 headings (Order No. 922774, Exh. 1). No section foreman with as much experience as Stiltner had would ask for an inspection to be delayed until he could improve conditions at the face and then overlook the setting of temporary supports which can be installed in a very short period of time.

On the basis of the above discussion, I find that the preponderance of the evidence fails to support Deel's claim that he requested Inspector Strength to make a special inspection of the face areas on May 5. Since Deel failed to prove that he had requested such an inspection, the evidence also does not support Deel's claim that his discharge was motivated because of his having allegedly requested the inspection on May 5 which resulted in the inspector's issuance of three unwarrantable failure orders.

#### The Firing of Two Shots at Once

As has been shown in the preceding discussion, Deel accompanied the inspector during the spot inspection conducted on May 5, 1982. Deel has arrogated to himself great credit for the inspector's having cited DOW for a violation of section 75.1303 in Order No. 922775 which alleges that permissible explosives were not being used in a permissible manner in the No. 7 heading and the crosscut right off the No. 7 heading because 24 charges (12 in each place) were shot or detonated at the same time (Exh. 1). The inspector explained that DOW's shot-firing battery is designed to detonate only up to 20 shots at one time and that the violation consisted of DOW's shot fireman (Chann Fields) having detonated 24 charges simultaneously when, in fact, he should not have detonated more than the 12 charges by means of a single discharge of electrical energy from the shot-firing battery (Tr. 1084).

Deel claims that when Strength found the wires running from the two headings tied in such a manner that they could have been fired simultaneously, Strength accused DOW of having shot both places at the same time. Deel contends that Stiltner stated that they wouldn't do such a thing and asked Deel to agree with him that the shots were fired separately, but Deel claims that he replied "Tivis [Stiltner], I ain't going to lie for you or nobody else" (Tr. 26). Deel also alleges that Strength told him that he might have to have Deel to testify in court in support of that alleged violation. Finally, Deel claims that Stiltner

repeated that the two places were shot separately and again asked Deel to agree with him, but Deel states that he reiterated that he would not lie for anyone (Tr. 27).

Strength recalled that Deel had said "The conditions are there and the evidence shows it; there's no need to lie about this" (Tr. 1051), but Strength did not recall whether Deel's statement was made in reply to any statement or question by anyone else. Additionally, Strength recalled that Stiltner said that he was unaware that the condition existed (Tr. 1051).

Deel additionally alleged that he was "right over from Fields" when he fired the two shots at once and that he knows of his own knowledge that Fields shot both places at once (Tr. 27). Deel, however, did not tell the inspector that he had seen Fields shoot both places at once (Tr. 1091). The inspector did not recall hearing Stiltner try to persuade Deel to agree with him that the places had been shot separately. Stiltner testified that Strength rolled up the wires and took them with him as evidence in the event DOW contested the citing of a violation of section 75.1303 (Tr. 885). The inspector kept the wires until after DOW had paid the proposed penalty for the violation and then discarded the wires (Tr. 1053-1054). When the inspector asked Fields if he had fired both places at once, Fields stated that they had been fired with separate cables, but the inspector told Fields that he could not agree with Fields because of the way the wires were tied together (Tr. 1052).

Deel called Kyle Turner as a witness to corroborate Deel's contention that he had upset Stiltner by refusing to agree with Stiltner that the two places had been shot separately. Kyle claims to have walked by an intersection on May 5 and to have seen the inspector, Stiltner, and Deel standing in a heading and heard Stiltner asking Deel to try to go along with Stiltner in claiming that the two shots were fired separately, but Turner said that Deel refused, saying that the inspector could see from the physical evidence that both places had been fired at once (Tr. 286). Turner, however, could not recall where he was when he heard the alleged conversation and could not recall what he was doing (Tr. 287). Deel's counsel tried to establish on cross-examination that Stiltner was wrong in saying that Turner was engaged in setting temporary supports or safety jacks in the No. 4 heading during the time they were inspecting the No. 7 heading where the double shots were fired. Stiltner agreed that supplies are stored in the vicinity of the No. 7 heading but continued to insist that Turner had no reason to be near the place where the double shots were alleged to have been fired (Tr. 1011).

There are at least two reasons for doubting Turner's claim that he heard Stiltner trying to persuade Deel to agree with Stiltner that the shots had been fired separately. First, it is

a fact that Turner was working near the headings in which the inspector had cited DOW for failure to install sufficient temporary supports in three different headings. It could have taken him a considerable period of time to set temporary supports in all three headings and if he had to go to the No. 7 heading to obtain temporary supports or timbers, he should have recalled his need to do so. Second, Strength testified that Stiltner merely stated that he was unaware that the conditions found by the inspector existed. If Stiltner had engaged in an all-out effort to persuade Deel to agree with him that the shots had been fired separately, the inspector would surely have recalled Stiltner's efforts to persuade Deel to agree with him, yet the inspector does not recall that Deel's remark about the existence of the wires was made in response to any question by anyone (Tr. 1051). It is also highly unlikely that the inspector ever stated to Deel that the inspector might have to call Deel as a witness because the inspector was relying on the wires themselves as being all the evidence he needed to support his citing of the violation. Moreover, since Deel did not tell the inspector that he had seen Fields fire the two shots at once, the inspector had no reason to believe that Deel had any independent knowledge of the manner in which the shots were fired other than the physical evidence on which both Deel and the inspector were relying in concluding that both shots had been fired simultaneously.

Deel's credibility with respect to the firing of two shots at once is greatly eroded by other inconsistent statements which he made when he testified before the Virginia Employment Commission and at the arbitration hearing. At the Virginia Employment Commission hearing, Deel gave the following account of the shot-firing incident (Tr. 44):

A \* \* \* and we went to Number 7 heading, and we found it had been double-shot, which is a federal violation, and the jumper wires was wired on through there, and Bill said, look here, we have found one that has been double-shot. Tivis [Stiltner] said, no; he said, that was shot the same turbine (sic). And he looked at him and said, now Tivis, you know it's been double-shot. He said, here's your lead wires and everything, and Bill [Strength] looks at me, and he said, now I want the truth; he said, what do you think about it? I said, well it's plain to see that places have been double-shot. He said, well I may have to call you for a witness when we have a trial, and he rolled the wires up and put them in his pocket as--you know, to show that the jumper cables were there. He took the cables and put them in his pocket for evidence.  
\* \* \*

It is obvious that Deel had forgotten, by the time he testified in this proceeding in February 1983, that he had previously stated in the Virginia Commission hearing, held on September 22, 1982, that his remark about the double-shot firing had been made in response to a question asked by the inspector, whereas in this proceeding, he claimed that his remark was made in response to at least two questions asked by Stiltner in an effort to get Deel to agree with Stiltner that the shots had been fired separately.

As to Deel's claim that he saw Fields shoot both places at once and knew of his own knowledge that Fields had shot the two places at once, Deel was read in this proceeding (Tr. 190) the following testimony from the arbitration hearing held on May 28, 1982 (Tr. 72-73):

- A. I said, I just said anybody can see the evidence is there; they are wired together. I said I wasn't there when they was shot. I said it's plain to see the evidence is there they was both shot together; but I wasn't going to lie and say they was shot one at a time because I wasn't there. \* \* \* [Emphasis supplied.]

Deel's explanation in this proceeding concerning the above inconsistent statements is as follows (Tr. 192):

A Well, let me explain to you what I was meaning by that. I wasn't actually up there when he tied -- the inspector asked me if I was actually up there when he tied the cable from that cable to this cable. I wasn't actually up there, but I was over from Chann Fields when he mashed the trigger on it. I could -- half a break. I could see him and I could hear it. I wasn't right beside him. But what I was saying was I couldn't be an actual witness to him wiring them together because I wasn't there to see him wire them together; and what I mean by I was there, I was over from him, you know, I could hear him hollering fire, fire, fire, and I heard the shot go off when he pulled the trigger.

I never did see him go back up in there and wire another one. I never did hear him yell fire, fire, fire and shoot nothing else over in there.

Q Well, if you were that close by, wouldn't it have been obvious that he was shooting two places at once?

A Well, I had it figured for that; but like I said, I couldn't swear, I never seen him tying the cables up there.

I stated at the hearing that I was glad I had asked him about the two inconsistent statements because it appeared that Deel was telling two different stories (Tr. 192). Further examination of the statements shows that he did tell two different stories because he first stated that he knew of his own personal knowledge that Fields had fired two places at once, but then he changed his testimony when confronted with his prior statements in the arbitration hearing to state that he "couldn't swear" that Fields had fired two places at once. Yet, that is exactly what he had done during his direct testimony in this proceeding--sworn under oath that he knew of his own personal knowledge that Fields had fired two places at once.

In the application which Deel filed on May 21, 1982, with MSHA, he alleged that "I told Tivis not to shoot two places at the same time in No. 7, but he did anyhow." When Deel was asked about that claim during cross-examination, he stated that he might have made that request on May 5 and that may be the reason that he recalls that two places were shot at once (Tr. 122). It is highly unlikely that Deel even knew it was a violation prior to May 5 that the mandatory safety standards prohibit the shooting of two places at once because he had previously worked with Randy O'Quinn on the evening shift and O'Quinn testified that they sometimes fired three places at once (Tr. 261).

Other reasons for doubting that Deel ever brought the firing of two shots to Stiltner's attention are: (1) Deel was called out of the mine at 8:30 a.m. to accompany Strength during his inspection of the mine on May 5. If Deel had asked Stiltner not to shoot two places at once before he came out of the mine, that would have been foremost in his mind when he returned underground with the inspector and Deel would have called the shooting of two places at once to the inspector's attention, but the evidence shows that it was the inspector who found the wires and concluded that two places had been shot at once. (2) No shots were fired after Strength began his inspection of the face area. Therefore, if Deel had asked Stiltner on May 5 not to fire two places at once, his tendency to brag about his safety-related activities would have compelled him to tell the inspector that he had asked Stiltner not to fire two places at once before he left the face area to come outside for the purpose of accompanying Strength during his inspection.

On the basis of the discussion above, I find that the preponderance of the evidence shows that Inspector Strength was the sole person who discovered evidence leading to a conclusion that Fields had fired two places at once. Since Deel played no part in calling the alleged violation to the inspector's attention, DOW's management would have had no reason to retaliate against Deel merely because he had repeated the inspector's own words and had stated at the time the inspector found the wires

that the physical evidence supported the inspector's belief that two shots had been fired simultaneously. In such circumstances, the inspector's citing DOW for firing two shots at once, based on physical evidence leading to a conclusion concurred with by Deel, would not have been a protected activity which would have motivated DOW to discharge Deel on May 7, 1982, or 2 days after the inspector had cited DOW for the violation of section 75.1303.

#### Stiltner's Alleged Threat

Deel claims that on May 6, 1982, the day after the order had been written citing DOW for shooting two places at once, that when the miners were getting into the mantrip to go outside, the miners were kidding Stiltner about the fact that Deel had refused to lie for him so that the inspector would not cite a violation, Stiltner is alleged to have looked at Deel and said, "I'll make you pay for this one" (Tr. 27; 120). Deel said that he figured Stiltner just meant that he would work Deel hard, like having him drill and roof bolt by himself, but instead Stiltner fired him the next day, May 7.

Stiltner denies having made such a statement (Tr. 836) and Fields testified that he did not hear Stiltner make such a statement (Tr. 723). On the other hand, both Randy O'Quinn and Kyle Turner claim to have heard Stiltner's alleged threat (Tr. 220; 288).

I believe that Stiltner's denial of having made the threat is more credible than Deel's claim because the inspector stated that all Stiltner said in response to the inspector's allegation that two places had been shot at once was a statement that he was unaware that the condition found by the inspector existed. It was just as obvious to Stiltner that the wires spoke for themselves as it was to the inspector and about the only denial Stiltner could have made was that he was unaware of the fact that the wires had been connected so as to support a conclusion that two places had been shot simultaneously. Deel gave inconsistent accounts, as indicated on pages 23-24, supra, about his personal knowledge of what had happened. Stiltner would have had no reason to threaten Deel about his part in bringing about the issuance of Order No. 922775 (Exh. 1) because Stiltner knew that the inspector had found the alleged violation by himself and had taken the wires as evidence that the violation had occurred. Nothing Deel could have said would have changed the inspector's belief that a violation occurred and there was no reason for Stiltner to have been carrying any special ill will toward Deel for the fact that the inspector had cited DOW for a violation of section 75.1303.

## Failure To Install Curtains and Failure To Apply Rock Dust

Deel claims to have irritated management by constantly complaining about the fact that DOW failed to maintain curtains as close to the face areas as he thought was required and for failure to apply rock dust as close to the face as Deel thought was required (Tr. 9; 12). The evidence shows that Deel operated a scoop at times and Deel conceded that he personally knocked down curtains at times and sometimes he would just tell the "curtain man" he had knocked the curtain down so that the curtain man could rehang the curtain (Tr. 63; 67). Deel also conceded that the "curtain man", Darrel O'Quinn, had threatened to hit him in the head with a hammer if he drove through a curtain which was not intended as a travelway for the scoop (Tr. 64-65). While Deel contended that the confrontation with Darrel over Deel's running through the curtain occurred shortly after Deel had been recalled and that Deel was not familiar with the layout of the mine at that time since they were developing a different area of the mine from the one in which he had been working when he was laid off in 1981 (Tr. 65), the fact remains that DOW was using the same seven-entry mining system when Deel was recalled in 1982 that was being used in 1981 when Deel was laid off. Deel claims to have been an experienced miner and should have familiarized himself with the travelways being used for scoops before he got on a scoop to operate it. Deel also agreed during cross-examination that DOW's position as to the hanging of curtains was reasonable and that DOW had had so much trouble with the miners knocking down curtains that DOW had had to assign one miner, Darrel O'Quinn, to the job of hanging and maintaining the curtains (Tr. 200). Neither Deel nor O'Quinn was able to explain why DOW would have gone to the expense of assigning a miner to the sole job of hanging curtains and would then have refused to supply curtains, as alleged by Deel (Tr. 12, 68; 937).

While Randy O'Quinn supported Deel's claim that DOW did not maintain the curtains as required by the mandatory safety and health standards, O'Quinn admitted that he personally failed to maintain the curtain at the required distance from the face when cold weather prevailed because the cold air made him uncomfortable (Tr. 938). O'Quinn also conceded that when he was failing to maintain the curtain at the required distance from the face, he was necessarily relying entirely on the methane monitor to safeguard him from encountering a hazardous concentration of methane (Tr. 939).

Deel also contended that he complained to DOW's management about their failure to keep the mine properly rock dusted (Tr. 9; 36). Exhibit 1 contains one citation alleging a violation of section 75.403 for failure of DOW to apply an adequate amount of rock dust and three citations alleging that DOW had failed to clean up accumulations of loose coal and coal dust. There is no

doubt, therefore, that DOW failed to apply adequate amounts of rock dust, but the issue in this case is whether Deel's complaints about DOW's failure to apply rock dust contributed in any way to his discharge. There are several aspects about Deel's understanding of the mandatory safety standards which cause me to conclude that Deel did not really complain to DOW about the failure to rock dust in a way which would have motivated DOW to discharge him for that reason.

I believe that if Deel had complained to the mine foreman and the section foreman about their failure to hang curtains and their failure to rock dust, they would have explained to Deel that he was in error about his contentions as to how close to the face rock dust has to be applied. Yet, the evidence clearly shows that Deel did not understand the regulations and argued with me on the record as to the meaning of section 75.402, contending that DOW was required to apply rock dust to within 35 feet of the working face and that section 75.402, which requires rock dusting only to within 40 feet of the working face, is inapplicable to DOW's mine (Tr. 201).

Deel, unfortunately, cannot read well enough to understand the citations, orders, and regulations to which he was exposed as a safety committeeman and the miners' representative to accompany inspectors pursuant to section 103(f) of the Act (Tr. 75). Deel testified that the inspector mailed copies of the citations and orders he issued to Deel at his home address and that he had his wife read the contents of the citations and orders to him (Tr. 76). If Deel did have his wife read the language on the citations and orders to him, he did not understand what was being read to him because Citation No. 922767 makes it clear that section 75.400 is enforced only to within 40 feet of the face. Deel also was uncertain as to how close to the face the line curtain must be maintained (Tr. 69). The inspector stated on the termination sheet accompanying Order No. 922764 that DOW's ventilation, methane, and dust control plan requires DOW to maintain the line curtain to within 10 feet of the working face (Exh. 1).

On the basis of the discussion above, I find that Deel failed to become acquainted with the mandatory health and safety standards sufficiently to be effective in his role as safety committeeman and that his complaining about curtains and rock dust applications were not likely to have been of sufficient concern to DOW's management to cause them to want to discharge him because he may have mentioned the lack of curtains and failure to rock dust on a few occasions.

There are other aspects about Deel's alleged complaints about failure to erect curtains, apply rock dust, and clean up loose coal which are less than convincing. For example, Deel contends that temporary supports or safety jacks were not being set, but he conceded on cross-examination that it is the duty of

the operator of the roof-bolting machine to install the safety jacks. Since Deel generally operated a roof-bolting machine, he necessarily recognized that he had to be a primary offender if the safety jacks were not being set, so he claimed that the section foreman, Stiltner, had ordered him not to set safety jacks, or temporary supports, because it took too much time to set them (Tr. 126).

Taylor, the mine foreman, claims that he ordered Stiltner to have Deel set temporary supports on at least one occasion when he saw Deel installing roof bolts without using them (Tr. 423; 844). Taylor also stated that the miners were not using safety jacks when he became mine foreman and that that was one of the areas in which he tried to improve safe mining practices at the mine (Tr. 421-423). Stiltner testified that the miners objected to erecting safety jacks when he ordered them to do so. He said that when they asked him if they would be fired for not setting them, he told them he would not fire them for failing to set them, but he would have to give them time to do so and would have to see that they worked safely (Tr. 844). It is not likely that miners would ask if they could be fired for failing to install safety jacks unless they had a propensity for preferring to ignore the requirement for setting safety jacks. Consequently, it is just as likely that safety jacks were not being set because that was the miners' preference as much as it was that Stiltner had told them he would prefer that safety jacks not be set, as claimed by Deel (Tr. 126).

If Deel had been the aggressive safety committeeman that he contends he was, he would have had an ideal situation for calling an MSHA inspector to get it established that the setting of safety jacks is required by DOW's roof-control plan. Deel contends, without record support as indicated above on page 14, supra, that he called Inspector Strength to ask for a special inspection when the belt-control switch was bridged out, and he contended that he called Inspector Strength to ask for a special inspection as to loose coal accumulations along the belt line (Tr. 36). There is hardly any explanation for Deel's failure to insist on setting safety posts, if he had really been instructed not to do so, other than the simple fact that he was too lazy to bother with setting them himself and brought up the matter of DOW's failure to require the setting of safety posts as just one more contention about his alleged safety-related complaints.

In his complaint filed with MSHA on May 21, 1982, Deel stated "\* \* \* I asked Tivis [Stiltner] to have Chann to pull the curtain 30 feet out the face before he shot the coal. Tivis said that Chann didn't have to. That you could do it yourself" (Exh. 2; Tr. 70-71). If DOW had complied with the aforesaid request, it would have been in violation of the mandatory health and safety standards and its own ventilation,

methane, and dust control plan. One of DOW's owners, Walker W. Hay, testified that they were shooting from the solid and that the explosives would knock holes in the curtains and throw them back down the track about 20 feet outby the face. Therefore, he said that in 1981 DOW asked MSHA for a variance in its ventilation plan which would permit them to set the curtains back out of the way prior to detonating the shots so that the curtains would not get torn or knocked down by the explosives. MSHA denied the request (Tr. 366-367).

Deel's allegation that he asked Stiltner to have the curtain moved back 30 feet before blasting shows that he did not understand the reason for having the curtain close to the face. Noxious fumes, methane, and dust are very likely to accumulate at the working face immediately after explosives are detonated. It is safer for the miners to have a damaged curtain hanging as close as possible to the face after a shot is detonated, than to have the curtain removed 30 feet from the face before the shot is detonated. A damaged curtain will remove some dust, noxious fumes, and methane, but a curtain which is 30 feet outby the face will have no ability whatsoever to sweep dangerous accumulations from the working face.

The above discussion shows that Deel was simply uninformed as to what the safety and health regulations were. Management necessarily had to deny some of his complaints about safety, if they were made, because he was asking management, at least part of the time, to violate the safety and health standards and to perform acts which were not required by its ventilation plan. In such circumstances, it cannot be successfully argued that DOW would have discharged Deel because he was making safety complaints.

Additionally, Deel's condemnation of DOW's management is inconsistent like all his other allegations in this proceeding. For example, Deel testified that when he was first elected as safety committeeman, DOW's management cooperated with him and provided him with all the supplies he wanted to make the mine safe. Deel states that, as a result of DOW's cooperation, the mine received no citations of violations during the first inspection which occurred after he became safety committeeman (Tr. 199, 431).

It is correct that Inspector Strength did not write any citations during the first inspection he made after Deel became safety committeeman, but Deel was elected safety committeeman on Saturday, April 3, 1982, and Deel's first day at the mine as safety committeeman occurred on Monday, April 5, 1982. The "clean" inspection made by the inspector on April 5 and April 6, 1982, during which no citations of violations occurred, would necessarily have been made on the basis of the way the mine had been left by Chann Fields, who was superseded by Deel as safety committeeman. DOW's management did not even know that Deel had

been elected to replace Chann Fields as safety committeeman until April 5, 1982 (Tr. 711). In such circumstances, Deel cannot take credit for the fact that no violations were cited by the inspector when he examined the mine on April 5 and April 6, 1982.

The effect of Deel's having claimed that DOW's management, when he was first elected committeeman, cooperated with him and provided him with all the supplies he needed to make the mine safe, leaves Deel in the position of having indicated that DOW's management was interested in operating a safe mine on or about April 5, 1982. Deel was the safety committeeman for 32 calendar days prior to his discharge and only actively performed the duties of a safety committeeman for a period of about 20 days, as indicated on page 11, supra. Deel has not established that he actually did anything after April 5 which would have changed DOW's position regarding safety within a period of 32 days so drastically that DOW would have wanted to discharge its safety committeeman just because he had tried to make the mine safe. As will hereinafter be shown, it was Deel's failure to do his job properly which caused him to be discharged--not his alleged protected activity under section 105(c)(1) of the Act.

#### Deel's Allegations of Disparate Treatment

Deel testified during his direct testimony and cross-examination (Tr. 42; 48) that he had not refused to perform a work order and that he did not know of anyone else who had ever refused to perform a work order. Randy O'Quinn testified, however, that he had refused to perform work orders and that Deel "thought it up" and had his attorneys ask O'Quinn about it (Tr. 273). The nearest O'Quinn ever came to refusing a direct order was one time when he was working for Jim Deel (who is not related to complainant (Tr. 353) and who was a section foreman). On that occasion, O'Quinn refused to watch the belt drive and said he was going home if that was all they had for him to do. He alleges that when he went outside at that time to hang up his light, Taylor, the mine foreman, asked him where he was going and persuaded him to go back into the mine to work on an extension of the water line (Tr. 912). O'Quinn also claims to have refused to perform work orders given by Stiltner, such as refusing to run the drill, and that Stiltner would undertake to drill a few holes and would feign that the drilling was hurting his back and O'Quinn would then take over and go ahead with the drilling (Tr. 910-911). The only time O'Quinn ever claimed to have refused to perform a work order, without changing his mind and doing the work after having said he would not do it, was in connection with the aforesaid incident of watching the belt drive, and even in that case, he relented and returned underground to perform alternate work other than watching the belt drive. Moreover, that alleged refusal to work involved a different section foreman from the one who discharged Deel.

In this proceeding, it is a fact that O'Quinn first told Stiltner that he was sick and could not go after an auger barrel which Stiltner had requested him to obtain. Yet, a few minutes later, he either went back to work voluntarily, as contended by Stiltner (Tr. 823), or he obeyed Stiltner's request that he go back to work, as he claimed (Tr. 226). Therefore, the record does not support Deel's claim that Stiltner allowed other miners to refuse to perform work orders without disciplining them, whereas Stiltner discharged Deel for refusing to perform a work order.

Kyle Turner stated at the arbitration hearing that he believed Stiltner treated all the miners on his crew alike (Arb. Tr. 122). Although Turner had some difficulty in answering a question about Stiltner's equal treatment of the miners when he testified in this proceeding, he ultimately conceded on cross-examination that his statement made at the arbitration hearing was correct (Tr. 297-300). When Turner testified on redirect examination of his rebuttal testimony, however, he was finally persuaded to state that he thought Deel was treated "a little different from the rest of the men" (Tr. 1000), but that change of opinion was elicited from him after several admissions to the contrary.

The different treatment Turner appears to have been referring to would apparently have been Turner's allegation that Stiltner had at times assigned Deel to run the coal drill which involves considerable manual labor (Tr. 342). Turner stated that Stiltner always told them on such occasions to bolt the places as fast as they could just to make Deel work hard (Tr. 326; 973), but Turner subsequently said that he still switched jobs sufficiently to avoid making it "that hard" on Deel (Tr. 343). Turner also conceded that he rarely had to work on the same roof-bolting machine that Deel was assigned to operate (Tr. 987-988).

O'Quinn also testified that when Deel was working on the night shift prior to the time Deel was laid off in 1981 for economic reasons, that Stiltner once granted Deel's request that he be permitted to work at the face, instead of at the tailpiece where he was normally assigned to work. On that occasion, Stiltner told O'Quinn to make Deel do all the drilling, but O'Quinn also admitted that he had a miner named Mack Lester helping him and that Lester liked to drill and did all the drilling, so that the way they made it "hard" on Deel was that they just worked faster than usual so that they were able to bolt and drill 10 places that night instead of eight (Tr. 964-966).

O'Quinn additionally stated that Stiltner, in those days, would assign Deel to performing work at the tailpiece just to get Deel out of the face area because Deel "got under his skin"

and he did not want Deel where he had to see him very often (Tr. 960). There was certainly nothing about Deel's activities in the mine that indicated he was a safety-conscious leader in those days because he requested permission to help a crew of men operate in the face area at a time when they were carrying explosives on the top of the roof-bolting machine--a procedure which was certainly as hazardous as it was for Chann Fields to haul explosives on his tractor. Yet Deel does not claim that he or anyone else ever pointed out to DOW's management that hauling powder on the roof-bolting machine was an unsafe practice.

In order for Deel to prove that DOW discriminated against him, he must show that he was treated differently from the other miners because of some activity protected under the Act, but Deel has been unable to show that his different treatment, if any, had anything whatsoever to do with safety-related activities. Stiltner testified that he discharged Deel on May 7 because he "had had it" with him (Tr. 810).

The record shows that Deel engaged in activities which were in no way protected under the Act and in conduct which would necessarily cause a supervisor to want to assign him to tasks that would make it unnecessary for the supervisor to come in contact with him. For example, Stiltner testified that one night when Deel was working on the night shift, also before he was ever laid off in 1981 for economic reasons, that the electrical power kept going off at the main power source and Stiltner could not determine what was causing the power interruptions. Finally, one of the miners told Stiltner that Deel was sitting behind the rectifier kicking the power off. Stiltner said that he went to the power source and found Deel sitting behind the rectifier. Stiltner stayed at the rectifier for an hour or longer and the power never did go off any more after that. Stiltner stated that after Deel was called back to work in 1982, Deel admitted under questioning by Stiltner that he had been knocking the power off, but he said that Stiltner could not prove it and could not do anything about it (Tr. 845-846). Deel made no attempt to rebut Stiltner's allegations about his power-interrupting activities.

In my opinion, if any other miner had been as obstinate about doing the work assigned to him by his foreman as Deel was on May 7, Stiltner would have taken the same action against that miner that he did in connection with Deel's failure to operate the scoop. I find that the preponderance of the evidence fails to support Deel's contentions that he was treated differently from other miners because of his safety-related work as safety committeeman or because of any other activity protected under the Act.

## The Aborted Discharge

About 1 (Tr. 115) or 3 (Tr. 819) weeks before Deel was actually discharged, Stiltner did not have a full crew of miners and requested Deel to install roof bolts as well as drill holes in the face for the placement of explosives. About 8:30 a.m. Stiltner checked the face area and found that Deel was not doing anything and had only drilled holes in one heading. Stiltner asked Deel what was wrong and Deel told Stiltner that installing roof bolts and running the drill were too hard for one man to do and that he was not going to do both jobs. Stiltner advised Deel that his response left Stiltner with no alternative but to take him outside for purposes of discharging him. As Stiltner and Deel were passing the loading point in a scoop, Deel asked to talk to his committeeman, Kyle Turner, who was at the loading point. After a discussion between Turner and Deel, Turner asked Stiltner to put Deel back to work as Turner did not think Deel had refused to perform both jobs. Stiltner asked Deel if he would do his job if he put him back to work and Deel said he would. Therefore, Stiltner allowed Deel to return to the roof-bolting machine. Stiltner said that he went to check on Deel about 10 minutes later and Deel had still not started installing roof bolts. Therefore, Stiltner ran the roof-bolting machine for the remainder of the day so that Deel would only have to operate the drill (Tr. 820-821).

Deel's story in this proceeding about his having to drill holes and install roof bolts on the same day differs from Stiltner's only in that Deel contends that he had already drilled three or four places before Stiltner found him resting long enough to get his breath before going into a new place (Tr. 117). Deel also claims that Stiltner "hollered" at him to get moving and he meant right then. Deel says that when he told Stiltner that Stiltner could make him do the work, but could not make him "run" at it, Stiltner told him he was fired and started taking him out of the mine in the scoop, but Stiltner stopped so that Deel could talk to Turner who persuaded Stiltner to put Deel back to work (Tr. 117-118). Deel also agrees that Stiltner ran the roof-bolting machine for the remainder of the day so that Deel only had to operate the drill for the rest of the shift (Tr. 120).

Once again Stiltner's version of the incident is more credible than Deel's because Deel endeavored to justify his position by claiming that he had already drilled three or four places before Stiltner asked him to get to work (Tr. 117). It is necessary to bolt the top before drilling is done at the face (Tr. 182). Several witnesses, including Deel, have testified that it takes 15 minutes to install roof bolts without using temporary supports and that it takes at least 10 minutes to drill 10 holes in one place (Tr. 127; 162; 776; 942). Therefore, it would have taken Deel three times 25 minutes to install roof

bolts and drill in three places and 100 minutes to bolt and drill four places. Deel did not deny that his near discharge occurred about 8:30 a.m. as claimed by Stiltner. The miners go underground at 7:00 a.m. and it takes about 25 minutes to arrive at the working place (Tr. 720; 1069). They generally spend some time emptying the dust-collecting box and checking over the roof-bolting machine and drill (Tr. 133; 187; 793). Therefore, it is quite unlikely that Deel had been working for as much as an hour before Stiltner asked him why he was not working. In an hour's time, he would not have been able to install roof bolts and drill in three or four places before Stiltner asked him why he was not working. Stiltner was upset because Deel had drilled only one place before Stiltner found him doing nothing. There is no reason to believe that Stiltner would have been upset if he had actually drilled three or four places before Stiltner found him "resting".

At the Virginia Employment Commission hearing, Deel testified that he had been running both the roof-bolting machine and doing the drilling by himself for almost 3 days before Stiltner started to discharge him (Emp. Com. Tr. 41), but in this proceeding, he claimed that he had been assigned to do both types of work only "that morning" (Tr. 115). Stiltner testified that other miners, such as Turner, had been assigned the dual jobs of installing roof bolts and operating the drill (Arbitration Hearing, Tr. 8).

Regardless of whether Stiltner was unduly critical of Deel's work efforts on the day he almost discharged Deel, the fact remains that Deel was involved in a confrontation with his foreman which caused the mine committeeman to think it was necessary to explain to Deel that he could not refuse to perform a work order (Arb. Hearing Tr. 70). Moreover, Deel testified at the arbitration hearing that he was aware of the fact that he was required under union rules to carry out a foreman's instructions and subsequently file a grievance if he felt that the work order was unreasonable (Arb. Hearing Tr. 96). Deel's statement that he replied to Stiltner's order for him to get to work by saying that Stiltner could make him work but couldn't make him "run" at it was argumentative and was equivalent to saying that he would work as slowly and do as little as he found it convenient to do.

Stiltner's willingness to abort his trip out of the mine after the mine committeeman's appeal that Deel be given another chance to do his job shows that Stiltner was not unreasonable in his demands of his employees and, in fact, Deel admitted during cross-examination that he thought Stiltner was "fair" in performing his supervisory duties (Tr. 120). There is nothing about Deel's near discharge for failing to perform the jobs of roof bolting and drilling which indicates that DOW would have discharged him that day or on May 7 because of his having made alleged safety complaints to DOW's management or to MSHA.

## The Actual Discharge

At the time Deel worked for DOW, coal was produced by a conventional mining process involving the use of two roof-bolting machines, two coal drills, three or four battery-operated scoops, and conveyor belts (Tr. 267; 806-807). The coal drills operated from hydraulic power supplied by the roof-bolting machines (Tr. 181). Two miners were assigned to each roof-bolting crew. Normally, one of the miners would operate the roof-bolting machine and the other would operate the coal drill, but often the miners would swap jobs so that each one would engage in an equal amount of coal drilling which involved more actual manual labor than operating the roof-bolting machine (Tr. 117; 184; 342; 708-710). When the normal crew of men was available, Billy Deel and Kyle Turner were considered the operators of the roof-bolting machines (Tr. 275). Lee Grizzle was assigned to operate the coal drill attached to Turner's roof-bolting machine and Randy O'Quinn was assigned to operate the coal drill attached to Deel's roof-bolting machine (Tr. 162; 987). Chann Fields was the shot fireman, Floyd O'Quinn was one of the operators of a scoop, and Darrel O'Quinn was assigned as curtain man to install ventilation curtains at the face and out-by the face (Tr. 806-807). Darrel O'Quinn was off in May of 1982 and Stiltner, the section foreman, was short a scoop operator because of absenteeism (Tr. 680). A miner by the name of Clayton Justice had been hired as a prospective section foreman on April 19, 1982, on the assumption that DOW would be able to open another section in the mine (Tr. 679; 705). Justice had not operated scoops as they were used in DOW's mine and had not operated a roof-bolting machine like the ones used in DOW's mine, but he was competent as an operator of a coal drill (Tr. 771; 775; 782). Justice was assigned to operate the coal drill attached to the roof-bolting machine which was normally operated by Deel and Randy O'Quinn (Tr. 788). Deel and Randy O'Quinn were also experienced operators of a scoop and, for that reason, they had been asked to alternate between the jobs of operating the scoop and operating the roof-bolting machine (Tr. 124; 186; 773; 792; 801). The above-described arrangement required that on the days when O'Quinn was assigned to the roof-bolting machine, Justice did the drilling. Likewise, when Deel was assigned to the roof-bolting machine, Justice did the drilling (Tr. 785; 788).

Deel's discharge on Friday, May 7, 1982, occurred because he insisted on operating the roof-bolting machine despite the fact that his supervisor, Stiltner, wanted him to operate a scoop and haul coal from the working faces to the conveyor belt (Tr. 773; 809-810). About half of the testimony in this proceeding was devoted to listening to Deel's, O'Quinn's, Justice's, Stiltner's, Taylor's, Fields', and Turner's versions of the incidents which led up to Stiltner's decision to discharge Deel

for insubordination. It is significant that Deel did not voluntarily give an account of the events which led up to his discharge in the complaint he filed with MSHA, or in the complaint filed with the Commission, or in his direct testimony in this proceeding. Deel's failure to give in his direct testimony a complete running account of his version of the incidents of May 7, 1982, requires one to collect his version of those events from various places throughout his cross-examination.

If all the statements made by Deel during cross-examination, redirect examination, recross-examination, and my examination are pieced together, Deel's version of the events is as follows: On May 7, 1982, Deel was asked by Stiltner to get a scoop and use it to pull the mantrip into the mine (Tr. 100). After Deel arrived at the working section, he delivered the miners to their working places, unhooked the mantrip, and proceeded on the scoop to "his" roof-bolting machine (Tr. 102-103; 125; 173). Although Randy O'Quinn and Clayton Justice were already at "his" roof-bolting machine when Deel arrived, the fact that two miners were there did not have any significance to Deel because Justice was getting something to eat out of his lunch bucket which was carried on Deel's roof-bolting machine (Tr. 183). Additionally, Justice had been assigned to drill from Deel's roof-bolting machine before May 7 and Justice, Deel, and O'Quinn would just swap jobs and work together (Tr. 184). There was no significance to Deel that Justice asked Deel what job he was planning to do that day because, when Deel told Justice that he was planning to operate the roof-bolting machine, Justice said only that he guessed he would operate the scoop (Tr. 185).

Justice, after saying he guessed he would have to operate the scoop, got on the scoop which Deel had parked near the roof bolter and left. In a little while, Justice returned and stated that Stiltner, the mine foreman, wanted Deel to run the scoop that day and wanted Justice to run the coal drill hooked to the roof-bolting machine. Deel's reply to Justice's message from Stiltner was that if Stiltner wanted Deel to run the scoop that Justice should go back to Stiltner and tell him to come to the roof-bolting machine in person and tell Deel what he wanted Deel to do. Justice left again on the scoop and returned on foot a little while later (Tr. 172-173). Deel, upon Justice's second appearance, asked Justice what the story was now and Justice told him that Stiltner said he would be up there to talk to Deel "in a minute" (Tr. 187).

Stiltner soon thereafter rode to Deel's roof bolter on a scoop and Deel claims that the first thing he said to Deel when he arrived was "to get my goddamned ass in the buggy." Deel said "What?" and Stiltner then asked, "Are you refusing to run a scoop?" to which Deel replied, "No, sir, I ain't refusing to do nothing." Stiltner then said, "Well, you're fired. Get your damn ass in the buggy, you're going to the outside." (Tr. 103).

About that time, Deel claims that Stiltner turned to O'Quinn and started talking to him about an auger barrel needed for the coal drill and Stiltner tried to send O'Quinn to get one, but O'Quinn did not want to go after one on foot, so O'Quinn told Stiltner he was sick and was going home. Stiltner told O'Quinn to get his ass in the scoop's bucket and then Stiltner looked at Deel and told him to get in the scoop bucket also (Tr. 103-104).

Deel said that after Stiltner started out of the mine with both him and O'Quinn in the scoop's bucket, Deel asked Stiltner three or four times to stop so that Deel could talk to his safety committeeman, Kyle Turner. Deel says that Stiltner finally stopped and a discussion ensued during which Turner asked Stiltner to give Deel another chance since, as Turner understood the matter, Deel had not refused to operate the scoop. Deel claims that Stiltner calmed down a lot and asked Deel if he were to put him back over there, would Deel run coal and Deel said he would. Deel thinks that Stiltner would have allowed him to go back to work if, about that time, Chann Fields had not spoken up and said, "There ain't no damn use arguing with him any more. Take him the hell on out (Tr. 114)." Whereupon, Deel says that Stiltner told Deel and Turner both to get in the scoop's bucket and he would take both of them outside. Deel additionally claims that Stiltner did not want O'Quinn to be a witness to the conversation he was having with Turner and Deel and ordered O'Quinn to go back to work and O'Quinn got out of the scoop's bucket and went back to the roof-bolting machine (Tr. 114-115).

Stiltner's version of what happened on May 7, 1982, is as follows: Stiltner says that he explained to Deel before they went into the mine that he was short a scoop operator that day and that he would take the little scoop in and try to operate it himself along with doing his supervisory duties and that he wanted Deel to get the big scoop and pull the mantrip in with it. The reason Stiltner had the discussion with Deel about the "little" and "big" scoops was that Stiltner had had some stomach problems associated with internal bleeding and he had found that he could be more comfortable in the little scoop than he could in the big one. Stiltner stated that Deel also wanted to take the little scoop and it was necessary for Stiltner to insist that Deel use the big scoop (Tr. 807; 857).

Chann Fields rode into the mine with Stiltner in the little scoop and all the other miners went underground in the mantrip pulled by Deel. Stiltner let Fields off at his tractor used to pull the explosives wagon and Stiltner then drove the little scoop to the belt tailpiece where Stiltner needed to make some repairs. While Stiltner was working on the belt, Clayton Justice came to see him riding on the big scoop which Deel had used to pull the mantrip into the mine. Justice told Stiltner that Deel had decided he wanted to operate the roof-bolting machine and

that Justice assumed that Stiltner wanted him to run the scoop, but Stiltner told Justice to go back to the roof-bolting machine and tell Deel that he wanted Deel to run the scoop and for Justice to drill coal. Subsequently, Justice returned and stated that Deel had told him he was not going to run the scoop and for Stiltner to come up there and talk to him. Stiltner says he told Justice to park the big scoop and go back and tell Deel that he would be up there in a few minutes (Tr. 808).

Stiltner says that he got in the little scoop a short time later and drove over to the roof-bolting machine where he asked Deel what his problem was and Deel stated that he did not have any problem. Stiltner then asked him why he wouldn't run the scoop and Deel said that he wouldn't run the scoop and let somebody else do his job. Stiltner then told Deel "to either get on his scoop or get in the bucket" (Tr. 809). Deel then came toward the scoop's bucket. At that time, Stiltner looked at O'Quinn and asked him why he was not working and O'Quinn said he needed an auger barrel for the drill. Stiltner told O'Quinn to go get one, but O'Quinn said that he was sick--had an earache or something like that--and was going to the house. O'Quinn then got into the scoop's bucket with Deel and Stiltner started outside with both of them (Tr. 809).

After they had gone about two breaks, Deel wanted to stop and talk to the committeeman, Kyle Turner. Stiltner stopped the scoop and Deel got out and went to talk to Turner. O'Quinn, according to Stiltner, decided he felt like working and went back to the roof-bolting machine. After Turner and Deel had talked for a few minutes, both of them came over to Stiltner who was still sitting on the scoop. Turner asked Stiltner what the problem was and Stiltner says he explained to Turner that Deel had told him that he was not going to run a scoop and let someone else operate his roof bolter. Stiltner claims that Turner asked him twice to put Deel back to work and Stiltner refused both requests, saying that "he had had it with" Deel and was taking him out (Tr. 810). Stiltner alleges that he then told Turner that he would do even better than taking Deel out and would take Turner and Deel both out so they could all talk to the mine foreman, Taylor.

Chann Fields, who had already returned with the auger barrel which O'Quinn had asked him to obtain, was listening to the discussion in which Stiltner, Turner, and Deel were engaged. Fields needed to obtain an explosives-shooting battery from outside the mine and, feeling that the discussion was at an impasse at this point, spoke up and said that if Stiltner was going out, he would like for Stiltner to bring him a shot-firing battery when he returned. Turner, Deel, and Stiltner all say, however, that Fields began his statement by saying, "There ain't no use

arguing about it no more. Take him on out." Turner and Deel claim that Stiltner would have relented and would have put Deel back to work if Fields had not made that statement (Tr. 114; 285), but Stiltner claims that it was none of Fields' business in the first place and that Fields' statement did not influence his determination to discharge Deel for insubordination (Tr. 824-825). Fields denies that he stated anything about there not being any use to argue and that Stiltner should go ahead and take Deel outside, but he agrees that he did ask for Stiltner to bring him a shooting battery (Tr. 749; 758).

Regardless of whether Fields influenced Stiltner's decision, all witnesses agree that Turner and Deel got into the scoop's bucket and were taken outside by Stiltner. There is no need in giving a detailed discussion here of what occurred on the surface of the mine as those facts are not contested by the parties, except in very minor details, and are summarized in Finding Nos. 17 and 18, supra.

As indicated above, Clayton Justice was the miner who carried Deel's statements to Stiltner and Stiltner's replies back to Deel. Justice was also present when Stiltner returned from working on repairing the conveyor-belt tailpiece to find out why Deel would not run the scoop. Justice's version of the actions and statements leading up to Deel's discharge is as follows: Justice began working for DOW on April 19, 1982, and O'Quinn was on sick leave at that time. Justice had run a coal drill prior to being hired by DOW (Tr. 771). Therefore, Justice was asked to run the coal drill which received its hydraulic power from the roof-bolting machine normally operated by Deel. Consequently, on his first day at the mine, Justice worked with Deel. DOW did not have enough scoop operators when Justice first began working there. As a result, when O'Quinn and Deel were both present at the mine, O'Quinn and Deel alternated jobs so that every other day Deel ran a scoop while O'Quinn operated the roof bolter and when O'Quinn ran the scoop, Deel operated the roof bolter. Justice was the drill man regardless of whether Deel or O'Quinn was the operator of the roof-bolting machine (Tr. 785). Justice knew how to run a scoop, but had never used one to haul coal in DOW's mine (Tr. 785).

Deel was hurt about April 22 when he was thrown to the front of a scoop while he was riding in a scoop operated by Webb Bailey (Tr. 189; 873). Deel returned to the mine to work on May 3, 1982 (Exh. L). The mine was closed by Inspector Strength on May 5, 1982, and was not released from the withdrawal orders until May 6, 1982 (Tr. 825; 831). Since Justice had been operating the drill on a rather continual basis, he assumed he would be running the drill on May 7, the day of Deel's discharge. Consequently, Justice spent the time just prior to going underground sharpening bits for use in the coal drill. Therefore, Justice

did not hear Stiltner give any instructions to Deel as to whether he was expected to operate a scoop that day, but Justice assumed Deel would operate the scoop that day because O'Quinn and he rode the mantrip while Deel operated the scoop which pulled the mantrip into the mine (Tr. 792).

Justice took his bits and went to the roof-bolting machine from which he normally drilled. Shortly thereafter Deel pulled up to the roof bolter in the scoop and came over to the roof bolter. Justice asked Deel what he intended to do and Deel said that he was going to run "his" roof bolter. Clayton replied that he assumed that meant that he would have to run the scoop to which Deel said "I guess so" (Tr. 772). Clayton felt that since Deel had been working for DOW longer than he had, that he had no reason to argue with him, but Justice was also uneasy about starting to run the scoop without making certain that Stiltner wanted him to change jobs (Tr. 794), so Justice got on the scoop which had been parked by Deel near the roof bolter and drove it about 120 feet, or two breaks, to the tailpiece where Stiltner was working (Tr. 795-796).

When Justice explained to Stiltner that Deel said he was going to operate the roof bolter and asked Stiltner if he wanted Justice to run the scoop, Stiltner replied by requesting Justice to go back to the roof bolter and tell Deel that Stiltner wanted Deel to run the scoop and wanted Justice to drill coal. After Justice had returned to the roof bolter and had relayed Stiltner's message to Deel and had received Deel's retort that Deel was going to run "his" roof bolter and for Stiltner to come in person and tell Deel what he wanted him to do, Justice went back to the tailpiece and told Stiltner that Deel was insisting on running the roof bolter. Stiltner then told Justice to park the scoop and go back to the roof bolter and that he would come and talk to Deel after he had finished his repairs at the tailpiece (Tr. 773).

Justice went on foot back to the roof bolter and told Deel that Stiltner would be up there and talk to him in a few minutes. Justice then sat down and waited for Stiltner to appear. According to Justice, Stiltner came to the roof bolter in a few minutes and asked Deel why he wouldn't run the scoop. Deel wanted to know what Stiltner meant by that question and Stiltner explained that he was asking Deel to run the scoop because he believed that Deel was more familiar with the scoop than Justice and that more coal could be produced with Deel as the scoop's operator than would be produced with Justice as the scoop's operator. Stiltner then told Deel that if he was not going to run the scoop, to get in the scoop's bucket and Deel got into the bucket (Tr. 773; 799).

As Justice recalls the events, Stiltner's conversation with Deel had been completed before Stiltner turned to O'Quinn to find out why O'Quinn was doing nothing. Stiltner then ordered O'Quinn to go after an auger barrel on foot. O'Quinn did not want to walk a few breaks to get one, so O'Quinn said he was sick and got

in the scoop's bucket with Deel and Stiltner started to the outside with both of them. Justice does not know anything more about what happened after that (Tr. 773). While Justice said on direct examination that he did not hear O'Quinn tell Stiltner that Fields had gone for an auger barrel, Justice was recalled as a rebuttal witness and stated at that time that O'Quinn did ask Stiltner why Fields could not go after an auger barrel on the tractor (Tr. 1017). Assuming that Justice's rebuttal testimony is correct, he was still unable to explain how Stiltner would have known O'Quinn needed an auger barrel if O'Quinn had not told him that he was not drilling because of a lack of an auger barrel (Tr. 1019).

Randy O'Quinn was the other miner present during Justice's and Stiltner's conversations with Deel on May 7, 1982. O'Quinn testified at the arbitration hearing held on May 28, 1982. O'Quinn's testimony at the arbitration hearing supports in nearly every detail Stiltner's and Justice's versions of the events leading up to Deel's discharge, but in this proceeding O'Quinn's testimony shows that he was trying very hard to support only Deel's version of the events of May 7 (Tr. 222-229). During cross-examination by DOW's counsel, O'Quinn stated that what he said at the arbitration hearing was closer to the time the events occurred than his testimony in this proceeding was and would be likely to be more correct than his testimony in this proceeding which was given on February 15 and 16, 1983 (Tr. 253). Subsequently, the following colloquy occurred (Tr. 271):

Q Do you think that anything you said at the arbitration hearing was wrong?

A No, because that was closer to the time. I'd say it would be more right than what I could tell you today, because that long ago I can't remember every word. I just remember patches.

In view of the above statement by O'Quinn, I am relying upon his testimony in the arbitration hearing for the purpose of determining his version of the events leading up to Deel's discharge.

According to O'Quinn, Stiltner ordered Deel to get the scoop and pull the mantrip into the mine. Deel pulled the mantrip into the mine as ordered and parked the mantrip at its accustomed place. Then Deel drove the scoop to the site where Justice and O'Quinn were beginning to prepare the roof-bolting machine and drill for work. When Deel came close to the roof bolter, Justice asked Deel what job he was planning to do and Deel replied that he was going to bolt the roof, so Justice got on the scoop which Deel had driven to the roof bolter and left. After a while, Justice returned and told Deel that Stiltner wanted Deel to run the scoop. Deel told Justice that if Stiltner

wanted him to run the scoop, for Stiltner to come up and tell Deel that in person. Subsequently, Stiltner came to the roof bolter on a scoop and wanted to know what was going on and Deel said nothing unusual was going on. Stiltner then asked Deel what job he was going to do and Deel said he was going to bolt the roof, but Stiltner said "No" to that and stated that he wanted Deel to run the scoop. Deel then asked Stiltner if he was going to park the roof bolter and Stiltner replied "No" (Arb. Tr. 100-101).

O'Quinn recalls that Stiltner then turned to O'Quinn and ordered him to get an auger barrel, but O'Quinn said he was sick and would just go to the house. O'Quinn claims that he then got his dinner bucket and got into the scoop's bucket after which Stiltner asked Deel if he was refusing to run the scoop and Deel replied, "No", but Stiltner looked at Deel, according to O'Quinn, and told him that he might as well get into the scoop's bucket with O'Quinn. Deel got into the scoop's bucket and Stiltner started out with both of them, but finally stopped, at Deel's request, so that Deel could talk to the mine committeeman, Kyle Turner. Stiltner then told O'Quinn to go back to the roof bolter. O'Quinn got out of the scoop and went back to the roof bolter, as requested, and did not hear any of the discussion which took place after Stiltner stopped the scoop so that Deel could talk to Turner (Arb. Tr. 101).

I have already provided in Finding Nos. 11 through 17, supra, the version of the events of May 7, 1982, which is supported by the preponderance of the evidence in this proceeding. Even if one were to adopt, however, the version of the events of May 7, 1982, which was elicited from Deel during cross-examination and my questioning, DOW was justified in discharging Deel for insubordination. Deel conceded that he had gone to "his" roof bolter on May 7, 1982. He found a two-man crew already preparing the roof bolter for operation. Prior to his being off for a week, he had been running the scoop on alternate days and he claimed that he did not mind running the scoop because he knew "how to do everything they had there" (Tr. 186).

Although Deel said he did not mind running the scoop, he also stated that Justice did not like to operate the scoop because it "bounced" him around (Tr. 183). If the scoop "bounced" Justice around, it would also have bounced Deel around. When it came to the desirability of running a scoop as compared with operating a roof-bolting machine, Randy O'Quinn stated that operating the roof bolter was the easiest job in the mine and that if running a scoop was as easy as roof bolting, he would have a scoop operator's job (Arb. Tr. 109).

Deel's claim that he had no reason to believe that Stiltner wanted him to operate a scoop when he went into the mine on May 7, 1982, is unconvincing because Deel had previously been alternating

between running the roof bolter and the scoop and he knew that Justice had sharpened drill bits just before coming underground and knew that Justice was planning to operate the drill. Deel also knew that O'Quinn and Justice were both at the roof bolter before he arrived there. He knew when Justice asked him what he was planning to do that day that Justice was planning to run the drill and he knew from O'Quinn's presence at the roof bolter that O'Quinn was planning to operate the roof bolter because O'Quinn had been running the roof bolter when Deel operated the scoop and that O'Quinn drove the scoop when Deel operated the roof bolter (Tr. 792; 872). Deel tried to explain Justice's being at the roof bolter by claiming that Justice's dinner bucket was carried on the roof bolter and that he thought Justice had come there to get something to eat, but they had just arrived on the section and no one had done any work yet.

Deel also claimed that Stiltner was sitting on the only scoop in the mine on the morning of May 7 and that there was not room on the operator's seat for both him and Stiltner. Deel said that when Stiltner told him to run the scoop or get in the scoop's bucket, he had no choice but to get into the scoop's bucket because Stiltner did not offer to get off the operator's seat so that Deel could get on the operator's seat (Tr. 132). Deel's actual knowledge of the location of scoops was much greater than he claimed it was because Deel subsequently testified that there was another scoop operating in the mine on the morning of May 7 and that they sometimes used three or four scoops simultaneously (Tr. 185-186). Additionally, Deel knew that Stiltner and Fields had ridden into the mine on the little scoop and he certainly knew the difference between the big scoop which he had used for pulling the mantrip and the little scoop which Stiltner had driven into the mine. Therefore, all he would have had to do in response to Stiltner's ultimatum for him to run the scoop or get into the bucket of the scoop on which Stiltner was sitting would have been to have said that he had decided to run the scoop and ask Justice, who was listening to the conversation between him and Stiltner, where Justice had left the big scoop. Moreover, there was nothing whatsoever to keep Deel from stating that he would rather run a scoop than to get into the scoop's bucket. He knew that getting into the bucket would be the equivalent of consenting to being discharged. Therefore, he could not possibly have increased his risk of being discharged by refusing to get into the scoop's bucket and simultaneously stating that he would rather run a scoop than be discharged. Instead of assuring Stiltner that he did not mind running a scoop, as he claimed at the hearing, he said nothing and got into the scoop's bucket to be taken out for discharge.

#### References to "his" Roof-Bolting Machine

There was a discussion at the hearing as to whether Stiltner had inconsistently testified about telling Deel to obtain "his"

scoop and pull the mantrip or had simply asked Deel to get "the" scoop and pull the mantrip (Tr. 863-864), but Deel himself referred to the roof bolter as "his" and "my" roof bolter on at least three occasions (Tr. 125; 173; 175). Consequently, there is no reason to doubt Stiltner's testimony to the effect that Deel had refused to operate the scoop because he did not want someone else running "my" roof bolter (Tr. 875).

On the contrary, there are ample grounds for believing that Deel had made up his mind on the morning of May 7 that he was not going to do any more alternating between the jobs of scoop operator and roof-bolter operator. He had been successful in getting Stiltner to provide him relief on the previous occasion when he had refused to perform both the job of running the drill and operating the roof bolter and he was confident that he would be able to appeal to Turner, the mine committeeman, again on the way out of the mine to be discharged, and Turner would be able, as he had on the prior occasion, to persuade Stiltner to put him back to work as the operator of the roof bolter which, according to O'Quinn, is the easiest job in the mine.

#### Supervisor Doing Classified Work

Another of Deel's motives for insisting on operating "his" roof bolter was that Justice had been hired as a section foreman. Justice, as a salaried or managerial employee, was apparently violating union rules by operating the coal drill which is normally work performed by union employees or hourly workers. That issue was a part of Deel's union grievance filed after his discharge on May 7, 1982, but that issue was dropped from the case before the arbitrator who upheld Deel's discharge under the Wage Agreement (Arb. Tr. 132-133). Since Deel agreed to waive that issue at the arbitration hearing, it is certainly inappropriate for him to raise that as an issue in this proceeding.

In any event, it is a fact that there were not enough hourly or union employees at the mine on May 7 to operate all the equipment and Stiltner had no choice but to utilize Justice for the purpose of operating equipment which is normally operated by union employees. Although Deel claimed that he would have been allowed to operate the roof bolter if Justice had not been present on May 7, the evidence does not support that contention because, after Deel was discharged on May 7, Randy O'Quinn was assigned to run a scoop and Justice operated a coal drill by using the hydraulic power from another scoop. There were two roof-bolting machines in the mine and the other crew operated a roof-bolting machine that day, but Deel's roof bolter was not used at all (Tr. 801). Obviously, running the scoop was more important for producing coal than having O'Quinn operate a second roof bolter.

Therefore, Deel was incorrect in contending that the only reason he was asked to run a scoop was that Justice took a job

which would otherwise have been assigned to an hourly employee. There is additionally no merit to Deel's claim that DOW was improperly using a managerial employee to do an hourly miner's work at a time when an hourly miner was available to do the work. DOW's contention that it only used managerial employees to do union employees' work when absenteeism forced it to do so was shown to be true on May 7, 1982 (Tr. 680).

#### Requirement To Perform Work Order and Then File Grievance

Deel admitted at the arbitration hearing that he is required to perform a work order and then to file a grievance if he believes that the order is unreasonable, assuming, of course, that the order does not involve a requirement that he work in unsafe conditions (Arb. Tr. 96). It would appear that Deel violated union rules when he refused to run a scoop on May 7, 1982, because no safety issue was raised in connection with Stiltner's request that Deel operate the scoop.

#### Deel's Refusal To Ask Stiltner About His Assignment

Deel conceded that Justice brought him a message to the effect that Stiltner wanted Deel to run the scoop on May 7 rather than operate the roof bolter (Tr. 172-173; Arb. Tr. 75). Deel claimed that he could not rely upon a section foreman's order brought to him by another miner because they kid around in the mines and that if he were to obey such an order, the other miners would have him running all over the place doing things which the boss had not actually requested him to do (Tr. 188). Also Deel said that if he had gone to the scoop and had started running it on the basis of a message from Stiltner brought to him by Justice, that he could have been fired for leaving "his" roof bolter at the face and going off to do another job (Tr. 174).

On the other hand, the mine committeeman, Kyle Turner, stated that if another miner had brought him a message to the effect that his supervisor wanted him to run a scoop instead of a roof bolter, that he would have finished installing the bolt he was then working on and "\* \* \* would go hunt the foreman" (Arb. Tr. 126). Turner is an experienced miner and his answer shows that Deel was being unduly obstinate in failing at least to check with Stiltner so as to find out for sure what his assignment was for that day. After all, Deel had not started doing any work and Stiltner was only 120 feet from the place where Deel's roof bolter was situated (Tr. 796).

As indicated above, there has been no mention by anyone in this proceeding that operating the scoop, as requested by Stiltner, would have exposed Deel to any hazardous conditions. Therefore, I cannot find any justification whatsoever for Deel's refusal to operate the scoop when Justice brought Stiltner's work order to him. At the very least, Deel should have been willing

to go 120 feet and ask Stiltner what he wanted him to do that day. As Stiltner appropriately remarked, "I ain't got all day to sit there and beg a man to do his job" (Tr. 877).

#### Final Consideration of Arguments in Deel's Brief

The attorneys who represented Deel in this proceeding were very conscientious and prepared a brief which presents Deel's contentions in as favorable a manner as they can possibly be argued. Deel's counsel followed the Commission's burden-of-proof guidelines as set forth in the Pasula case, supra, in an admirable fashion. Nevertheless, Deel's contentions lose all of their validity when one begins to examine in detail the true facts which underlie Deel's legal arguments.

Deel's brief contains a Table of Contents which facilitates review of his arguments. It is claimed under Part I that Deel's discharge was motivated by his protected activities. Part A under the aforesaid heading lists the protected activities in which Deel is alleged to have engaged. As I have previously indicated, it is a fact that Deel was a safety committeeman for about 32 calendar days and he also accompanied an MSHA inspector on some inspections while he was safety committeeman. Therefore, Deel did engage in some protected activities prior to his discharge.

While Deel's brief does establish that he was engaged in some activities which are protected under the Act, Deel's brief utterly fails to show that his protected activities had anything whatsoever to do with his discharge. It is correct, as Deel argues under Part I(B) of his brief, that DOW was aware of Deel's activity as safety committeeman and it is a fact that he only held that position for 32 days prior to his discharge. Therefore, Deel is necessarily correct in arguing that his protected activity preceded his discharge by only a short period of time. The preponderance of the evidence, however, fails to support the remaining allegations made under Part I(B) of Deel's brief. As I have shown under the headings discussed above, Deel incorrectly argues that DOW displayed animus in the face of Deel's protected activity. Deel himself, for example, stated that when he was first appointed as a safety committeeman, the mine foreman was very cooperative and provided Deel with all the supplies and equipment he needed to make the mine safe (Tr. 199). As to the remaining contentions in Part I(B) of Deel's brief pertaining to DOW's alleged animus toward Deel for his protected activities, my discussion, supra, of the hauling of powder on the tractor, the belt-bridging incident, Deel's alleged refusal to support DOW in the simultaneous firing of two shots, and Deel's allegations of disparate treatment have been thoroughly considered above under those respective headings and the preponderance of the evidence clearly shows that DOW discharged Deel solely for his recalcitrance and insubordination and not because he had brought a few safety-related problems to DOW's attention.

Under Part II of his brief, Deel argues that DOW would not have discharged Deel if he had not engaged in protected activity. Under Part II(A) of Deel's brief, he argues that he was not assigned to operate the scoop before he went into the mine on May 7, 1982, the day of his discharge. Even if one agrees with Deel's argument that he was not given a direct order to operate the scoop for the entire shift before he went into the mine on May 7, 1982, the preponderance of the evidence supports the section foreman's contention that Deel knew before going into the mine that his section foreman wanted him to operate the scoop on that day. I have addressed that contention in great detail in my discussion of the "The Actual Discharge" above, and the preponderance of the evidence clearly supports the section foreman's contention that Deel knew that his section foreman wanted him to operate the scoop before he went into the mine on May 7. Assuming, arguendo, that Deel did not know his section foreman wanted him to operate the scoop on May 7 before Deel went into the mine, Deel's argument in Part II(A)(1) of his brief cannot be sustained because Deel was given a message from his section foreman by another miner as to exactly what the section foreman wanted Deel to do, but Deel was so determined to ignore his section foreman's orders that he refused to go a distance of only 120 feet to ask what his section foreman actually wanted him to do that day. Moreover, it cannot be successfully argued that Deel did other than argue with his section foreman about the assignment even after the section foreman personally came to Deel and gave him specific orders that he wanted Deel to operate the scoop, instead of the roof-bolting machine, on May 7, 1982. These matters are all discussed in great detail above under the headings of "The Actual Discharge" and the other headings following my discussion of the actual discharge.

The most astounding and utterly unfounded argument in Deel's brief is contained under Part II(B) in which he claims that even if he had refused to operate the scoop on the day of his discharge, DOW still would not have been justified in terminating him. Since my prior discussions above of the factual allegations in this proceeding have not specifically dealt with the arguments in Part II(B) of Deel's brief, beginning on page 39 of the brief, I shall give those contentions some detailed consideration at this time. Deel attempts to find support for the aforesaid contention by stating that DOW's management has no established policy for determining when a miner will be discharged for refusing to obey a work order. Deel also claims that the mine foreman inconsistently stated first that an employee was given a warning for the initial refusal to obey a work order and was discharged for the second offense and later stated that the employee was discharged for the first offense.

An employee's refusal to obey a work order may be done in an outright defiant and quarrelsome way or it may be done in such

a way that the section foreman looks upon the refusal as an aberration in a person's normal willingness to work. For example, under the heading of "Deel's Allegations of Disparate Treatment", supra, I discussed the fact that O'Quinn would say he was not going to do a particular job and would then almost immediately thereafter change his mind and do the very work he had just said he was not going to do. Deel's refusal to run the scoop on May 7 was not accompanied by any ameliorating circumstances. He ignored the previous conditions under which the work force had been used which required him to alternate with O'Quinn on running a scoop one day and a roof-bolting machine the next. He ignored the clear indications that the section foreman expected him to run the scoop because Justice and O'Quinn had gone to the roof-bolting machine before Deel ever reached that machine after delivering the other men to their assigned working places. Deel then ignored a specific message brought by Justice from the section foreman telling Deel that the section foreman wanted him to run the scoop. Deel then argued with the section foreman in person about the assignment to operate the scoop. Finally, when given the ultimatum that he would have to run the scoop or get into the scoop's bucket to be taken out for discharge, Deel said nothing and got into the scoop's bucket to be taken outside.

The aforesaid defiant refusal to perform a work order cannot be tolerated by a section foreman if he wants to control the work force on which he has to rely for production of coal. Therefore, regardless of whether DOW's management has written guidelines or a consistent policy of determining when it will discharge employees, Deel's refusal to carry out his section foreman's orders on May 7 were accompanied by such blatant defiance of his section foreman's instructions that the section foreman was clearly within the bounds of reason in deciding that Deel should be given the ultimate punishment of discharge.

Assuming, arguendo, that there is some merit in Deel's claim that he should only have received a warning for his first refusal to obey a work order and should not have been discharged until he had refused a second time to perform a job assigned to him by his foreman, it is a fact that Deel did refuse to perform work on a prior occasion as I have noted in the discussion above under the heading of "The Aborted Discharge". Deel, of course, argues in his brief (pp. 40-41) that DOW cannot take refuge in a claim that Deel's refusal to perform the two jobs of bolting and drilling on a prior occasion should be counted as a true refusal to perform work because, it is argued, that assignment was unfair and the fact that the section foreman ultimately did the roof bolting for Deel for the remainder of that day shows that Deel was unfairly asked to do two different jobs. As I have already pointed out in my discussion of the aborted discharge above, Deel was nearly discharged that day for failing to do anything more than drill 10 holes, requiring 10 minutes of time, within a period of an hour

after the miners had been delivered to the working section. Moreover, Deel's refusal to do both jobs in anything like a reasonable speed exposed the other miners to excessive danger because the section foreman, in order to get any work at all out of Deel on that day, had to operate a roof-bolting machine for the remainder of the shift and therefore had to slight his supervisory work. If he had failed to make methane checks or otherwise had failed to assure that the miners were using proper safety procedures, an accident could have occurred solely because of Deel's obstinate refusal to do two types of work on a day when a full crew of miners was not available.

The aforesaid discussion shows that if Deel was supposed to have been given a warning for the first refusal to perform work, he had already had that warning when the section foreman almost discharged him on the previous occasion. Consequently, his discharge on May 7 occurred after a first warning if that is a prerequisite which should be given any consideration.

The final argument Deel makes in Part II(B) of his brief (p. 41) is that Deel would not have been discharged on May 7 except for his protected activity because other miners had engaged in unprotected activity of refusing a work order and had not been disciplined by discharge for such unprotected activity. As I have clearly shown above under the heading of "Deel's Allegations of Disparate Treatment", other miners have not engaged in refusals to obey work orders in the defiant and belligerent manner which was associated with Deel's refusals to work. If the other miners had acted as Deel did, I am confident they would have been discharged just as Deel was.

The Commission pointed out in the Pasula case, supra, at page 2795, that a judge should give some weight to an arbitrator's decision if there was congruence between his decision and the issues raised in a discrimination case. I have noted in Finding No. 18, supra, that the question of Deel's discharge on May 7 was the subject of an arbitrator's decision issued on June 8, 1982. That decision is pertinent in ruling upon Deel's arguments in Part II(B) of his brief because the arbitrator, upon an adequate record, discussed Deel's refusal to operate the scoop on May 7 and found that his discharge was justified. The arbitrator pointed out on page 6 of his decision that refusal of an employee to comply with an order of his foreman is one of the most serious offenses which can be leveled at a subordinate. The arbitrator found that Deel had willfully refused an order given by his foreman and that DOW's management was clearly justified in discharging him for that refusal. I agree with the arbitrator's ruling and believe that his decision is a further reason for holding that Deel would have been discharged solely for his unprotected activities even if he had not also engaged in the protected activities of calling some safety problems to DOW's attention.

For all of the reasons hereinbefore given, I find that the preponderance of the evidence fails to support Deel's contentions that he was discharged because of any activities protected under section 105(c)(1) of the Act. For that reason, DOW's motion to dismiss is hereinafter granted.

WHEREFORE, it is ordered:

The motion to dismiss made by respondent's counsel is granted and the complaint filed on September 23, 1982, in Docket No. VA 82-62-D is dismissed for failure of complainant to prove that a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 occurred.

*Richard C. Steffey*  
Richard C. Steffey  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

DEC 19 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. LAKE 80-216  
Petitioner : A.C. No. 11-00609-03016  
v. : Captain Strip Mine  
SOUTHWESTERN ILLINOIS COAL :  
CORPORATION, :  
Respondent :

ORDER

Before: Judge Koutras

On October 31, 1983, the Commission issued its decision on the appeal filed in this matter and remanded the case to me for the determination of an appropriate civil penalty for Citation No. 777767, issued on November 30 CFR 77.1710(g). The Commission reversed my decision vacating this citation, reinstated and affirmed the violation, and remanded the case for an assessment of civil penalty.

By agreement of the parties, and after consideration of the record in this case, including the statutory criteria found in Section 110(i) of the Act, a civil penalty assessment of \$78 is imposed for the violation in question, and the respondent IS ORDERED to pay this amount within thirty (30) days of the date of this Order. Upon receipt of payment by the petitioner, this case is dismissed.

  
George A. Koutras  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

DEC 28 1983

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 83-141-D  
ex. rel. MICHAEL HOGAN :  
and ROBERT VENTURA, : Emerald No. 1 Mine  
Complainants :  
v. :  
EMERALD MINES CORPORATION, :  
Respondent :

DECISION

Appearances: Catherine O. Murphy, Esq., Office of the  
Solicitor, U.S. Department of Labor, Philadelphia,  
Pennsylvania, for the Complainants;  
R. Henry Moore, Esq., Rose, Schmidt, Dixon & Hasley,  
Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern a complaint of discrimination filed by the Secretary of Labor on behalf of the named complainants pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977. The complaint alleges that Mr. Hogan and Mr. Ventura were suspended without pay for five days by the respondent on or about December 28, 1982, for exercising certain protected safety rights under Section 105(c)(1) of the Act. Specifically, the complainants assert that they were suspended by mine management for refusing to ride an elevator which they believed to be unsafe. The elevator is used to transport the working shifts to the underground working section.

A hearing was convened in this matter on August 23-24, 1983, in Washington, Pennsylvania, and the parties appeared and participated fully therein. Posthearing proposed findings and conclusions, with supporting arguments, were filed by the parties and they have been fully considered by me in the course of this decision.

## Issues

The critical issue presented in this case is whether the suspensions meted out by mine management were prompted by protected activity under the law. Specifically, the crux of the case is whether the refusal by Mr. Hogan and Mr. Ventura to ride the elevator in question to their assigned work stations on the asserted grounds that it was not safe was reasonable and made in good faith. Additional issues raised by the parties are identified and disposed of in the course of this decision.

### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).
3. Commission Rules, 29 CFR 2700.1, et seq.

### Complainants' Testimony and Evidence

Michael Hogan testified that he first heard about a problem with the elevator during his work shift of December 27, 1982. Sometime after 5:00 p.m., he heard the shift foreman call underground superintendent Morris to advise him that the elevator was inoperative. However, shortly thereafter, the problem was taken care of and the elevator was operating, and he left the underground section by means of the elevator without any problem, and heard nothing further about any problems. He next returned to the mine at approximately 3:30 p.m., on December 28, and he went to the bathhouse to change into his work clothes. At this time he learned from general bathhouse conversation that the crew on the evening shift of December 27 had encountered some problems with the elevator, and that the day shift on December 28th had delayed entering the mine until approximately 10:00 a.m., because the elevator had some problems and some maintenance people were working on it. He also spoke with someone on the day shift who advised him that the elevator doors would not open (Tr. 29-34).

Mr. Hogan testified that after he dressed and left the lamp room on December 28th, he encountered several miners from the day shift who had just alighted from the elevator at the end of their shift, and he identified them as Pat Buttermore,

Charlie Cooper, Jerry Kessler, and Don Dowling. They informed him that the elevator had malfunctioned, that it slowed down as it came up the shaft, and that they then felt it drop and their knees buckled. He described the miners as being "shaken up" and "highly agitated", and described two of them as being "actually white" (Tr. 34-35). Mr. Hogan stated that he then returned to the lamproom for a cigarette, and he spoke with Terry Limely, another miner who had just alighted from the elevator. Mr. Limely told him "you are crazy if you get on that thing, it is really messed up, it's really bad". When he questioned Mr. Limely further, Mr. Limely informed him that the elevator had dropped, started to fall, stopped suddenly, and that his knees buckled (Tr. 36).

After assessing the situation further, and since it appeared that there would be no "collective refusal" to ride the elevator, Mr. Hogan decided to speak with shift foreman Denny Smith. He advised Mr. Smith that he did not believe the elevator was safe to ride and that he was invoking his individual safety rights in refusing to ride the elevator, but that he was available for other work (Tr. 39). Mr. Smith asked him to stand aside while the other employees were loaded on the elevator, and by this time Mr. Ventura had also invoked his safety rights and refused to ride the elevator. At that point in time, mine foreman Allen Hager arrived on the scene and Mr. Hogan advised him that he would not ride the elevator, and Mr. Hager responded "there's nothing wrong with it" (Tr. 41).

When asked to explain why he believed the elevator was not safe at the time of his refusal to ride it, Mr. Hogan replied as follows (Tr. 42-43):

Q. Why did you believe that the elevator was not safe at that time, Mr. Hogan?

A. Well, I felt very sure, for myself, that all the incidents that had happened in the previous twenty-four hours or so, and then the most recent incident, at approximately ten to four, so I felt that if this had been a problem for all this time, that there should have been something done about it, it shouldn't still be malfunctioning like that.

Q. In your opinion, was it still defective at that time?

A. Absolutely.

Q. What did you figure could happen, if you got on the elevator, based on what information you had?

A. Well, I thought it could, if it would fall, I thought perhaps it could get stuck, somewhere along the way you could be stuck in it, and the one thing that Terry Limely had said about it, buckling his knees, I thought perhaps about being injured in it.

Q. What kind of injuries did you feel that you could sustain?

A. Well, I felt that I could get killed, you know, anything from being highly shook up to being killed, or anything in between, you know what I mean.

Q. Mr. Hogan, what reason did you give to Mr. Hager, as to why you were afraid to ride the elevator on that day?

A. Well, I told him that I didn't think it was safe, you know.

Mr. Hogan stated that at the time he informed Mr. Hager that he would not ride the elevator, he had no knowledge as to what steps had been taken to ascertain the reason for the elevator "dropping". He did know, however, that the elevator had been "test run" up and down several times after the complaints by the day shift crew, but he had no knowledge as to whether or not any repairs or maintenance had been performed. He was also aware of the fact that several groups of miners from his shift went underground on the elevator after the complaints were made (Tr. 44). Mr. Hogan also stated that he asked maintenance foreman Jackie Smith "what was wrong with the elevator", and that Mr. Smith replied that he did not know and could not state whether it was safe (Tr. 45).

Mr. Hogan testified that after the initial conversation with Mr. Hager, Mr. Hager instructed Mr. Denny Smith to "find something for us to do" (Tr. 45). He later spoke with Mr. Hager by phone while he (Hogan) was still in the elevator area, and he again informed Mr. Hager that he would not ride the elevator because he didn't feel it was safe, and that "I was using my safety rights" (Tr. 46). Mr. Hogan confirmed that Mr. Hager offered to operate the elevator manually, but he still refused to ride it, and he explained the refusal as follows (Tr. 47):

Q. Did you understand what he meant by the manual motor?

A. Yes, I understood what he meant, yes, he asked us if we would ride on the elevator, if it was being run manually, and I told him that I didn't feel that in my opinion, it didn't make a difference whether it was run on manual or automatic, they seemed to have an obvious problem, and unless they knew the source of the problem, I don't think that they could say it would be safer one way or the other.

Mr. Hogan confirmed that he and Mr. Ventura were then summoned to Mr. Hager's office, and Mr. Hager asked if they were willing to ride into the mine on the slope car. Mr. Hogan stated that he asked Mr. Hager how this would "leave us in regard to having two fresh air escapeways from the mine", and Mr. Hager did not reply and instructed Denny Smith to find something for Mr. Hogan and Mr. Ventura to do. Mr. Hogan and Mr. Ventura left the office, but were immediately called in again and Mr. Hager informed them that he was withdrawing his offer to have them transported into the mine by means of the slope car. Mr. Hager also informed them that depending on the outcome of an investigation by federal and state agencies, they could be subject to disciplinary action, up to and including discharge, and Mr. Hogan informed Mr. Hager that "I understood the situation" (Tr. 50).

Mr. Hogan stated that after leaving Mr. Hager's office, he and Mr. Ventura spent the rest of the shift working around the bathhouse (Tr. 50). At approximately 6:00 p.m., the elevator manufacturer's representative arrived, and shortly thereafter, state inspector Monohan and federal inspector Conrad arrived. At approximately 8:15 p.m., Mr. Hogan, Mr. Ventura, and management and union representatives were summoned to a meeting in Mr. Hager's office. Mr. Hager asked the elevator representative whether it was safe and he indicated that "in his opinion, the elevator was safe, and none of the safety features had been jumpered out". Mr. Hogan stated that he "nodded in the affirmative" to this statement, and that Mr. Conrad indicated that he was no expert on elevators, but was simply present "to see that there were no violations of law", and that after speaking with the elevator representative, he simply wanted to assure Mr. Hogan and Mr. Ventura that it "was safe to run" (Tr. 52). Although Mr. Hogan stated that Mr. Monohan concurred with Mr. Conrad, Mr. Hogan said that Conrad made the statement that "he wouldn't rode [sic] the God damn thing either" (Tr. 54).

Mr. Hogan testified that at the conclusion of the meeting in Mr. Hager's office, Mr. Hager informed him that he and Mr. Ventura were suspended, and that he stated as follows (Tr. 55):

\* \* \* \* he said that it was the company's opinion that Bob and I had interfered with their right to direct the work force at four o'clock, by not boarding the elevator, and we had acted arbitrarily and capriciously, and not in good faith, in not boarding the elevator, and that we were thereby suspended for five days, beginning at about eight forty-five, which the time was, and not to return to work, until Wednesday, January the 5th.

Mr. Hogan confirmed that he became angry after being informed that he was suspended, and that at this time he was available to work underground and would have ridden the elevator (Tr. 56). Mr. Hogan also confirmed that he stated to Mr. Hager that "they had a pretty good guy here up until this point, now I wasn't sure, but watch out now, or something to that effect". Mr. Hogan explained that he was upset because he did not believe he would be suspended, and he confirmed that since the episode he has had no suspensions or other actions taken against him (Tr. 57).

Mr. Hogan stated that after the oral suspension, he met further with Mr. Hager during the initial grievance stage of his case, and he identified exhibit G-1, as a copy of the written notice of suspension which he received on January 4, and he confirmed a notation on the notice which states "revised as agreed in the meeting of December 31, 1982" (Tr. 58). Mr. Hogan explained the notation, and he also confirmed that he had been involved in a prior exercise of his safety rights in the summer of 1981, and was assigned other work but was not suspended (Tr. 60-62). Mr. Hogan also confirmed that he has made safety complaints in the past, and that they are generally taken care of (Tr. 62).

On cross-examination, Mr. Hogan confirmed that he did not know what the elevator problem was on December 27, but by the end of the shift the elevator was repaired, and that any repairs were made within ten or fifteen minutes after he heard that the elevator was inoperative. Mr. Hogan also confirmed that when he spoke with Jackie Smith, Allen Hager, and Denny Smith on December 28, he did not ask them about the condition of the elevator on December 27 (Tr. 65). Mr. Hogan stated that he spoke with no one on the midnight shift, and that other than the fact that the elevator was not working, he had no knowledge of the specific problem.

With regard to any "elevator drop", Mr. Hogan conceded that he did not mention this to Dennis Smith or Jackie Smith, but he believed he mentioned it to Mr. Hager, but was not certain (Tr. 67-68).

Mr. Hogan confirmed that on the afternoon of December 28, after the "elevator dropping incident", there were some tests made on the elevator and it was his understanding that local union president Tom Rebottini rode the elevator during the tests (Tr. 68). Mr. Hogan also confirmed that one or two elevator loads of men on the evening shift went underground before he approached Dennis Smith to tell him he would refuse to ride it, and at these times Mr. Hogan saw no evidence of any elevator malfunctioning (Tr. 69).

Mr. Hogan confirmed that during the taking of his deposition he did indicate that to a small degree, he has a fear of being enclosed in small spaces, and in response to a question as to whether he had a certain fear or riding elevators, he replied "I would call it more of a healthy respect for them" (Tr. 73).

Mr. Hogan stated that prior to the time he refused to ride the elevator, he was aware that the elevator "had been run up and down", and that after the "elevator stopping incident", he did not ask Dennis or Jackie Smith or Mr. Hager whether they had checked the elevator to determine what was wrong with it (Tr. 77).

In response to bench questions, Mr. Hogan confirmed that he was not on the elevator during the alleged "dropping incident", and his knowledge of this event is from what others told him (Tr. 79-80). He recounted what he had heard as follows (Tr. 81-83):

JUDGE KOUTRAS: While you were back there, waiting to come to your shift, you had conversations with people, that were coming off of the day shift?

THE WITNESS: Yes.

JUDGE KOUTRAS: During these conversations, you learned about the problems with the elevator?

THE WITNESS: Yes.

JUDGE KOUTRAS: Now, you indicated that you talked about all these things that had happened, on the elevator, did you actually sit down and talk with Mr. Buttermore, and Mr. Dowling, and have

any detailed discussions with them about the events that transpired on the elevator, while they were coming out, the knees buckling, the fears and all that, before you went to work, or did you find this all out, after all this happened?

THE WITNESS: I spoke with them, within a minute of the time they come out from the elevator that dropped.

JUDGE KOUTRAS: And they said what?

THE WITNESS: They said that it had come up, started to drop, and then fell, and the one in particular, said his knees buckled, and they were saying they were scared.

JUDGE KOUTRAS: Okay.

THE WITNESS: And the one individual screamed.

JUDGE KOUTRAS: Who was that?

THE WITNESS: I don't know, they said somebody on the elevator screamed.

JUDGE KOUTRAS: Did they tell you how far the elevator dropped?

THE WITNESS: Each had their own opinion of that, it's very difficult to tell, but you can't say.

JUDGE KOUTRAS: Any length of time, how did they describe the dropping to you?

THE WITNESS: Well, one individual said, he thought it fell about ten feet, and another one, some of their estimates ran much higher than that, to the possibility that it could have been a hundred feet, or something like that.

JUDGE KOUTRAS: Once the drop had stopped, how did they come out, how did the elevator proceed, how did they take care of the problem, when I say they, whoever was there in charge, did they have somebody there on the elevator that was in charge of the crew?

THE WITNESS: Well, at the time of the incident Jackie Smith was in the penthouse, which is above

ground, above the elevator, and he took over manual control of the elevator at that point, and brought it up.

JUDGE KOUTRAS: How did he know to bring it up?

THE WITNESS: I suppose he knew some way that something had malfunctioned.

JUDGE KOUTRAS: How did he know that, was this elevator coming up and down automatically, do you know?

THE WITNESS: As far as I know, it was running on automatic at that point, yes, but see, because they were having the problems, there were someone where the elevator comes up here, there's an area above the elevator, right above the shaft, to other controls and circuits and stuff, where I guess Jackie Smith was in that penthouse, what they call the penthouse, at the time it malfunctioned, and he just in some manner, knew that it was malfunctioning, and he brought it up manually.

Mr. Hogan indicated that Jackie Smith told him that he did not know what was wrong with the elevator, and Mr. Hogan believed that the only time the elevator would be operated on a manual mode would be in the event of a motor malfunction (Tr. 87, 89). Regardless of which mode it operated on, he did not believe that management had sufficient time to check the malfunction and conduct proper tests (Tr. 89). He conceded that the prior elevator problems had been taken care of the day before his work refusal, but he insisted that "some problem apparently kept repeating itself" (Tr. 90). He also believed that it "was possible" that the prior malfunction still prevailed, and when asked whether he would have still refused to ride the elevator if no one had mentioned that it had dropped, he answered "I don't know, that's hypothetical" (Tr. 91).

Mr. Hogan confirmed that safety committeeman Willis and Union President Rebottini were both present when he refused to ride the elevator, and he indicated that they worked the same shift. He stated further that Mr. Rebottini worked underground and rode the elevator, but that Mr. Willis was assigned to surface work (Tr. 93). Mr. Hogan also confirmed that approximately a year or so earlier he had refused to ride the same elevator, but that this prior incident did not influence his decision in this case (Tr. 98).

Mr. Hogan stated that prior to the instant case he had no knowledge that the elevator had ever "dropped" in the past. He confirmed that the elevator shaft is approximately 600 feet high, and that on prior occasions when miners refused to ride the elevator they were taken into the mine by means of the slope shaft (Tr. 101). He also indicated that he was unaware of any other miners being suspended or fired for refusing to ride the elevator (Tr. 102). He stated that the elevator was installed sometime in 1976 or 1977, and that it has been the topic of past discussions and meetings between the union and mine management (Tr. 104).

Robert Ventura testified that he is employed by the respondent as a mechanic, and that at the time of his suspension he worked as a utility man. He stated that on December 27, 1982, he reached his working place by means of the elevator which took his crew underground on the second shift, 4:00 p.m. to 12:00 p.m. Mr. Ventura stated further that at approximately 5:30 p.m. that day he was informed by his foreman that the elevator was inoperative and that if it were not repaired within a half hour the crew had the option of leaving the mine. Since the elevator was the main escapeway, Mr. Ventura indicated that he would leave and requested that he be allowed to do so. However, since the elevator was repaired, he did not do so. He subsequently took the elevator out at the end of his shift at approximately 11:45 p.m. One of his fellow shift workers told him that as he was boarding the elevator to leave, it raised up 8 to 12 inches and he tripped while getting on (Tr. 109-111). However, Mr. Ventura did not report this and went home.

Mr. Ventura testified that he reported for work on December 28, 1982, and while in the bathhouse he had some discussions with other miners concerning the elevator, but he did not know any of the specific details. While in the lamphouse he said one of the miners from the day shift, Jerry Kessler, advised him that the elevator had stopped and then dropped about fifty feet while he was riding it up the shaft at the end of his work shift. Mr. Ventura then proceeded to the elevator and asked his safety committeeman Willis if the elevator was safe, but he could not state whether Mr. Willis responded. Mr. Ventura then spoke with section foreman Russ Clark, and Mr. Clark referred him to foreman Denny Smith. Mr. Smith advised him that the elevator was safe and referred him to Mr. Hager, but Mr. Ventura did not discuss his safety rights with Mr. Smith (Tr. 111-117).

Mr. Ventura confirmed that Mr. Hager offered to operate the elevator on the manual mode, but he (Ventura) stated that

he was afraid to ride it for fear that it might drop again. He said Mr. Smith advised him that the elevator representative had been summoned to the mine, but that Mr. Smith could not tell him what was wrong with the elevator. During this time, all of the other crew members had gone underground on the elevator, and Mr. Ventura confirmed that this made no difference to him as he was exercising his own personal safety rights in refusing to ride the elevator (Tr. 117-120).

Mr. Ventura confirmed the meeting in Mr. Hager's office and he also confirmed that Mr. Hager offered to take him into the mine by means of the slope car. However, after Mr. Hogan raised the escape route question, Mr. Hager said nothing further and he and Mr. Hogan were assigned other work (Tr. 121). Mr. Hager subsequently retracted his offer to take them in by means of the slope car (Tr. 122). Mr. Ventura corroborated the fact that another meeting was held with Mr. Hager and that he was subsequently suspended (Tr. 123-128).

On cross-examination Mr. Ventura confirmed that at the time of his refusal to ride the elevator he believed that "there was something wrong with the elevator", and he confirmed that he knew nothing about its features (Tr. 133). He also confirmed that Mr. Kessler told him it dropped fifty feet and that this scared him, but that no one was injured. He conceded that since no one was hurt after the asserted fifty foot drop, Mr. Kessler may have exaggerated the extent of the drop (Tr. 134). Mr. Ventura also confirmed that he asked no one else on the elevator about the drop, and he stated that he did tell Mr. Smith and Mr. Hager what he heard about the elevator dropping fifty feet (Tr. 135).

Mr. Ventura confirmed that he knew that the reported elevator malfunction of December 27th had been repaired, but that he did not know all of the specifics of the problem (Tr. 135). He also stated that it was possible that he would not have refused to ride the elevator had Mr. Kessler not mentioned the drop (Tr. 136). Mr. Ventura indicated that he was not aware that test runs had been made on the elevator on December 28th prior to his work shift, and he was unaware that Mr. Rebottini had ridden it (Tr. 139). Mr. Ventura stated that he mentioned the elevator dropping to Dennis Smith, Jackie Smith and Alan Hager, but that none of them could assure him that the elevator was safe (Tr. 141).

In response to further questions concerning what he told mine management about the elevator dropping, Mr. Ventura stated as follows (Tr. 149-151):

JUDGE KOUTRAS: Well, then after you spoke to Willis, when was the first time that you had any contact with any management representative?

THE WITNESS: Right after I talked to Mr. Willis.

JUDGE KOUTRAS: Who did you talk to then?

THE WITNESS: My shift foreman.

JUDGE KOUTRAS: Which is?

THE WITNESS: My section foreman, Mr. Clark.

JUDGE KOUTRAS: You told Mr. Clark, that you were reluctant to get on the elevator, and Clark did what?

THE WITNESS: He referred me to the shift foreman, Mr. Smith.

JUDGE KOUTRAS: Who was Mr. Smith, and you told him the same thing?

THE WITNESS: Yeah.

JUDGE KOUTRAS: Now, in both those conversations did you specifically tell either Mr. Clark, or Mr. Smith, that someone had told you that the elevator had dropped fifty feet?

THE WITNESS: Yes.

JUDGE KOUTRAS: You did?

THE WITNESS: Yeah, well, I didn't say fifty feet, but that it had dropped.

JUDGE KOUTRAS: Did you tell them who had told you that?

THE WITNESS: No.

JUDGE KOUTRAS: Then what happened, when did Mr. Hager get in on the act?

THE WITNESS: Mr. Smith referred me to Mr. Hager.

JUDGE KOUTRAS: Was Mr. Hager there physically?

THE WITNESS: Yes.

JUDGE KOUTRAS: And you told him the same thing?

THE WITNESS: Yes.

JUDGE KOUTRAS: Did you specifically tell Mr. Hager, that you had heard from someone from the previous shift, that the elevator had dropped some distance?

THE WITNESS: Yes.

JUDGE KOUTRAS: What was his reaction to that?

THE WITNESS: He couldn't answer why, I asked him if he was aware of the elevator dropping, and he says, no.

JUDGE KOUTRAS: Do you have any idea how many people were on the elevator, when riding it up with Mr. Kessler?

THE WITNESS: I would say maybe eight people, I don't know, for sure.

JUDGE KOUTRAS: About eight, and you heard no one else say anything about the elevator dropping, how far it dropped or anything?

THE WITNESS: Not at the time, you know it was a situation, where I was coming out to get my lamp, and Jerry was there, and other people were starting to leave, I was running late.

Martin Willis, stated that he is employed by the respondent as a motorman, and that he is vice-president of local union 2258 and also serves a safety committeeman. He confirmed that he went to the mine on December 28, 1982, at 9:00 a.m., to attend a safety meeting with mine management and that he was scheduled to work that day on the 4:00 p.m. to 12:00 midnight shift. While at the bathhouse someone advised him that there was a problem with the elevator, and he spoke with the general mine foreman Allen Hager about the matter and Mr. Hager advised him that "they were working on it". Mr. Willis then proceeded to the elevator area and someone from the work crew which had just finished a shift told him that "the elevator came up, stopped, felt like it dropped, and then it came up on inspection speed" (Tr. 165-169, 171). When asked who told him this, he identified the crew members as Jerry Kessler and Wayne Bara, and he indicated that Mr. Kessler appeared scared and frightened (Tr. 172).

Mr. Willis confirmed that while speaking with several miners waiting to go underground on the four to midnight shift, Jackie Smith informed him that he did not know what was wrong with the elevator and that he could not state whether it was safe. Mr. Willis did not speak with Mr. Hogan or Mr. Ventura at this time, but he did learn that they informed foreman Denny Smith that they were invoking their individual safety rights and would not ride the elevator underground. Mr. Willis then accompanied Mr. Hogan and Mr. Ventura to Mr. Hager's office for a meeting, and Mr. Ventura and Mr. Hogan were subsequently assigned other work. Later, a federal and state inspector arrived on the scene but did not examine the elevator. The elevator company mechanic changed some electrical contactor points and determined that the elevator safety features had not been "jumpered out" (Tr. 178). Later, Mr. Hager informed him that Mr. Hogan and Mr. Ventura would be suspended for five days (Tr. 179). Mr. Willis confirmed that federal inspector Conrad stated that he found no violations of federal law and that as far as he was concerned the elevator was safe. However, state inspector Monahan indicated that he would not ride the elevator (Tr. 180).

On cross-examination, Mr. Willis stated that when he spoke with Mr. Kessler he did not tell him how far the elevator had dropped, and that Mr. Bara characterized the elevator as being "f..... up" (Tr. 183). He also confirmed that while Mr. Bara did not specifically state that the elevator had dropped, he did indicate that it "felt like it" (Tr. 184). Mr. Willis also confirmed that Jackie Smith told him he could not find the elevator problem (Tr. 184).

In response to further questions, Mr. Willis confirmed that after the inspectors and the elevator representative were called, they all "gave the elevator a clean bill of health", and while no one knew what the specific problem was, the changing of the contactor points took care of it and he learned that if dirt gets into the contactor tips they have a tendency to stick (Tr. 190).

Mr. Willis stated that he did not believe that mine management acted unreasonably by calling in the elevator mechanic and the state and federal inspectors, but he believed that Mr. Hogan and Mr. Ventura should not have been suspended, and he expected management to just let them go back to work after they determined that the elevator was safe (Tr. 193). Mr. Willis confirmed that he had ridden the elevator many times and he explained how it operates on the "manual" mode, and he also indicated that "anytime that elevator malfunctions it is a headache for both management and union, it causes a lot of concern" (Tr. 192, 194-195).

Jerry Kessler, mechanic, testified that on December 28, 1982, he reported to work on the day shift, 8:00 a.m. to 4:00 p.m., and the usual procedure is to ride the elevator underground. However, on this particular morning the elevator was not working and his crew had to wait until 10:00 a.m. to go to work. He was told that there was a problem with the elevator and that it had been repaired, but he was not aware of the specific problem. His crew used the elevator and he was not aware of any other problems with it during his shift. However, after his work shift ended and while coming up on the elevator a problem developed, and he described it as follows(Tr. 205-207):

A. Well, when we got on the elevator, we started up, the elevator got approximately one hundred feet from the top, the cage stopped, it fell, how far, I don't know, it stopped, it started back up, and it stopped a third time, then that's when Wally Petros called out to see what was the matter, and he said, that they said it would be going in just a second.

Q. Who is Wally Petros, can you tell the Judge?

A. He's one of my mechanic bosses.

Q. Did you hear him make the phone call?

A. He made the phone call, I didn't hear the conversation.

Q. What did he say to you after he made that call?

A. He said that it would be fixed in just a minute, that it would be coming up, and then it started up on inspection speed, slow speed.

Q. Can you describe for the Judge, in as much detail as you can, as much as you can recall, how long the drop, and how long the drop lasted, when you were in the elevator, can you give us an idea of the distance?

A. It was difficult to tell, because you were enclosed in the cage, but when it stopped, it fell, the second stop buckled my knees, because we were on a downfall, I had time enough to make up my mind, I was prepared to hit the bottom, and I thought that if I could possibly time it and jump, that I wouldn't get my legs broke, whatever time that was, I don't know.

Q. How did the other people on the elevator react, what did you see?

A. Everybody was shook up, everybody was scared, Hap Buttermore screamed, Bob Richie pinched a gentleman's arm, or grabbed his arm, to get something to hold on to, everybody was shook up.

Q. How about when you got off the elevator, what happened when you finally got to the top?

A. Well, as soon as it got to the top, the door opened, and everybody rushed for the landing.

Mr. Kessler testified that after getting off the elevator he mentioned the elevator episode to Denny Smith, but he assumed that Mr. Smith did not hear him (Tr. 208). Mr. Kessler spoke to no other management people, but did speak with Mr. Willis and Mr. Ventura. Mr. Kessler stated that "I told Bob Ventura that something was wrong with the cage, and told him to go out and find out what was wrong" (Tr. 209). Mr. Kessler confirmed that he returned to work the next day and the elevator had been fixed and the midnight and second shift had taken it underground (Tr. 210). After observing several elevator trips, he too rode it underground (Tr. 211).

On cross-examination, in response to a question as to whether he told Mr. Hogan or Mr. Ventura a specific distance that the elevator fell, Mr. Kessler replied as follows (Tr. 212):

Q. Did you tell him how far it fell?

A. I would imagine six to eight feet if I made a guess, I don't know.

Q. So you didn't tell him that it had fallen -- either Mr. Ventura, or Mr. Hogan, that it had fallen fifty feet?

A. No, sir, I didn't tell it had fallen fifty feet.

Mr. Kessler explained further that he did not tell Denny Smith how far the elevator had dropped, and that no one else from mine management was present when he got off the elevator (Tr. 214). When shown a copy of his prior statement to the MSHA investigator indicating that the elevator dropped 10 to 15 feet, Mr. Ventura was asked to reconcile that statement with his testimony that it only dropped six to eight feet. He replied "you are enclosed in the cage, I can't tell you how far the cage dropped" (Tr. 223)

Don Dowling, mechanic trainee, testified that he was scheduled to work the 8:00 a.m. to 4:00 p.m. shift on December 28, 1982, and that upon reporting to work that day he did proceed immediately underground by means of the elevator as was his usual practice because "there was trouble with the elevator" (Tr. 226). He went underground on the elevator at 10:10 a.m. that day after being advised by his foreman that the elevator had been fixed (Tr. 227). When asked whether anything unusual happened when he came out of the mine on the elevator at the end of his shift, he replied as follows (Tr. 227-229):

A. Well, when we got on the elevator, the doors weren't exactly operating correctly.

Q. What were they doing?

A. The doors were slow to close, and then finally someone pushed it shut. And we started up, and I don't know how far up, it seemed like it was fairly close towards the top, than it was the bottom, and it hung up, stayed there for a couple of seconds, and then fell, and then locked, felt like it was pretty solid down, and then while we were falling, one guy screamed and Bob Richie grabbed a hold of my arm, pretty tight, it was hurting me, and then it locked up pretty solid, it felt just like it hit something.

It wasn't the ground or anything, it was like something caught a hold, it felt solid after that, a couple of jerks, and then, while we were waiting there, Wally Petros called outside, and I don't know who he called, but a few minutes after he hung up the phone, it jerked a couple of times, and then started up.

Q. Did you hear what Wally Petros said that day?

A. He was asking about the elevator itself, and I didn't hear no response, and he just kept saying, yeah, yeah, after that.

Q. What did he say, to the rest of you in the elevator?

A. He said, it would be fixed in a little bit, we would be going up, and the next thing you know, we were going up on inspection speed, real slow.

Q. Can you describe for us, how you felt when that happened, Mr. Dowling?

A. I was scared, very scared.

Q. What were you scared of, afraid of?

A. Hitting the bottom, actually, when it fell, then after we locked up solid, and while we were standing there, one guy popped the top off of it, and looked up, and we could see the top of the shaft, it was still a fairly good distance, and I was scared, being locked there, myself.

Mr. Dowling testified that after he got off the elevator he made no comments to any of the other miners, and since he did not know Mr. Hogan or Mr. Ventura he did not speak with them (Tr. 230). He returned to work the next day and rode the elevator and "it worked fine" (Tr. 231).

On cross-examination, Mr. Dowling confirmed that after he got off the elevator he did not approach mine management, but he was sure that someone else had informed them as to what happened (Tr. 233).

Charles W. Cooper, continuous miner operator, testified that he worked the 8:00 a.m. to 4:00 p.m. shift at the mine on December 28, 1982, and he did not enter the mine until approximately 9:45 a.m. because the elevator was not working properly (Tr. 238). When asked whether anything unusual happened at the end of his shift, he replied as follows (Tr. 239-241):

A. Well, we started up in the elevator, it came up, oh, a little over half way, and then the elevator stopped, and when it stopped, and then it seemed to drop right back down, it dropped oh, around eight to ten feet, roughly, and we couldn't judge the distance it fell, and then the elevator stopped again, and like locked up, and when it locked up, everybody jumped down you know, like, you were on a gum band, just being bounced, and you could feel the elevator, like shaking up and down.

Q. Could you see the other people move up and down, like you just described?

A. Yes, all of them, the majority of them did.

Q. Okay. What else happened, what did the other employees do now?

A. Everybody was standing dazed like, you know, looking at each other, and saying what happened, and stuff like this.

Q. What did you think had happened?

A. I thought we were going down.

Q. By going down, you mean you thought you were going to hit the bottom?

A. I thought we were going to the bottom.

Q. Were you afraid?

A. Yeah.

Q. What happened next?

A. Well, then, Wally Petros, the foreman, got on the phone, and called out to somebody outside or something.

Q. Could you hear what he said?

A. No, offhand, I couldn't hear what he said.

Q. What happened, after he called outside?

A. The elevator, it was a few minutes, and then the elevator started, and it started coming up, when it got to the top, it went up past where it usually stops at the door, about eight, ten inches above, and then somebody or something, it recycled or something, and it came back down a couple of inches above the normal position, the door opened.

Mr. Cooper stated that after he got off the elevator he spoke with Mr. Willis and advised him that "there's something wrong with that elevator". However, he did not see or speak with Mr. Hogan or Mr. Ventura (Tr. 243). Mr. Cooper confirmed that he returned to work the next day, December 29, and was told that the elevator had been repaired, that some relays were replaced, and he rode it underground without incident and there has been no reoccurrence of any elevator "dropping" (Tr. 244).

On cross-examination, Mr. Cooper stated that he could not recall seeing the wall of the elevator shaft from the inside of the elevator when it dropped, and he confirmed that he estimated that it fell eight to ten feet "by the way I felt" (Tr. 245). He estimated that 18 to 19 miners were on the elevator during the incident in question (Tr. 246).

Mark A. Sunyak, shuttle car operator, testified that he worked the 4:00 p.m. to 12:00 midnight shift on December 28, 1982. After dressing, he proceeded to the hallway by the elevator to take the first trip underground. When the elevator doors opened, no one from the crew seemed to be boarding and someone commented that there was a problem with the elevator. He could recall no specifics, he did not ask the shift foreman if there was a problem, and he could recall no conversations as to whether the elevator had problems (Tr. 252). As the crew began getting on, he hesitated but then got on after the shift foreman began telling everyone to get on. He rode the elevator down without incident, and no one said anything further about it (Tr. 254).

On cross-examination, Mr. Sunyak stated that his initial reluctance to board the elevator was prompted by his doubts as to whether anything was wrong with it. However, since he knew none of the facts he rode it. He confirmed that prior to December 28, 1982, he had exercised his safety rights in the past with regard to certain imminent danger situations but was never disciplined since management recognized the dangers and took corrective action (Tr. 258).

Mr. Sunyak stated that before he got on the elevator on December 28, he was not aware that employees from the preceding shift had reported a "drop" while they were coming out. He confirmed that he worked on the same shift with Mr. Hogan and Mr. Ventura, but did not know at that time that they had refused to ride the elevator (Tr. 259-260). He also indicated as follows (Tr. 267):

JUDGE KOUTRAS: Did you hear anything from the previous shift coming up?

THE WITNESS: No, I had no knowledge of anything.

JUDGE KOUTRAS: The only knowledge that you had, was the night before, there was a problem?

THE WITNESS: Yeah, but that was more or less unusual, if that would be the right word, but just little things like that happen every now and then, but I was probably more concerned about getting home, than anything else.

JUDGE KOUTRAS: But while you were waiting to ride the elevator down, you knew that something was up, because things weren't moving along, you surmised that there were some problems?

THE WITNESS: Yeah, right.

JUDGE KOUTRAS: Yet, you didn't exercise your safety rights, and refuse to go?

THE WITNESS: Not knowing full well, what all was involved, I didn't really feel that I could, not knowing any specifics on it.

Thomas Barrett, respondent's employee relations representative, confirmed that he was at the mine on December 28, 1982, and was aware of the elevator problem. He identified exhibit G-3 as a memorandum he prepared from his own personal notes relating to the events of December 28, and he confirmed that he was present when Mr. Hager informed Mr. Willis that he had changed his mind about offering to transport Mr. Hogan and Mr. Ventura into the mine through the slope (Tr. 273-276).

#### Respondent's Testimony and Evidence

John F. Lusky, testified that he is employed by the Schindler Houghton Elevator Company as an elevator mechanic, and he described his duties and experience. He confirmed that he received a service call on the afternoon of December 28, 1982, and he went to the mine in response to information that there was a "problem with the elevator not automatically returning to the top, and that it had made a stop. It was traveling up, and it made a stop" (Tr. 288). Mr. Lusky identified exhibit R-1 as a copy of a service record indicating the work which he performed on the elevator in question, and he estimated that he arrived at the mine at 6:00 p.m. He confirmed that he found no malfunction with the elevator while he was there, but did indicate that he visually inspected the elevator, adjusted some switch contacts, and he changed a relay contact since he believed it had something to do with returning the car to the top. While he indicated that it was possible that the contactor was related to the elevator stopping, he did not believe this was likely because there is very little current passing through the contactor (Tr. 292). He also explained the adjustments he made to certain switches, and confirmed that the work he performed on the elevator did not relate to or affect the safety features of the elevator. He also confirmed that the safety features were not by-passed or "jumpered out", and he could not determine what caused the elevator to stop (Tr. 293).

Mr. Lusky stated that during the time he was at the mine the elevator was safe. Based on the work he performed on the elevator, he was of the opinion that it was safe earlier in the day. He confirmed that the elevator will not run if the doors do not close properly, and in his opinion the fact that there is a problem with doors would

not affect the other safety features because they are on separate circuits (Tr. 295). He described the safety features of the elevator, and he stated that no one told him that the elevator had dropped. He also indicated that had the elevator dropped "the safeties would have set," and he saw no evidence that this happened (Tr. 298).

On cross-examination and in response to further questions, Mr. Lusky explained the functions of the elevator relays and contactors, and he confirmed that he had not previously done any work on the elevator in question. He confirmed that he spoke with no one who had ridden the elevator and that he considered his service call to be "routine." He also indicated that any prior service calls would be a matter of record, but he could not recall exactly when the elevator was first installed. He confirmed that an elevator could stop for a number of reasons, and conceded that such a stop would be an "unusual event" (Tr. 311).

Willard D. Smith, shift foreman, testified that on December 27, 1982, when he rode the elevator down at 5:30 the doors would not shut and the elevator would not go up. He reported this to the maintenance foreman, and the elevator was operated manually until the problem could be taken care of. The elevator was repaired, but he did not know what work was done on it. He reported to work for the second shift on December 28, and prepared to load the elevator to send the crews underground. He was not present when the elevator stopped while coming up and he spoke to no one who was on that elevator. He stated that "I had heard through the maintenance that they had trouble with the elevator," and he was present when Mr. Rebottini came up on the elevator and he heard him state "it worked fine." Mr. Smith did not speak with Mr. Rebottini, and after he got off the elevator the evening shift began loading on the elevator (Tr. 324).

Mr. Smith stated that no one told him that the elevator had stopped and he heard no one waiting to load on his shift state that they thought the elevator was unsafe. Three elevator loads went underground while he was there and the elevator did not malfunction. Mr. Smith described his conversations with Mr. Hogan and Mr. Ventura as follows (Tr. 325-327):

Q. Now, there came a point when Ventura and Hogan approached you?

A. Yes, they did.

Q. What did they say to you.

A. The only thing I remember Bob saying, Ventura saying, was, "Do you guarantee me -- , can you guarantee me that elevator is safe?"

Q. And what was your response to that?

A. I said, "The elevator is running fine, but I can't guarantee anything."

Q. Did you, at that point, feel that it was safe to ride?

A. Yes, sir.

Q. Did Mr. Ventura and Mr. Hogan raise the fact that they had heard that the elevator had dropped?

A. I don't recall it. No.

Q. Had you heard from anybody else, at that point, that the elevator had dropped?

A. No. I didn't.

Q. Did either Ventura or Hogan raise to you the issue of the previous malfunctions on the elevator as making it unsafe?

A. No, they didn't.

\* \* \*

Q. Yes, assuming that Ventura and Hogan came up to you and said, "We heard that it dropped fifty to a hundred feet" would you have behaved differently?

A. No.

Q. And that's because you had heard that it was running properly at that point?

A. Fine, Right.

Q. Did you have any further conversation with Ventura and Hogan?

A. Not after that, no sir.

Q. What did you tell them to do?

A. If I recall right, I said, "Well -- ". Allen Hager, our mine foreman was there. We all went into the office, and meanwhile, as soon as they arrived in the office, I stepped inside, and I had a phone call, and I had to leave. And that's all that I --. What happened in the office, I don't recall. I wasn't in there.

Q. Were you involved in assigning them other work?

A. Yes, sir.

Q. Did you ride that elevator that day?

A. Yes, sir.

On cross-examination, Mr. Smith stated that he surmised something had been wrong with the elevator when he saw Mr. Rebottini "test ride" it, but he was sure it was fine when Mr. Rebottini got off. Mr. Smith confirmed that approximately 80 miners rode the elevator into the mine after 4:00 p.m. on December 28, and he also confirmed that he was present by the elevator doors when the 8:00 a.m. to 4:00 p.m. shift came out (Tr. 332). He denied speaking with Charles Cooper, Donald Dowling, or Patrick Buttermore, and denied hearing any comments that there was anything wrong with the elevator (Tr. 334). He also denied hearing any comments that the elevator had dropped or that men were screaming when it did (Tr. 335-336).

In response to further questions, Mr. Smith indicated that Mr. Hogan and Mr. Ventura had served on his crew for two years and that during this period they had never asked him to "guarantee" their safety, and he conceded that this was an "unusual occurrence". He conceded that Mr. Ventura and Mr. Hogan were concerned when they refused to ride the elevator, and when asked about this concern on their part, he replied "I guess they were reluctant because of the situation that happened on the day shift. That's the only reason I can say" (Tr. 339). When asked what he would have done had he been told that the elevator stopped or dropped, Mr. Smith replied "if the maintenance people that was checking the elevator told me it was safe and okay to operate, then I would have expected them to go to work" (Tr. 340). He explained further at Tr. 341:

JUDGE KOUTRAS: But, as far as guaranteeing anyone's safety, you took the position that you couldn't do that?

THE WITNESS: I could not.

JUDGE KOUTRAS: So, for all you know, even though they said it was fine, it could very well have been, once they got on, something could happen, some unforeseen thing, or something.

THE WITNESS: It could have malfunctioned.

JUDGE KOUTRAS: Is that the context in which you made the statement that you can't guarantee their safety?

THE WITNESS: Right. I could have put them on it, and the doors may have malfunctioned, anytime.

JUDGE KOUTRAS: But, in any event, once you got on and went down, you went down without any problem?

THE WITNESS: Fine.

JUDGE KOUTRAS: And, how about coming back at the end of the shift?

THE WITNESS: Yes. It worked fine. To my knowledge, no one had reported anything.

Mr. Smith confirmed that he had no similar problems with Mr. Hogan or Mr. Ventura in the past and that he considered them to be good conscientious employees. When asked whether he would have ridden the elevator given the same circumstances, Mr. Smith replied as follows (Tr. 342):

JUDGE KOUTRAS: Let me ask you this hypothetical. It might be tough to answer, but put yourself in their position, what would you have done?

THE WITNESS: I would have rode the elevator.

JUDGE KOUTRAS: For what reason?

THE WITNESS: Because everyone else rode it, and I would have felt that --. I would have rode it too. I would've felt that it was safe once it was checked out, to ride.

Wayne S. Bair, maintenance foreman, testified that he worked the day shift on December 28, 1982, and was on the elevator when it stopped while coming up the shaft. He indicated that the elevator stopped near the top and it did not drop. He described the sensation when it stopped as "you got light on

your feet". He heard no one scream and saw no one grab anyone's arm, and he stated that "everyone kind of got quiet" (Tr. 347). He confirmed that foreman Walter Petros called out on the elevator phone and that after the call the elevator came up. After he got off the elevator he encountered Mr. Willis and they went to Mr. Hager's office and Mr. Bair told Mr. Hager that "the elevator did mess up". Since he did not believe that it dropped, he said nothing to Mr. Hager about any reported drop.

Mr. Bair stated that at no time did he hear anyone state that the elevator had dropped. He confirmed that a week prior to the hearing Mr. Kessler remarked that he thought the elevator had dropped and while Mr. Bair disagreed with him he told Mr. Kessler "to tell them the way he really feels" (Tr. 349). Mr. Bair also confirmed that he did not speak with Mr. Hogan or Mr. Ventura on the day in question.

In response to further questions, Mr. Bair stated that when the elevator stopped he felt "a little light", but that his knees did not buckle and his feet never left the floor (Tr. 350). He indicated that "I think some people had some pretty big eyes, . . . but outside of that everything was pretty quiet right after that, until they made the telephone call" (Tr. 353). He said that he would have ridden the elevator again "once it was checked".

Adren A. Whitehair, maintenance clerk, testified that while he was not directly involved in the repair of the elevator on December 28, 1983, he was aware of the problems that day. He confirmed that a Haughton elevator representative and surface electrician Scott Kramer had performed some work on the elevator on the morning of December 28, and that no other problems developed until late in the afternoon. He received a call from the bottom of the elevator which indicated that the doors would open and close but that the elevator would not work properly. He contacted Jackie Smith in the shop, and Mr. Smith and shop mechanic Jim Howard checked the elevator, and they "recycled" it by turning the power on and off. They then tested it by "two dry runs" and it worked properly. However, ten to fifteen minutes later the doors malfunctioned and Mr. Smith recycled it a second time, and after testing it he indicated that it was working (Tr. 358).

Mr. Whitehair testified that after the first elevator malfunctions were taken care of he received a call that the elevator had stopped. Mr. Petros advised him that it stopped approximately 100 feet from the top of the shaft and he said nothing about any drop. Mr. Whitehair then went to the penthouse, and Jackie Smith was checking the contactors. The elevator

was tested, and after several test runs, Jackie Smith advised him that the elevator was operating properly. Mr. Whitehair later heard some conversations regarding the elevator drop, but he was not present when Mr. Hogan and Mr. Ventura initially spoke with Mr. Hager. However, he was present at a subsequent meeting when Mr. Willis informed Mr. Hager that they should not be expected to be on an elevator which was not safe and which purportedly dropped (Tr. 362).

In response to further questions, Mr. Whitehair stated that if he had been told that the elevator had dropped he would not permit anyone to ride it. He characterized a "drop" as the "free-falling of an elevator", and the distance would not make any difference. When asked how he would account for such differences of opinions as to the purported drop of the elevator, he replied "That's hard to say, but I will say that when an elevator stops when its traveling at speed, that you will get light-footed, of course" (Tr. 366).

Jackie T. Smith, maintenance foreman, testified that his work experience includes some five years of inspections of the elevator in question. He identified exhibit R-2 as a copy of an inspection form dated December 28, 1982, for the elevator in question, and he confirmed that it was executed by mechanic Scott Kramer. Mr. Smith explained all of the required inspection steps listed on the form, and he explained the safety features of the elevator, and he confirmed that operating it on a manual speed does not result in any loss of safety (Tr. 371-379).

Mr. Smith confirmed that he was present on the morning of December 28, 1982, when work was done on the elevator during the day shift. He stated that he received a call at 3:05 p.m. advising him that the elevator was stuck on the bottom. He checked the switches, ascertained that the safety features were operative, and after recycling the power and making some test runs the elevator operated properly. Shortly thereafter he was again informed that the elevator doors would not function properly, and since they couldn't close the elevator would not run. He recycled the power again and the elevator worked properly. Shortly after this, the elevator stopped and he could see it from his vantage point in the penthouse. As soon as the elevator stopped, the brakes set and he observed no slippage. He then turned it on the manual mode and Mr. Petros called him. Mr. Smith said that he informed Mr. Petros that "We're going to bring you up manual mode" (Tr. 383).

Mr. Smith stated that he immediately brought the elevator up on manual mode to avoid "waiting time" while he recycled the power. Had there been any malfunction of the safety

features he would not have been able to move the elevator at all. After bringing the elevator to the top, he checked out the contactors and "test ran" the elevator at least four times, but he could not find out why it had malfunctioned. However, it was his opinion that the elevator was safe to operate. He later encountered Mr. Hogan and Mr. Ventura and they asked if he had found the problem. Mr. Smith responded that he had found nothing wrong with the elevator, and in response to a question as to whether it was safe to ride, Mr. Smith stated that he responded "it was the safest piece of equipment in the mine" (Tr. 386). Mr. Smith could not state whether Mr. Hogan or Mr. Ventura said anything to him about the elevator dropping.

Mr. Smith stated that he was present when the Haughton elevator representative arrived to check out the elevator, and he confirmed that some contactors were changed but that the mechanic could not specifically identify the malfunction that caused the elevator to stop (Tr. 388).

On cross-examination, Mr. Smith stated that he did not speak to any of the miners who were on the elevator when it stopped. He identified a copy of his previous statement given to an MSHA special investigator, exhibit G-4, and confirmed that his statement indicated that he told Mr. Hogan and Mr. Ventura that he "didn't know what the problem was". When asked whether there was a difference in telling them that "there's no problem", as opposed to telling them that he "didn't know what the problem was", he replied "I'd say that's pretty close to the same thing" (Tr. 395).

In response to further questions, Mr. Smith stated that from his position in the penthouse at the time the elevator stopped he would have been able to observe any drop. While he could not see the actual cage, he could observe the cables and would have seen any slippage of the elevator motor or head frame. He confirmed that he was standing at the penthouse by the elevator braking device when the motor stopped and he heard the brakes set, and had the elevator dropped he would clearly have seen the cable drop (Tr. 404). When asked to explain why some of the miners described the stop as a drop, he replied "I've been on it when it stopped before, and it gives you a sensation of rising and then falling down, gravity" (Tr. 404). He also confirmed that from his position he could hear no shouts or screams from inside the elevator cage.

James S. Conrad, Jr., MSHA Federal Mine Inspector, testified that he was familiar with the safety features required

for elevators in underground mines. He confirmed that he was called to the mine at approximately 5:00 p.m. on December 28, 1982, by Mr. Hager, the general mine foreman, and that he was asked to come to the mine "to help settle a dispute in relation to the elevator, whether or not it was safe to operate" (Tr. 408). After arriving at the mine, Mr. Conrad indicated that he met with elevator mechanic John Lusky who advised him that none of the safety devices were "jumpered out". Mr. Lusky also advised him that the elevator was safe to operate, and Inspector Conrad confirmed that he issued no citations or violations (Tr. 411).

Allen E. Hager, General Mine Foreman, testified that he was aware of the fact that on December 27 and 28, 1982, the elevator in question was experiencing problems. There was a problem with the doors on December 27, and it was taken care of. The problems early in the day on December 28, were also with the doors, and the midnight shift came out of the mine by means of the slope, and this was because the elevator representative was trying to find out what was wrong with the elevator (Tr. 425). The decision to call in the mechanic had nothing to do with the safety of the elevator because the elevator could have been used and any malfunctions had nothing to do with its safe operation (Tr. 426).

Mr. Hager confirmed that on the morning of December 28, the malfunctioning elevator doors had been repaired, but another malfunction occurred at approximately 3:00 p.m. that day, and this was again connected with the doors. He later learned that the elevator stopped as it was coming up with a load of miners. When he was informed of this incident, he proceeded to the elevator landing, and learned that Mr. Smith had run some tests and he asked Mr. Smith if anything was malfunctioning and he responded "no" (Tr. 427). Mr. Hager then remained while the evening shift rode the elevator down, and prior to 4:00 p.m. no one complained to him concerning the safety of the elevator (Tr. 428).

Mr. Hager stated that he first learned that Mr. Hogan and Mr. Ventura refused to ride the elevator after the day shift had "caged out" and the majority of the afternoon shift had "caged in". Mr. Hogan, Mr. Ventura, and Mr. Denny Smith "confronted him" on the elevator landing and informed him of the fact that Mr. Hogan and Mr. Ventura were exercising their individual safety rights because they believed the elevator was unsafe to ride (Tr. 429). Mr. Hager stated that he offered to "cage them down on in the manual mode" and explained to them that he believed the elevator was safe to ride. His precise words were "there's nothing wrong with the elevator. It's safe to ride" (Tr. 430). He stated that they still persisted in invoking their individual safety rights and that they said nothing about the elevator dropping (Tr. 430).

Mr. Hager confirmed that he met with Mr. Hogan and Mr. Ventura in his office after their refusal to ride the elevator and that he repeated his offer to cage them in manually, and also repeated his view that the elevator was safe to ride (Tr. 431). Prior to this meeting he (Hager) had spoken with Jackie Smith and was informed that the elevator was operating properly and that he had found nothing wrong with it. Mr. Hager also confirmed that he had initially offered to transport Mr. Hogan and Mr. Ventura into the mine by means of the slope, but subsequently retracted that offer. He retracted the offer after he gave thought to the fact that by making the offer in the first place he would be placed in a position of saying there was something wrong with the elevator, and as far as he was concerned this was not the case (Tr. 432).

Mr. Hager stated that he summoned the federal and state inspectors to the mine to determine the safety of the elevator because this is the procedure dictated by the labor-management contract, exhibit R-3 (Tr. 433-435). He also called in the elevator representative, and Mr. Hager stated that there was no doubt in his mind as to the safety of the elevator (Tr. 436-437). He confirmed that during his meetings with Mr. Hogan and Mr. Ventura concerning their refusal to ride the elevator no information was forthcoming concerning the purported elevator dropping or the fact that people on the elevator had screamed, grabbed other people's arms, or that legs had buckled (Tr. 437).

Mr. Hager confirmed that he met with Mr. Willis, Mr. Hogan, and Mr. Ventura and informed them collectively that he was suspending Mr. Hogan and Mr. Ventura for their refusal to ride the elevator. He further confirmed that the suspensions were made in accordance with the contract which authorizes such suspensions if it is determined that the proper state and federal inspection officials confirm that the work conditions on which the refusals are based did not constitute violations. Further, it was his view that Mr. Hogan and Mr. Ventura did not act in good faith because the elevator was operating properly at the time of their refusal to ride it and that approximately 160 miners caged in and out of the mine on the very same elevator at the same time as the work refusal (Tr. 441-442). When asked what he would do if he had been told that the elevator dropped 50 to 100 feet, Mr. Hager responded as follows (Tr. 445):

A. Well, I'd investigate the incident with the people that allegedly made the statements, and if they were sincere in saying they fell that distance, I'd have no alternative but to shut the elevator down until it was inspected thoroughly.

On cross-examination, Mr. Hager reiterated that he may have heard about the elevator dropping, but the first time he heard this would have been after 4:00 p.m. on December 28, 1982. He also confirmed that he had no knowledge as to the specific causes of elevator malfunctions at the time he made the offer to take Mr. Hogan and Mr. Ventura down on the elevator by manual mode (Tr. 447). He was aware of the test runs and had no knowledge of any additional malfunctions at the time this offer was made, and he was present when Mr. Rebottini got off the elevator. Mr. Hager confirmed that while he did not draft the suspension notices given to Mr. Hogan and Mr. Ventura, exhibits G-1 and G-2, he signed them (Tr. 450). He confirmed that Mr. Hogan had on one previous occasion exercised his individual safety rights in connection with the elevator, but he was not disciplined and was given alternative work (Tr. 454).

In response to further questions, Mr. Hager denied that Mr. Hogan or Mr. Ventura ever apprised him of any statements made by miners on the elevator that the elevator had dropped any distance, that their knees buckled, that someone grabbed another, or that anyone screamed (Tr. 460-461). If these assertions had been communicated to him he would have shut the elevator down and conducted a thorough investigation (Tr. 461).

Walter A. Petros was called as the Court's witness, and he confirmed that he is employed by the respondent as a maintenance foreman. He confirmed that he was on the elevator in question when it stopped on December 28, 1982, and that he spoke with Jackie Smith over the telephone from the elevator. Mr. Petros stated that after the elevator stopped he heard no one screaming, and he described the demeanor of the miners on the elevator as follows (Tr. 474-475):

Well, I would say, just like everybody else, it was a shock at first, you know, because just like going in any other elevator that comes up to the floor, it sort of, you know, your stomach sort of feels uneasy to start with, and then it just settles back down when you come to a pretty fast stop. But, I know myself, it's happened two or three times that when you're going down somebody'll accidentally hit the stop button. And it does the same thing. It gives you a jolt. And as soon as it did that, you know, like I said, everybody was probably scared at first, but as soon as it did that, and it did it, you realized what happened, or I did. And then I went over to find out what, you know, had caused it.

Mr. Petros stated that in his opinion the elevator did not drop, and he indicated that when it came up the shaft and stopped there was spring tension on the cables and that "this will give you a little up and down movement" (Tr. 475). When asked whether he detected any panic on the elevator, he replied as follows (Tr. 476):

Not right -- . You know. I don't know. Like I said, I was trying to get to the phone and, I mean, I didn't actually pay any attention to what everybody was saying. But, some people are more susceptible to panic than others. So, you know, I mean --. I think, what happened is when it did stop and then I got on the phone and talked to Jackie and it started back up, I don't really think there was time for --, you know, if it would have set there for maybe 10 or 15 minutes, then you might have got the people into a little panic situation.

Mr. Petros confirmed that after he got off the elevator he went to the bathhouse but did not speak with Mr. Hogan or Mr. Ventura, and he remembered speaking to no one else, nor did he remember observing anyone talk to any management people (Tr. 477).

#### Findings and Conclusions

The critical issue in this case is whether the refusal by Mr. Hogan and Mr. Ventura to ride the elevator underground to their work stations because they believed it was not safe is protected by Section 105(c) of the Act. Although Mr. Hogan and Mr. Ventura were assigned other work after the refusal, since the elevator was the normal means for transporting them underground to their assigned duty stations, their refusal to ride the elevator constituted a work refusal.

Refusal to perform work is protected under Section 105(c)(1) if it results from a good faith belief that to go ahead with the assigned work would expose the miner to a safety hazard, and if the belief is a reasonable one. Secretary of Labor, ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (October 1980), rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 802, 2 BNA MSHC 1213 (April 1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1982). Further, the reason for the work refusal must be communicated to the mine operator. Secretary of Labor ex rel. Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (February 1982).

In Secretary of Labor ex rel. Bruce Edward Pratt v. River Hurricane Coal Company, Inc., 5 FMSHRC 1529 (September 1983), the Commission relied on its prior decisions in Robinette, supra, and Haro v. Magma Copper Co., 4 FMSHRC 1935, 1944 (November 1982), and rejected River Hurricane's argument that any standard used to assess the legitimacy of a miner's work refusal must be an objective one supported by ascertainable evidence. The Commission followed its previously adopted standard that the miner's honest perception of a hazard be "a reasonable one under the circumstances." The Commission also rejected a suggestion that it articulate a standard as to how severe a hazard must be in order to trigger a miner's right to refuse to work, and opted to rely on the "gradual development of the law in the cases contested before us."

In the Pratt case, the Commission considered the miner's perception of the hazards involved when he refused to fight a battery fire and refused to agree to attempt to extinguish future fires under similar circumstances. The Commission found that Pratt feared an explosion of the batteries in question would throw shrapnel and acid over him and might kill him, and they affirmed the Judge's finding that Pratt reasonably believed in a serious risk of injury from an exploding battery. Citing Bush v. Union Carbide Corp., 5 FMSHRC 993, 998 (June 1983), the Commission held that once a reasonable good faith fear in a hazard is expressed by a miner, the operator has an obligation to address the perceived danger, 5 FMSHRC at 1534.

After review of the circumstances surrounding Pratt's work refusal, the Commission found that the mine operator's explanation or attempt to address his fears did not include specific information or support as to why fighting the battery fires may not have been as dangerous as Pratt believed. The Commission affirmed the Judge's finding that the operator violated Section 105(c) of the Act by discharging Pratt for his refusal to perform a task still reasonably believed by him to be dangerous.

The facts and circumstances surrounding the work refusal in the Pratt case are different from those presented in the instant case. In addition, it seems clear to me that contrary to the position taken by the mine operator in Pratt, the operator in the case at hand took positive and affirmative steps to address the concerns articulated by Mr. Hogan and Mr. Ventura, and my reasons for this conclusion follow below.

Mr. Ventura and Mr. Hogan were not on the elevator at the time of the "dropping" incident. They learned of the incident through passing conversations with others. The

testimony concerning the purported dropping of the elevator is conflicting. Mr. Hogan testified that the miners he spoke with had different opinions, and that the purported dropping distance ranged from ten to 100 feet. Mr. Ventura claimed that Mr. Kessler informed him that the elevator stopped and then dropped about 50 feet. However, Mr. Ventura conceded that since no one was injured, Mr. Kessler may have exaggerated the extent of the purported drop. Mr. Ventura also testified that he believed eight miners may have been on the elevator with Mr. Kessler, but heard no comments from anyone else indicating that the elevator dropped.

Mr. Kessler denied that he told Mr. Ventura that the elevator dropped 50 feet. He then testified that he may have said it fell six to eight feet, and when asked to reconcile his prior signed statement to the MSHA investigator that it dropped 10 to 15 feet, Mr. Kessler stated that since he was enclosed in the cage "I can't tell you how far the cage dropped."

Mechanic trainee Don Dowling and continuous miner operator Charles Cooper, who were also on the elevator, believed that the elevator rose, stopped, fell, and then stopped again. Mr. Dowling did not state how far it fell, and while Mr. Cooper said it may have fallen eight to 10 feet, he also said "we couldn't judge the distance it fell."

Mr. Dowling stated that after he got off the elevator, he did not speak with Mr. Hogan or Mr. Ventura because he did not know them. He also stated that he said nothing about the incident to mine management. He returned to work the next day, rode the elevator, and he indicated that "it worked fine."

Mr. Cooper stated that after he got off the elevator, he spoke with safety committeeman Willis, but simply told him "there's something wrong with the elevator." However, Mr. Cooper said that he did not see or speak with Mr. Hogan or Mr. Ventura at that time. Mr. Cooper returned to work the next day and rode the elevator without incident.

Shuttle car operator Mark Sunyak, who worked the same shift as Mr. Hogan and Mr. Ventura on December 28, testified that he rode the elevator down on the first trip and that he heard no one from the preceding shift mention anything about the elevator dropping.

Shift foreman Dennis Smith loaded three trips on the elevator during Mr. Hogan's and Mr. Ventura's shift, and the

elevator did not malfunction. He heard no statements from the prior shift indicating that the elevator had dropped.

Maintenance Foreman Wayne Bair was on the elevator when it stopped, and he stated that it did not drop. Maintenance Foreman Walter Petros was on the elevator when it stopped, and he stated that it did not drop. Maintenance Foreman Jackie T. Smith was at the elevator controls when it stopped. He observed nothing in the cable mechanism which would lead him to conclude that the elevator dropped.

Mr. Hogan admitted that before telling Dennis Smith that he refused to ride the elevator, he was aware that several elevator trips were made underground with other crew members and that he observed no evidence of any elevator malfunction. Mr. Hogan also conceded that after the asserted elevator dropping incident, he did not ask Dennis Smith, Jackie Smith, or Alan Hager whether they had checked the elevator to determine what was wrong with it.

At no time during his direct testimony did Mr. Hogan ever indicate that he specifically informed anyone in mine management about the purported elevator dropping prior to, or at the time of, his work refusal. On cross-examination, Mr. Hogan conceded that he did not mention the purported elevator dropping to Dennis Smith or Jackie Smith. As for Mr. Hager, Mr. Hogan testified that he "believed" he mentioned it to Mr. Hager, but was not certain.

Mr. Ventura testified that he mentioned the elevator dropping to Dennis Smith, Jackie Smith, Alan Hager, and his section foreman Clark. When asked whether he specifically mentioned to Mr. Smith and Mr. Clark that someone had told him that the elevator dropped fifty feet, Mr. Ventura replied "yes." He then testified "\* \* well, I didn't say fifty feet, but that it had dropped." He also indicated that he did not identify the person who had told him about the drop to Mr. Hager, and that Mr. Hager advised him that he was not aware that the elevator had dropped.

Respondent's testimony and evidence establishes that after the complainants informed Dennis Smith and Alan Hager that they were exercising their individual safety rights in refusing to ride the elevator, both Mr. Hager and Mr. Smith assured them that the elevator was safe. Mr. Hager testified that had he been informed that the elevator had dropped 50 or 100 feet, he would have shut it down as an imminent danger and prohibited anyone from riding it. While it is true that miners are not necessarily required to accept mine management's evaluation of a perceived hazard, on the facts of the instant

case, I conclude and find that mine management here made a positive and reasonable response to the complainants safety concerns and my reasons in this regard follow.

While it may be true that Mr. Hogan and Mr. Ventura communicated "their fears" about the elevator to several management members, MSHA's inference at page 8-9 of its brief that they articulated any specific concerns about the purported elevator dropping to either Mr. Hager, Mr. Dennis Smith, or any other management representative is rejected as unsupported by any credible testimony.

While it may be true that Mr. Hager and Mr. Dennis Smith had reason to know that the elevator had malfunctioned prior to the work refusal, I cannot conclude that Mr. Hager's reactions to the complaints by Mr. Hogan and Mr. Ventura were unreasonable in the circumstances. He summoned an elevator serviceman from the manufacturer, dispatched a maintenance foreman to the elevator penthouse to try to find the problem, and also summoned a Federal and state mine inspector to the scene. He also offered to operate the elevator in a manual mode so as to transport Mr. Hogan and Mr. Ventura underground without resort to the automatic elevator controls. In the meantime, several elevator trips were made underground with the rest of the shift, and the union president himself made two "test runs" on the elevator and found nothing wrong with it. All of these events were known to Mr. Hogan and Mr. Ventura prior to the work refusal. Mr. J.T. Smith, an experienced maintenance foreman who had gone to the elevator penthouse to check it, assured the complainants that he found nothing with it and that it was safe. This was communicated to Mr. Hogan and Mr. Ventura prior to the work refusal.

No cause for the stopping of the elevator was ever found. While there was speculation that a faulty contactor relay may have caused the elevator to stop, at no time were any of its safety features inoperative, and the relay was replaced. Further, the inspection by the Federal and state mine inspector revealed no safety infractions, and did not result in the issuance of any citations.

Safety committeeman Willis believed that mine management acted reasonably in summoning an elevator mechanic and the Federal and state inspectors. He commented that he had ridden the elevator many times and that "anytime that elevator malfunctions it is a headache for both management and union, it causes a lot of concern."

Committeeman Willis, who also held the elected position of vice-president of the local UMWA union, worked the same shift with the complainants, and was at the mine on December 28. He

testified that Mr. Hogan and Mr. Ventura did not speak with him prior to their work refusal. Although he spoke with Mr. Kessler, Mr. Willis testified that he simply told him that the elevator stopped and "felt like it dropped," but that Mr. Kessler said nothing about how far the elevator may have dropped.

The complainants failure to bring the purported hazardous elevator condition to the attention of a mine safety committeeman who was present for work on the same shift remains unexplained. A possible answer may lie in the fact that the complainants may have expected a "collective" work refusal by the entire shift not to ride the elevator. When this failed to materialize, the complainants invoked their own individual safety rights.

I find it rather surprising that the complainants would not bring the purported elevator "dropping" condition to the immediate attention of the safety committeeman who was present at the scene. Rather than doing this, the complainants waited until they were summoned to the mine foreman's office before involving safety committeeman Willis. The failure by Mr. Hogan and Mr. Ventura to immediately bring the purported 50 to 100 foot elevator drop to the attention of their safety representative is not only irresponsible, but casts serious doubts on their credibility and motivation in refusing to ride the elevator.

While it is true that there were elevator problems on December 27, and earlier during the day shift on December 28, the fact is that those problems involved malfunctions of the doors which had been corrected prior to the work refusal in question. Further, both Mr. Hogan and Mr. Ventura rode the elevator out of the mine at the end of their shift on December 27, and they encountered no problems.

Mr. Hogan confirmed that by the end of his shift on December 27, the elevator problem had been repaired, and that such repairs were made within ten or fifteen minutes after he heard about it. He also testified that when he later spoke to mine management (Jackie Smith, Allen Hager, and Denny Smith) on December 28, he did not ask them about the December 27 problem.

Mr. Ventura confirmed that he knew that the reported elevator malfunction of December 27 had been repaired. As a matter of fact, he testified that since the elevator was the main escapeway, his foreman granted his request to leave the mine early if the elevator were not repaired within a

half hour. Since it was repaired, Mr. Ventura did not leave early, and he rode the elevator out of the mine at the end of the shift. At that time, even though Mr. Ventura claimed that one of his fellow workers told him that he tripped while boarding the elevator when it raised up 8 to 12 inches, Mr. Ventura did not report this incident to anyone and went home.

In view of the foregoing, I conclude and find that the earlier problems with the elevator on December 27, cannot serve as a basis for any reasonable good faith belief that the elevator was hazardous at the time of the work refusal immediately prior to the work shift on December 28.

With regard to the elevator door problems of December 28, which delayed the day shift from entering the mine until approximately 10:00 a.m., testimony from several men on that shift (Kessler and Dowling), maintenance personnel (Whitehair and Jackie T. Smith), and mine foreman Hager, reflects that repairs were made. The day shift then used the elevator to enter the mine, and that they did so without experiencing any problems. Under these circumstances, although Mr. Hogan and Mr. Ventura may have learned about these problems through general bathhouse conversations after the day shift came out of the mine on December 28, at the end of the shift, I cannot conclude or find that these earlier problems contributed to, or formed a basis for, any reasonable good faith belief that the elevator was hazardous at the time of their refusal to use it.

Based on a careful review and scrutiny of all of the testimony and evidence in this case, I conclude that the only possible basis for the complainants' belief that an elevator hazard existed is the information given them by certain day shift miners who were on the elevator when it reportedly "dropped." The essence of the work refusal lies in the contention by Mr. Ventura and Mr. Hogan that, not knowing what caused the reported "drop," they were not willing to chance a possible repeat incident.

Mr. Ventura testified that it was possible that he would not have refused to ride the elevator had Mr. Kessler not mentioned the purported "drop." When asked whether he would have still refused to ride the elevator if no one had mentioned the "drop," Mr. Hogan responded "I don't know, that's hypothetical."

There is no evidence in this case that the respondent has ever retaliated against any miners because they exercised their individual safety rights. As a matter of fact, Mr. Hogan

and Mr. Ventura were assigned other work when they refused to ride the elevator. On prior occasions, Mr. Hogan had made safety complaints and invoked his right to refuse to work for safety considerations, and nothing happened to him. He was given other work, and the matters complained of were taken care of by mine management.

Shuttle car operator Mark Sunyak testified that he had previously exercised his safety rights in regard to certain imminent danger situations, but that mine management took corrective action and did not discipline him.

In Dunmire and Estle, *supra*, the Commission held that a combination of trustworthy first-hand reports from other miners, coupled with the complainant's immediate preceding first-hand experience as to certain hazardous roof conditions, supplied a supportable and acceptable basis for concluding that there was a reasonable belief in the existence of the hazardous conditions. In affirming the Judge's finding that the complainant's work refusal was protected activity, the Commission relied on the record of credible, first-hand, corroborative evidence presented, including the complainant's prior personal exposure to the hazardous roof conditions, and their previous complaints spanning several months.

In the case at hand, I cannot conclude that the circumstances faced by Mr. Hogan and Mr. Ventura, were similar to those faced by Dunmire and Estle. Based on a preponderance of all of the credible testimony, I am convinced that Mr. Ventura and Mr. Hogan were not presented with credible first-hand information indicating that the elevator in question would more than likely fall to the bottom of the shaft if they were to ride it. Taken as a whole, the record in this case establishes to my satisfaction that notwithstanding the fact that mine management took reasonable steps to insure their safety, Mr. Hogan and Mr. Ventura took it upon themselves to decide that they were not going to ride the elevator. The fact that their own union representatives rode it, that other members of the crew rode it, and that mine management assured them that it was safe, simply had no impression on them. Given these circumstances, I cannot conclude that the respondent violated their protected rights under the Act. In the final analysis, I believe that Mr. Hogan and Mr. Ventura, faced with a decision that they would have to make as individuals, opted to make a decision that they believed would ultimately vindicate their own individual opinions. However, after close examination of all of the objective testimony and evidence of record, I believe that they were wrong. Accordingly, I cannot make findings and conclusions that would support their position.

After both sides had completed their questioning of the complainants, I recalled them for additional questions. When asked why their prior signed statements given to MSHA's special investigator during his investigation of their complaints fail to mention that they informed anyone in mine management at the time of the work refusal about the purported elevator dropping, Mr. Hogan indicated that the special investigator somehow failed to record his entire statement and somehow edited his statement. Mr. Ventura stated that he "was not sure" why he did not tell MSHA's investigator the full story of the purported elevator "dropping."

After viewing Mr. Ventura and Hogan on the stand during their testimony at the hearing, I conclude that they were less than candid in what they told the MSHA special investigator during his investigation of their complaint, as well as what they testified to at the hearing. In short, I simply do not believe that they in fact told the special investigator that they were informed that the elevator had in fact dropped or fallen, and that this asserted event really influenced their decision not to ride it. To the contrary, I conclude and find that Mr. Hogan and Mr. Ventura did not communicate the asserted elevator "dropping" to anyone at anytime prior to their work refusal. Absent this communication, I cannot conclude that their work refusal was reasonable.

Contrary to the situation which existed in the Pratt case, supra, I conclude and find that the respondent in the instant case specifically and directly addressed the purported hazardous condition articulated by Mr. Hogan and Mr. Ventura, and it did so in a manner which should have pacified and assured a reasonable person that he was not faced with a choice of riding an elevator that could have been expected to result in injury or exposure to possible harm. In short, I conclude and find that the complainants in this case acted unreasonably in refusing to ride the elevator in question, and that the suspensions meted out for the work refusal were reasonable in the circumstances, and did not violate any protected rights under the Act.

#### Conclusion and Order

In view of the foregoing findings and conclusions, and after careful consideration of a preponderance of all of the testimony and evidence adduced in this case, I conclude and find that the respondent did not discriminate against Mr. Hogan or Mr. Ventura, and their rights under the Act have not been violated. Accordingly, their complaints ARE DISMISSED.

  
George A. Koutras  
Administrative Law Judge

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

DEC 21 1983

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 82-363
Petitioner	:	A.C. No. 46-04168-03503
v.	:	
	:	Docket No. WEVA 83-64
KITT ENERGY CORPORATION,	:	A.C. No. 46-04168-03528
Respondent	:	
	:	Kitt No. 1 Mine

DECISION

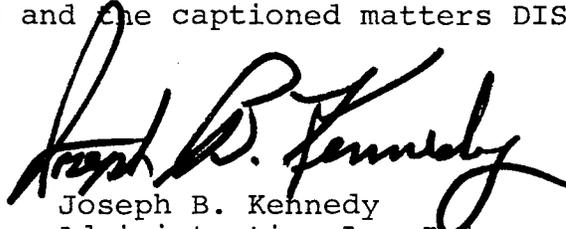
Before: Judge Kennedy

The parties move for approval of a motion withdrawing the captioned penalty petitions on the ground that a review of the videotapes of the condition cited shows the violation charged did not, in fact, occur.

In what came to be known as the case of the "slippery slopes," MSHA charged two violations 75.1704 on the ground that the hand rails on a slope that served as an escapeway were not maintained so as to insure safe passage of the miners at all times. Because the violations were considered "nit-picks," MSHA proposed its usual "wrist-slap" penalty of \$20. When the matters, together with others, came on for a prehearing conference, the trial judge suggested that before the parties put the taxpayers and stockholders to further inordinate expense over what both parties conceded were trivial violations they attempt to resolve the matter by making videotapes of miners using the slopes in question to determine the difficulty, if any, involved in climbing through the areas.

The parties agreed to this and after accomplishing the "view" agreed the citations were improvidently issued and should be vacated. This having been accomplished the instant motion followed. I conclude the violations charged did not, in fact, occur and that the citations were, therefore, properly vacated.

Accordingly, it is ORDERED that the motions to withdraw  
be, and hereby are, GRANTED and the captioned matters DISMISSED.



Joseph B. Kennedy  
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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FALLS CHURCH, VIRGINIA 22041

DEC 2 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 83-237  
Petitioner : A.C. No. 46-01283-03518  
v. :  
WESTMORELAND COAL COMPANY, : Hampton No. 3 Mine  
Respondent :

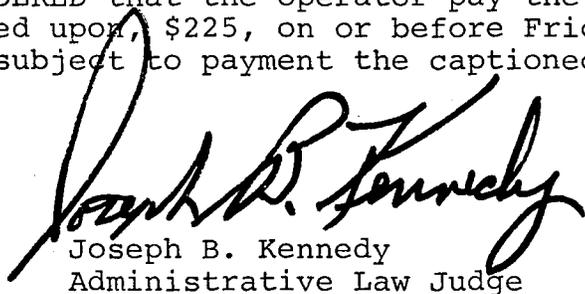
DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

The parties move for approval of a settlement of the respirable dust violation (2.5 mg/m<sup>3</sup>) charged in the captioned proposal at a 27% reduction in the amount initially assessed (\$225 v. \$311).

Based on an independent evaluation and de novo review of the circumstances, I find the settlement proposed is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the operator pay the amount of the penalty agreed upon, \$225, on or before Friday, January 4, 1984, and that subject to payment the captioned matter be DISMISSED.



Joseph B. Kennedy  
Administrative Law Judge

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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DEC 22 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 83-89  
Petitioner : A.C. No. 36-00970-03512  
v. :  
 : Maple Creek No. 1 Mine  
U.S. STEEL MINING COMPANY, INC., :  
Respondent :

## DECISION APPROVING SETTLEMENT

Appearances: David A. Pennington, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for Petitioner;  
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania,  
for Respondent.

Before: Judge Broderick

When the above case was called for hearing in Washington, Pennsylvania, on November 30, 1983, the parties submitted on the record a motion to approve a settlement. The MSHA inspector who issued the two citations contained in this docket number was unable to be present at the hearing.

One citation was originally assessed at \$136, and the parties propose to settle for \$50. The violation charged was insufficient velocity of air (4,500 cfm when the methane and dust control plan called for 5,000 cfm). It appears that the low reading was taken during the mining cycle and that one of the shuttle cars hit a line curtain. There was sufficient air at the face before mining started. The significant and substantial designation is to remain.

The other citation was originally assessed at \$168, and the parties propose to settle for \$100. The violation charged was the failure to have a trolley wire properly guarded. The parties state that the missing guard was on the narrow or rib side and thus miners were unlikely to contact it.

I accept the representations in the motion and conclude that the settlement agreement should be approved.

Therefore, IT IS ORDERED that the settlement agreement is APPROVED and Respondent is ORDERED TO PAY the sum of \$150 within 30 days of the date of this decision.

  
James A. Broderick  
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

December 22, 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 84-7-M  
Petitioner : A.C. No. 09-00067-05503  
v. :  
: Kennesaw Quarry and Plant  
VULCAN MATERIALS COMPANY - :  
SOUTHEAST DIVISION, :  
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The parties have filed a motion to approve settlement in the above-captioned proceeding. The parties propose to settle the two citations at issue in this case for the original assessments total of \$4,000.

Citation No. 2243958 was issued for a violation of 30 C.F.R. § 56.12-25 because the emergency stop switch for a conveyor belt was not frame-grounded. A miner was electrocuted when he grasped the actuating lever of the emergency stop switch. The accident was caused by an electrical fault at the stop switch which occurred due to strain and flexing of the conductors entering the switch housing. The single bolt securing the switch to the wall was not sufficient to prevent movement of the switch when the cord was pulled. Consequently, the cable pulled out of the strain clamp and the bare or damaged conductors contacted the switch frame. The parties advise that negligence was low because the status of the grounding was not visually apparent and had not been detected despite previous diligent inspections by the operator. The violation was abated in good faith. The mine is medium in size and the operator is large. There is no history of prior violations of the cited standard. Payment of the penalty will have no significant effect on the operator's ability to remain in business. The parties propose to settle this citation for the original assessment of \$3,000.

Citation No. 2243959 was issued for a violation of 30 C.F.R. § 56.12-2 because the emergency stop switch for a conveyor belt was not properly mounted. The violation contributed to the fatality described above. The parties advise that negligence was low. The remainder of the statutory criteria set forth in section 110(i) of the Act are as described above. The parties propose to settle this citation for the original assessment of \$1,000.

I have very carefully reviewed the settlement motion and supporting materials. Although the violations are exceptionally grave, I note the low degree of negligence and absence of prior violations of the cited standards. Inasmuch as both assessments are substantial amounts, I conclude the recommended settlements are appropriate in this case. The recommended settlements are therefore, approved.

ORDER

The operator is ORDERED to pay \$4,000 within 30 days from the date of this decision.



Paul Merlin  
Chief Administrative Law Judge

Distribution:

Ken S. Welsch, Esq., Office of the Solicitor, U. S. Department of Labor, 1371 Peachtree Street, N.E., Atlanta, GA 30367  
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/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400  
DENVER, COLORADO 80204

DEC 22 1983

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 83-90-DM
ON BEHALF OF ROBERT K. ROLAND,	:	
Complainant	:	MSHA Case No. MD 83-01
v.	:	
	:	Parachute Creek Mine
OIL SHALE CONSTRUCTORS,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Carlson

The Secretary of Labor has filed a motion styled "Motion to Withdraw Proposal for Penalty" in which he seeks to withdraw as representative of the complaining miner in this discrimination case, and to withdraw the complaint. (Penalty is mentioned in the title of the motion because the discrimination complaint includes a plea for a civil penalty of \$5,000 in addition to remedies for the miner.)

Before I rule upon the motion, certain prefatory matters must be set forth. On December 14, 1983, Robert K. Roland, the complaining miner, came to the offices of the Commission in Denver and spoke to the undersigned judge. He expressed concern that the Office of the Solicitor had orally advised him on November 21, 1983 that the Secretary would no longer furnish counsel in his case. He was unsure of the posture of his case since the Solicitor's office had not yet made any filing evidencing an intent to withdraw. As Mr. Roland spoke, he made declarations which touched directly upon the merits of the case. I must regard these declarations as an ex parte communication forbidden by Commission rules. While Mr. Roland was in my belief innocent of any improper intent, I concluded at that time that I should disqualify myself from any further proceedings in the case.

On the following day the Secretary's motion for withdrawal was filed. On December 16, 1983, I initiated a telephone conference call with the counsel for Oil Shale Constructors, counsel for the Secretary, and Mr. Roland on the line. At the outset I made known that an ex parte communication respecting the merits had been made, and that I had decided that disqualification was the only proper action on my part. I did not disclose the content of the ex parte declaration in view of the decision to disqualify.

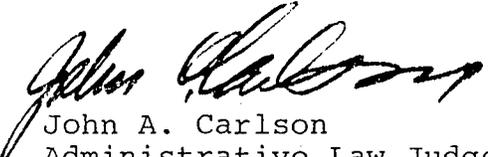
I did, however, indicate a willingness to rule upon the pending motion should all of the parties agree that I should do so, since that act would not relate to the merits, and would move the matter one step closer to possible resolution. All participants were agreeable.

I further advised Mr. Roland that I would give him fifteen days, if he wished them, in which to file formal objections to the Secretary's motion to withdraw. Mr. Roland indicated an understanding of what was involved and affirmatively waived his right to object.

I also made clear to the parties my intent to grant the motion. I indicated that a question exists as to whether the Secretary possesses an absolute right to decide whether or not to continue representation, once begun, but that for reasons of practicality and fundamental fairness I was not inclined to require the Secretary to particularize his reasons for withdrawal for fear such reasons, if spread upon the record, might substantially prejudice the complaining miner's cause should he elect to refile the case on his own behalf.

No party contested this reasoning. Consequently, the motion is granted, and docket number WEST 83-90-DM is dismissed.

The complaining miner is advised, as he was during the telephone conference, that under my interpretation of the relevant statutory provisions and Commission rules, he has 30 days from the issuance of this order to refile the complaint with the Commission on his own behalf.

  
John A. Carlson  
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
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DEC 23 1983

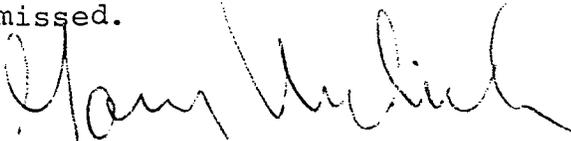
J. D. MOSLEY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 84-15-D
	:	
D. F. J. COAL COMPANY, INC.,	:	BARB CD 83-39
and JOHN LINDER,	:	
Respondent	:	No. 4 Mine

ORDER OF DISMISSAL

Appearances: Tony Oppeward, Esq., Appalachian Research and Defense Fund of Kentucky, Hazard, Kentucky, for Complainant;  
S.H.Johnson, Esq., Johnson & Johnson, Paintsville, Kentucky, for Respondents.

Before: Judge Melick

At expedited hearings, the Complainant requested approval to withdraw his complaint in the captioned case based on a satisfactory settlement agreement between the parties. Under the agreement, the Complainant receives certain promises from the operator as well as payment of \$10,000 for lost wages. Under the circumstances herein, permission to withdraw is granted. 29 CFR § 2700.11. The case is therefore dismissed.



Gary Melick  
Assistant Chief Administrative Law Judge

Distribution:

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nsw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400  
DENVER, COLORADO 80204

DEC 27 1983

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 80-79
Petitioner	:	A.C. No. 42-00094-03008 I
	:	Docket No. WEST 80-128
v.	:	A.C. No. 42-00093-03018
	:	Docket No. WEST 80-152
KAISER STEEL CORPORATION,	:	A.C. No. 42-00092-03013
Respondent	:	
	:	Sunnyside Nos. 2, 1, 3 Mines

DECISION

Appearances: Phyllis K. Caldwell, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
David B. Reeves, Esq., Kaiser Steel Corporation, Fontana, California, for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

The above three consolidated cases, involve petitions proposing assessment of civil penalties pursuant to provisions of the Federal Mine and Safety Act of 1977 (hereinafter the "Act"), 30 U.S.C. § 801 et seq. A hearing on the merits was held in Price, Utah, following which the parties filed post-hearing briefs. Based upon the entire record and considering all of the arguments of the parties, I make the following decision. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

STIPULATION

The parties stipulated as follows:

1. Kaiser Steel Corporation (hereinafter "Kaiser") and its Sunnyside Mines Nos. 1, 2, and 3 are subject to the jurisdiction and coverage of the Act.
2. Kaiser is a medium sized operator employing 230 miners and producing approximately 3,000 tons of ore daily.

3. It is further agreed by the parties that the history of prior violations under the Act is low and that the assessment of reasonable penalties in these cases, would not impair Kaiser's ability to continue in business.

4. It was also stipulated that good faith was shown on the part of Kaiser in the abatement of citation No. 789800 in Docket No. WEST 80-152 and citation Nos. 789765 and 789767 in Docket No. WEST 80-128.

Docket No. WEST 80-79

At the commencement of the hearing, the Secretary moved to withdraw his petition for the assessment of penalties for two citations in Docket No. WEST 80-79. Counsel for the Secretary stated that the basis for this motion was an inability on the Secretary's part to prove the alleged violations. (Transcript at 5).

There being no objection by Kaiser and pursuant to 29 C.F.R. § 2700.11, <sup>1</sup>/<sub>1</sub>, the Secretary's motion was granted and citation Nos. 789229 and 789230 are vacated and Docket No. WEST 80-79 is dismissed.

Docket No. WEST 80-152

Citation No. 789800

On August 14, 1979, MSHA inspector Gerald Mechtly conducted an inspection of Kaiser's underground coal mine identified as the Sunnyside Mine No. 3. Ralph A. Sanich, Kaiser's safety specialist, accompanied Mechtly.

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1/ 2700.11 Withdrawal of Pleading:

A party may withdraw a pleading at any stage of a proceeding with the approval of the Commission or the Judge.

As a result of this inspection, Mechtly issued a 104(d)(1)<sup>2</sup>/ citation No. 789800 alleging a violation of safety standard 30 C.F.R. § 75.305. The condition or practice alleged to have occurred is described in the citation as follows: "There was no date, time, and initial, in the 16R return belt entry to indicate a Mine Examiner had performed the weekly examination since 7-30-79. On the surface the pre-shift mine examiner's book has records dated 8-6-79 and 8-13-79 stating "16R belt return O.K."

The standard alleged to have been violated reads in pertinent part as follows:

§ 75.305 Weekly examinations for hazardous conditions. [Statutory Provisions] In addition to the preshift and daily examinations required by this Subpart D, examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one entry of each intake and return air course in its entirety, idle workings, and, insofar as safety considerations permit, abandoned areas. Such weekly examinations need not be made during any week in which the mine is idle for the entire week, except that such examination shall be made before any other miner returns to the mine. The person making such examinations and tests shall place his initials and the date and time at the places examined .... A record of these examinations, tests, and actions taken shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

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<sup>2</sup>/ Section 104(d)(1) of the Act provides in pertinent part as follows:

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act ....

Kaiser contends that weekly examinations of the cited area of the mine had been made as evidenced by the notations on the surface in the pre-shift mine examiner's book. Also, Tom Dickerson, Kaiser's mine examiner, testified that he had made the required examinations and entries in the surface book as well as underground at certain locations in the entry. Kaiser further contends that exhibit R-2 support the testimony of Dickerson (Tr. 93, 94 and Exh. R-2).

The Secretary argues that there were at least four inspection cards in the left half of the 16 right entry of Kaiser's mine which bore no dates or initials that would coincide with the pre-shift mine examiner's book on the surface. He further contends that section 75.305 requires an inspection be made once a week of one entry of each intake and return air course in its entirety. Further, that the violation cited here is for a failure to inspect rather than a record keeping violation, thus the 104(d)(1) designation (Tr. 92, 93).

The facts surrounding the inspection which gave rise to the issuance of citation No. 789800 are not in dispute. The 16 right belt entry is described as a two entry system approximately 6800 feet long. The lower level is designated a travel and intake entry and the upper level as a belt and return entry. The two entries are separated by pillar blocks with stoppings constructed between the pillars. Doors are located in the stoppings at approximately every 500 feet with six or seven doors between cross-cuts 29 and 62, the area cited here.

Mechtly testified that on August 14, 1979, he and Sanich traveled the intake entry to an isolation area located between cross-cut 61 and 62. After inspecting that area, they started back in the return belt entry. It was at this point he observed cards indicating when the area had last been inspected on a weekly basis. The first card without the proper date and initials was observed near the isolation door between cross-cuts 61 and 62. It showed July 30, 1979 as the last date a weekly inspection was conducted. Three other cards with the same date and initials were observed in the return belt entry at cross-cuts 53, 58, and 46. Based on this, Mechtly informed Sanich of his concern that there was a violation of section 75.305 and that he wanted to go to the surface to look at the mine examiner's book. They then proceeded to cross-cut 29 and out the lower intake entry (Tr. 45-49, Exhibits P1 and P2).

The mine examiner's book on the surface indicated that inspections were made in the 16 right entry on August 6 and 13, 1979 (Tr. 50).

Sanich testified that he observed some cards shown him by Mechtly in the return belt entry on August 14, 1979, with dates and initials to indicate a weekly inspection was not made within the prior two weeks. He also stated that when Kaiser was given citation No. 789800, he did not realize it was a (104(d)(1) order. On December 4, 1979, approximately three months later, Kaiser was sent a notice by the MSHA assessment office indicating that the citation was a 104(d)(1) order. Upon receipt of that information, Sanich went underground to the 16 right entry and retrieved some miner's inspection cards from cross-cuts 2, 19, 29, and raise belt cross-cut 1 and 7 indicating that the area had been inspected on August 13, 1979 (Tr. 33, 34 and Exhibits R1 and R2, A,B,C,D). Based upon this evidence, Kaiser argues that it has proven that a miner's examination was conducted of the 16 right entry. Also, that standard 75.305 does not require that every card in the return must be signed.

I reject Kaiser's argument in this case. The standard requires a weekly examination by a certified person in at least one entry of each intake and return air course in its entirety. In this case, the operator had placed cards for the miner examiner to sign in various locations in the entry. The four cards observed by Mechtly in the return entry, without the proper dates and initials to show that a weekly examination had been made, covered a distance of approximately 3000 feet or half of that particular entry. Prior dates and initials had been placed on these cards as late as July 30, 1979. I must assume that the operator placed these cards at those particular places expecting them to be used by the person certified to do the weekly mine examination.

Kaiser's four cards showing dates and initials for August 6 and 13, 1979, submitted as exhibit R-2 (A,B,C and D), were not persuasive in showing that the proper weekly inspections were made of the entire area. Kaiser admitted that these cards were retrieved approximately three months after the citation was issued. Card R-2B and R-2D were located at the far ends of the entry. When asked about this, Mechtly testified that the fact that these cards showed dates that conformed with weekly inspections "indicated that the mine examiner had access to both ends of that entry to mark those cards" (Tr. 64). As to the card marked R-2C, this was supposedly found by Sanich near cross-cut 53 when he went back in December 1979. However, on cross-examination, Sanich testified that in August 14, 1979, the cards seen between cross-cuts 63 and 29 in the return entry did not have correct dates on them (Tr. 35).

In light of the foregoing, I do not find Kaiser's arguments to be credible. It must be assumed that the portion of the return entry between cross-cut 29 and 63 was not examined by the mine examiner. Even assuming that the standard 75.305 does not require a card every few feet, as Kaiser argues, both Mechtly and Kaiser's own safety specialist testified that they did not see a card with proper

dates and initials entered thereon for a distance of over 3000 feet in the return entry of this part of the mine on the day of the inspection. Therefore, it must be assumed that such a card was not there. Exhibit R-2C found at cross-cut 54 three months later shows the date of August 6, 1979 and then August 15, 1979, which was a day after the inspection so this does not support Kaiser's contention that a card existed in the cited area showing that the required weekly inspection had occurred.

I have considered the testimony of Tom Dickerson, Kaiser's certified mine examiner, wherein he testified that there were approximately ten cards in the 16 right belt entry and that he does not mark each card as he does his inspection. Also, that he made a weekly inspection of 16 right belt entry on August 6 and 13, 1979 (Tr. 80-81). However, the credible evidence does not support this. Out of ten cards, in this entry, only one, Exhibit R-2C was presented as evidence to show the examination was made and this showed a date of August 6, 1979 which was more than a week before the inspection and a date of August 15, 1979, which was a day after. Also, Dickerson testified that he was advised by a Mr. Oviatt, Kaiser's mine foreman on August 14, 1979 (the day citation No. 789800 was issued) to stay out of the area (Tr. 78). However, Exhibit R-2C shows that Dickerson was back in the area and dated the card and initialed it with his initials "TD" on August 15, 1979. Dickerson also testified that he didn't go into the area on August 14 or 15, 1979 (Tr. 79). No explanation was given at the hearing for this discrepancy but it goes towards the credibility of the witness.

I find that a violation of the standard occurred and that such a violation constitutes an unwarrantable failure on the part of Kaiser. Kaiser knew or should have known that the cards were not being marked in an area of its mine which would alert it to the probability that weekly inspections were not being properly conducted. Other members of mine management would have occasion to be in this area and should have observed this. Zeigler Coal Company, 7 IBMA 280 (1977).

I further find that such a violation is of a significant and substantial nature as those terms are defined in Cement Division, National Gypsum Company, 3 FMSHRC 822 (April 1981). That is, a finding of whether a violation is "significant and substantial" depends on whether there existed a reasonable likelihood that the hazard contributed to or would have resulted in an injury of a reasonable serious nature. The purpose of the weekly inspection provided for in standard 75.305 is to detect hazardous conditions such as deteriorating roof conditions, air currents being blocked off and reversed, and methane accumulations. Any of these conditions could cause serious injury or death to miners in the area, if undetected.

I find that Kaiser did show good faith in quickly abating this violation. I find that a penalty of \$210.00 is appropriate in this case.

Docket No. WEST 80-128

The facts in this case are not in dispute. On August 1, 1979, MSHA inspector Theodore L. Caughman issued six citations involving three pieces of mine equipment alleging violations of the Federal Coal Mine and Safety Act of 1977, 30 U.S.C. § 801 et seq. Caughman wrote the citations when he observed two shuttle cars and a loader cleaning up coal in the 15 right belt entry of Kaiser's Sunnyside No. 1 Mine. Each piece of equipment was cited under 30 C.F.R. § 75.523-1 (failure to have a panic bar) and 30 C.F.R. § 75.1710-1 (failure to have a cab or canopy). Kaiser was given until the following day (August 2, 1979) to abate these violations.

On August 2, 1979, Caughman returned to the same area and found that the three pieces of equipment had been moved to a location near the railroad track leading out of the mine. The trailing cables were disconnected and stored in the cars. Caughman issued a modification for each citation indicating that the equipment had been removed from service and that additional time was needed to remove it from the mine. The abatement period was extended to August 7, 1979 (Exh. R-1).

On August 7, 1979, the inspector returned to the mine and found the loader parked outside the mine on a rail car and so terminated the two citations issued on that unit. On entering the mine, he discovered that the two shuttle cars were still underground at the location where he had earlier seen them. Caughman issued a 104(b)<sup>3</sup>/ order against each of the four citations issued on the two shuttle cars and pinned a red tag on the equipment for failure to abate the citations within the time designated.

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3/ Section 104(b) of the Act reads in pertinent part:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

Issues:

The issues in this case are:

1. Whether the three pieces of mine equipment cited here are electric face equipment within the meaning of 30 C.F.R. § 75.523.1 and 30 C.F.R. § 1710-1.
2. Whether the 104(a) citations on the two shuttle cars were abated by removing the cables and storing them in the machines although they remained underground in the mine.
3. If violations are found, what is the appropriate penalty to be assessed.

Discussion:

Kaiser concedes the fact that neither the loader or two shuttle cars were equipped with panic bars, cabs or canopies. However, it contends that the citations should be set aside because these machines were not "electric face equipment" within the meaning of the two cited safety standards and, therefore said standards are not applicable (Kaiser's Brief at 2).

The facts show that on the day the three pieces of equipment were cited by inspector Caughman, they were being used to clean up coal and rock from the floor of an arched entry. The debris had fallen from between the arches and the area was being prepared for a belt entry. This was located several thousand feet from the nearest working face.

Rex W. Jewkes, Kaiser's safety engineer, testified that they no longer used loaders, like the one cited here, directly behind the continuous miner in extracting coal. Instead, the continuous miner loads coal directly into the shuttle cars at the working face. Also, that all of the shuttle cars used at the working face are equipped with either cabs, canopies, or panic bars (Transcript 15, 16 and 17).

The specific issue to be decided here, then, is whether the loader and two shuttle cars being used in this location are required to comply with either standards § 75.523-1 or § 75.1701-1 by being equipped with either panic bars, cabs or canopies. I am persuaded that they are.

Safety standard § 75.523-1(a) requires that all self-propelled electric face equipment which is used in the active workings of each underground coal mine shall be provided with a device that will quickly deenergize the trammig motors of the equipment in the event of an emergency. Section 75.523-1(b) provides that self-propelled electric face equipment that is equipped with a substantially constructed cab which meets the requirements of this part shall not be required to be provided with a device that will quickly de-

energize the tramming motors of the equipment in the event of an emergency. Section 75.523-1(b) provides that self-propelled electric face equipment that is equipped with a substantially constructed cab which meets the requirements of this part shall not be required to be provided with a device that will quickly deenergize the tramming motors of the equipment in the event of an emergency.

Standard § 75.1710-1 requires installation of protective cabs or canopies on all self propelled electric face equipment on a staggered time schedule coordinated with descending mining heights. It states in pertinent part:

(a) [A]ll self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine on and after January 1, 1973, shall, in accordance with the schedule of time specified in subparagraphs (1), (2), (3), (4), (5), and (6) of this paragraph (a), be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face, or rib, or from rib and face rolls. (emphasis added).

Kaiser argues that the equipment cited here is not electric face equipment as specified in the above standard for the reasons that the loader and two shuttle cars were not taken or used in by the last open crosscut of an entry or a room of the mine. In support of this argument, Kaiser suggests that "electric face equipment" is defined in 30 C.F.R. § 75.2(i) as: "'Permissible' as applied to electric face equipment means all electrically operated equipment taken into or used in by the last open crosscut of an entry or a room of any coal mine ...." Further, it argues that applicable legislative history dispels any doubt that the term "electric face equipment" was only descriptive of equipment used in the specified geographic area (Kaiser's Br. 4, 5).

I am not persuaded by Kaiser's argument. Both regulations do refer to self propelled electric face equipment and, also, to shuttle cars specifically. However, the area of use is not stated to be or restricted only to the face of the mine. Instead, the area of use is described as the "active workings" of the mine. In 30 C.F.R. § 75.2, the drafters of the regulations saw fit to define what they meant by the terms used. 75.2(g)(4) states as follows: "active workings means anyplace in a coal mine where miners are normally required to work or travel." It should be noted that under § 75.2(g)(i) it defines what a working face means and states as follows: "[M]eans any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle." I feel certain that if the

intent of the Secretary was to restrict the requirements of panic bars or cabs or canopies to the face area of the mine, he would have stated "working face" rather than "active workings."

It must also be kept in mind that the purpose of the Act and regulations promulgated thereunder is to protect the safety and health of the miners. A similar argument as presented by Kaiser and involving definitions of this Act, but a different regulation, was considered by the Sixth Circuit Court of Appeals in the case of Shamrock Coal Company v. Secretary of Labor, (Reference 6th Cir. Number 79-3199)(February 9, 1981). The case involved the issue of where 30 C.F.R. § 75.202 regarding roof support required roof support in tunnels leading to the face, or just the face, under the phrase "working places." The Court stated in pertinent part as follows:

The mine operator argues that the emphasized portion of this section is only applicable in "working places" within the mine. The term "working place" is defined to be the area of the mine inby the last open crosscut, 30 C.F.R. 75.2(g)(2). Common sense, and the congressionally expressed purposes of the Act, 30 U.S.C. § 801(a), however, compel us to reject an interpretation of the regulation which would protect workers at the face of the mine, but expose miners to the danger of unsupported roof in the tunnels they traverse on the way to and from the working face.

I believe this logic is applicable in the present case.

Kaiser further argues that by description, the two shuttle cars and the loader are "electric face equipment" and must only comply with the requirements of the cited regulations if they were being used or intended to be used at the face. This problem was addressed by the Commission in Secretary of Labor v. Solar Fuel Company, 3 FMSHRC 1384 (1981), wherein they held that "equipment which is taken or used inby the last open crosscut" means equipment habitually used or intended for use regardless of whether it is located inby or outby when inspected. The Commission emphasized in Solar Fuel Company that it is not where the equipment is located at the time of the inspection that is important, but whether it is equipment which can be taken or used "inby." Accordingly, each of these three pieces of equipment involved in the present case could have been utilized at the face if the operator so desired.

Kaiser maintains it no longer used loaders at the face or was it intending to use the two shuttle cars there. However, nothing would prevent them from so utilizing the equipment at the face should the requirement of its use arise. I therefore feel that it

is not sufficient that the operator maintains it was not their intention to use the equipment as "electric face equipment."

Kaiser further contends that according to the legislative history of the Act, the Secretary exceeded the scope of his authority in promulgating regulations providing for panic bars or cabs or canopies on electric face equipment used in "active workings" of the mine. A review of the Act shows that section 318(g)(4) defines "active workings" the same as under the regulations recited earlier herein. I do not find that the applicable legislative history restricts the authority of the Secretary to provide regulations governing the use of self powered electric face equipment outside the area of the face. It is obvious that by adopting certain provisions of the Act, strict compliance was intended for any electric powered equipment taken in by the last open crosscut of the mine. However, I do not find that the standards § 75.523-1 and 75.1710-1 are in conflict here.

In light of the foregoing, I find that Kaiser was in violation of the six citations issued against the three pieces of equipment cited here.

The other issue presented in this case is whether the four citations against the two shuttle cars were abated, even though they remained underground, by removing the power cable from the power source and storing the cable in the boxes on the machines.

The Secretary argues that the shuttle cars were still available for use and that it would only take minutes to plug the trailing cables into the power source located approximately 150 feet away and the machines would be back in service (Secretary's Brief at 4).

Kaiser argues that the two machines had not been used since the withdrawal from service and that there is no requirement that defective equipment be removed and taken to the surface to constitute abatement. Kaiser also contends that the Secretary's reliance on the Commission's decision in Ideal Basic Industries, 2 FMSHRC 1242 (April 1981), is misplaced (Kaiser's Br. at 14).

I disagree with this argument as I find the Commission's ruling in Ideal Basic Industries plainly supports the Secretary's argument here. In Ideal Basic, the equipment cited was a track mobile with one of two hydraulic couplers defective. The operator argued that the track mobile was not used in its defective condition after it was cited. The Secretary argued that the machine had been used, using the non-defective coupler, and that could affect safety. The Commission agreed and stated further as follows:

Even if, however, the evidence were insufficient to establish that the track mobile was operated while the coupler was broken, we find that the mobile was nonetheless "used" within the meaning of the standard. If equipment with defects affecting safety is located in a normal work area, fully capable of being operated, that constitutes "use". Here, at the time of the inspection, the mobile was parked in a usual location, right next to the area where railroad cars--which the mobile is used to move--are loaded. It was neither rendered inoperable nor in the repair shop. To preclude citation because of "non-use" when equipment in such condition is parked in a primary working area could allow operators easily to use unsafe equipment yet escape citation merely by shutting it down when an inspector arrives.

This same conclusion can be applied in the case of the two shuttle cars. They were in the area and available for use by taking out the power cables and plugging them into the transfer. It could take only an estimated five minutes of a miners time to put them back in service.

The Commission in Ideal Basic stated that its decision was consistent with that in Eastern Associated Coal, 1 FMSHRC 1473 (October 1979), which involved placing a danger tag on a defective jitney that remained operable in the working area. The Commission stated in that case:

We hold that tagging the jitney was not sufficient to withdraw the jitney from service because the danger tag did not prevent the use of the defective piece of equipment. The jitney was still operable and the danger tag could have been ignored. 1 FMSHRC at 1474. The reasoning of Eastern Associated is applicable here as well, where there was not even a danger tag placed on the defective coupler.

In light of the foregoing, I find that the same reasoning must be applied in the present case. There was no danger tag on either of the shuttle cars and either one could have been returned to service, either unintentionally by a miner unaware of the citations, or intentionally if such were the need or desire of the operator. Therefore, I find that the citation was not abated as required under 104(b).

#### Penalty

The six criteria for assessing a penalty are set out in 30 U.S.C. § 820(i). The parties have previously stipulated as stated before regarding the jurisdiction, size of the operator, and that assessment of reasonable penalties in this case would not affect their ability to continue in business.

From the evidence I conclude that Kaiser was negligent in allowing the two shuttle cars and the loader to be operated in the active workings of the mine without either panic bars or cabs or canopies installed on them. I find the gravity to be serious for the operator of either of these machines could have been seriously injured or killed by being squeezed between the rib of the entry and the operator would be unable to quickly deenergize the tramming motors if an emergency arose. Also, there was an exposure of injury or death from the lack of either a cab or canopy on any of the equipment.

I find that by removing the loading machine to the surface, Kaiser evidenced good faith in abatement of the two citations against it. However, in failing to remove the two shuttle cars from the mine within the time specified initially and subsequently extended for termination of the four citations issued against them, I find that Kaiser did not evidence good faith and increased penalties to be assessed herein is warranted.

As to the six citations involved herein, I find the following penalties to be appropriate:

<u>Citation No.</u>	<u>30 C.F.R. Standard</u>	<u>Description</u>	<u>Penalty</u>
789765	75.523-1	(loading machine, no panic bars)	\$ 50.00
789767	75.1710-1	(loading machine, no cab or canopy)	50.00
789768	75.1710-1	(shuttle car ET 7314 no cab or canopy)	100.00
789778	104(b)	(failure to abate)	
789769	75.523-1	(shuttle car ET 7314 no panic bars)	100.00
789777	104(b)	(failure to abate)	
789770	75.523-1	(shuttle car ET 7065 no panic bars)	100.00
789775	104(b)	(failure to abate)	
789771	75.1710-1	(shuttle car ET 7065 no cab or canopy)	100.00
789776	104(b)	(failure to abate)	
		Total	<u>\$500.00</u>

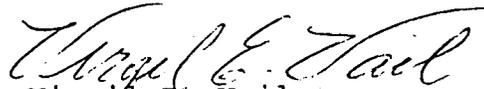
I have elected to reduce the amount of the Secretary's proposed penalties in the above six citations for the reason that I do not find that Kaiser's negligence in this case was gross.

Also, there were two citations against each piece of equipment for separate violations although compliance with either standard would have satisfied the Act's requirements.

As to the abatement of the four citations on the two shuttle cars, I find that the machines were removed to the area where they would be taken to the surface and no evidence that this was not Kaiser's intention. Also, there is no evidence that the shuttle cars were used or there was an intention to use them after the citations were issued. Therefore, I do not find any indication of violations of the initial citations.

ORDER

Accordingly, in Docket No. WEST 80-79, citation Nos. 789229 and 789230 are VACATED and the case is DISMISSED. In Docket No. WEST 80-152, citation No. 789800 is AFFIRMED, and Kaiser is ORDERED to pay a civil penalty of \$210.00. In Docket No. WEST 80-128, the six 104(a) citations and the four 104(b) orders are AFFIRMED and Kaiser is ORDERED to pay civil penalties totaling \$500.00 therefore. Kaiser is ORDERED to pay the above civil penalties totaling \$710.00 within 40 days of this decision.

  
Virgil E. Vail  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**DEC 28 1983**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket Nos. PENN 82-218  
Petitioner : PENN 82-219  
 :  
 :  
v. : A.C. Nos. 36-00970-03122  
 : 36-00970-03125  
 :  
 :  
UNITED STATES STEEL MINING : Maple Creek #1 Mine  
COMPANY, :  
Respondent :

DECISION

Before: Judge Fauver

These proceedings were brought by the Secretary of Labor under Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., for assessment of civil penalties for alleged violations of mandatory safety standards. The cases were consolidated and heard in Pittsburgh, Pennsylvania.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent operated an underground coal mine, known as Maple Creek No. 1, in Pennsylvania, which produced coal for sales in or substantially affecting interstate commerce.

Citation No. 1145282  
Docket No. PENN 82-218

2. On February 25, 1982, Federal Mine Inspector Francis Wehr issued to Respondent Citation No. 1145282, under Section 104(a) of the Act, charging a violation of 30 CFR 75.1405. That section provides, in pertinent part:

All haulage equipment... shall be equipped with automatic couplers which couple by impact and uncouple without the necessity of persons going between the ends of such equipment.

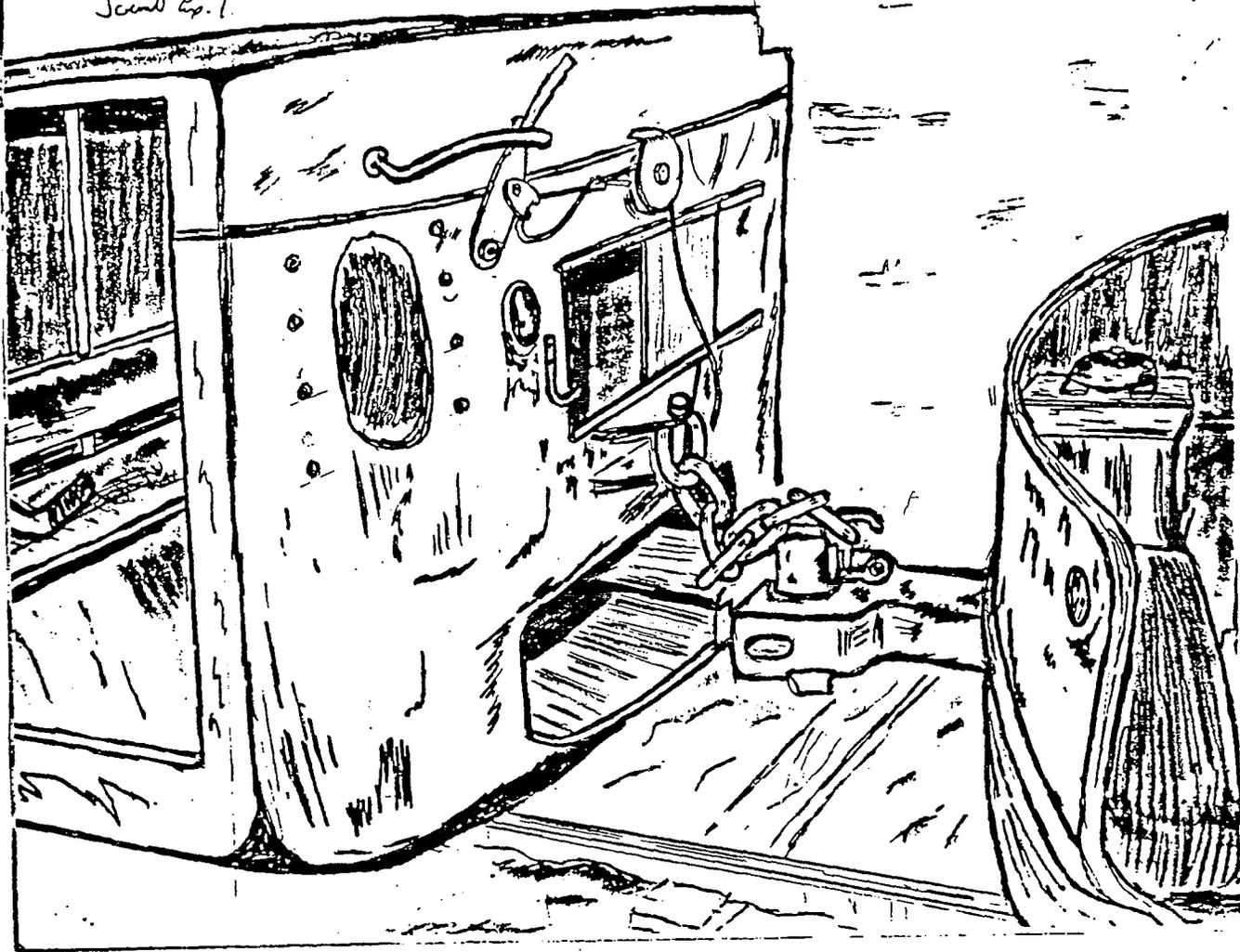
3. Inspector Wehr issued the citation because two locomotives were coupled to a personnel car with safety chains in addition to automatic couplers. Personnel were required to reach between the ends of the cars to connect or disconnect the chains. The couplers and chains are indicated in the drawings (Joint Exhibits 1 and 1-A) reproduced at page 3.

4. The automatic couplers coupled on impact. They were uncoupled by a hand-lever near the top of the wall of the locomotive (which was pulling or pushing the personnel car). MSHA approved use of the hand-lever for uncoupling.

5. The chain had to be worked to uncouple. Depending on the tightness of the links or the strength of the miner, one or two hands were required to uncouple. Also, depending on the size, skill, and strength of the miner, the percentage of body exposure between the cars would vary. A window in the personnel carrier wall, as shown in the drawings at page 3, could be used for access to the chain, in connecting or disconnecting it, but personnel might also connect or disconnect the chain from outside the cars.

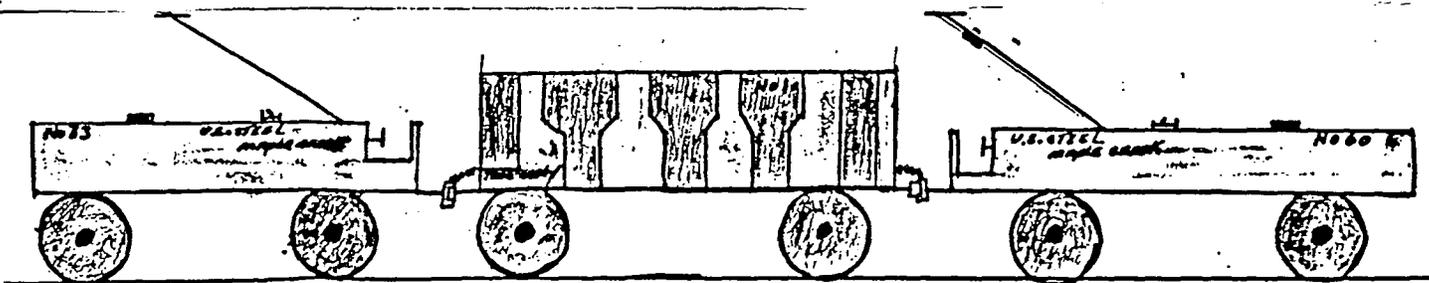
6. MSHA did not approve use of the safety chains, which were manually connected and disconnected by reaching in between the cars.

Isand Ep. 1.



Isand Ep. 1 A

SIZE LENGTH 24 FT 5 IN HEIGHT 4 FT 7 IN WIDTH 6 FT.



7. When reaching through the window to connect or disconnect the chain, personnel had a risk of hand and arm injuries in the event the cars were moved. If miners reached in from the sides of the cars to connect or disconnect the chain, more of the body was exposed to risk of injury.

8. In the mining industry, serious injuries and deaths have occurred because miners were reaching in between cars to couple or uncouple them when the train was inadvertently moved.

9. Respondent did not use safety chains on non-personnel haulage cars. It used them on the personnel train because of the risk of injury to passengers in the event of accidental uncoupling of the personnel car. The grade in the mine was an average of about 2%, and ranged up to about 10%. The personnel car had its own braking system, which could slow down the car but not bring it to a full stop in the event of an accidental uncoupling.

10. Since the first use of the chains at this mine, in 1959, there have been no reported injuries of miners who were connecting or disconnecting the safety chains.

Citation No. 1145239  
Docket No. PENN 82-219

11. On March 31, 1982, Federal Inspector Alvin Shade issued to Respondent Citation No. 1145239, charging a violation of 30 CFR 75.1725(a), which provides:

(a) Mobile and stationary -  
equipment shall be maintained  
in safe operating condition  
and machinery or equipment  
in unsafe condition shall be  
removed from service  
immediately.

12. Inspector Shade issued the citation because continuous miner No. 7761 would not turn to the right. When the operator tried to operate the right tram, the circuit breaker would trip, de-energizing the whole machine. This condition had been called to Inspector Shade's attention by the continuous miner operator, who said the tram had not been working right for about two weeks.

13. Inspector Shade inspected the continuous miner about 2 coal blocks from the face. The machine had been parked there around the beginning of the shift. They were tramping it to the face, but when it would not tram right, they backed it up about 50 feet and parked it. It was energized when Inspector Shade inspected it. Under his observation, they tried to tram it to the right and the circuit breaker tripped, de-energizing the machine.

14. Respondent had frequent problems with the tramping system on this machine from the time of its purchase, in 1980. The problem was the micro-switches in the tramping circuit. At times the circuit breaker would trip several times a shift. There are about 12 micro-switches in the circuitry of the machine, and any one might fail at any time. Respondent made repeated efforts to have the manufacturer test the switches and supply reliable ones, but as of March 31, 1982, and even at the time of this hearing (December, 1982), no fully reliable equipment or maintenance program had been developed to avoid this problem. On the day of the inspection and citation a new micro-switch had been installed on the previous shift.

#### DISCUSSION WITH FURTHER FINDINGS

##### The Safety Chains

Respondent combines automatic couplers with safety chains on its personnel train. The couplers couple on impact; they are uncoupled by a hand-lever that MSHA has approved; the safety chains, to be connected or disconnected, require that an employee reach in between the ends of cars. MSHA has not approved the chains and charges a safety violation.

I conclude that Respondent's use of the safety chains violates the safety standard, 30 CFR 75.1405, which requires "automatic couplers which couple by impact and uncouple without the necessity of persons going between the ends [of the cars]." By adding safety chains, Respondent has modified its coupling system so that it cannot meet the requirements of the mandatory safety standard. Several cases have held a violation in similar circumstances. See, e.g., Pittsburgh Coal Company v. Secretary of Labor, 1 FMSHRC 1468 (1979); and Mathies Coal Company v. Secretary of Labor, 2 FMSHRC 1661 (Judge Melick, 1981).

Respondent contends that this application of the standard will diminish safety by requiring abandonment of the safety chains. But this argument does not address other feasible means of supplementing automatic couplers on personnel cars, e.g., chains or wire ropes on the sides of cars, which would not violate § 75.1405. Moreover, it is addressed to the wrong forum. Petitions for modification of the application of a safety standard should be filed with the Labor Department, under section 101(c) of the Act.

I find that Respondent was negligent, in that the violation condition was known by Respondent and could have been prevented by the exercise of reasonable care. I also find that this is a serious violation. There is a risk of serious injury or death in the event a person is handling the chain or reaching in between the cars when the train is inadvertently moved. Considering these factors, and Respondent's size, history of compliance and prompt, good-faith abatement of the violation, I find that a civil penalty of \$195 for this violation is appropriate.

#### The Continuous Miner

Inspector Shade testified that one of the dangers of operating the continuous miner with a defective tram was that the operator could not move out of the way of roof-falls in retreat mining. With a defective micro-switch, when the operator tried to tram to the right the circuit breaker would trip, and the whole machine would be de-energized. This defective condition could endanger the operator. He could retain the protection of the canopy if he could tram the machine away from falling roof, but would probably be tempted to run if the machine would not move, thus exposing himself to greater danger from the roof.

Moving equipment that cannot be steered properly is not in safe operating condition.

Respondent argues that MSHA cited a violation simply because Respondent could not guarantee that a new switch would not fail, and the safety standard does not require that the mine operator guarantee that a repair will last for any specific period.

Respondent misconstrues the purpose and application of the safety standard. The standard requires that equipment be "maintained in safe operating condition" and if it is "in unsafe condition it shall be removed from service immediately." When the circuit breaker tripped, soon after

the beginning of the shift, Respondent knew that the continuous miner could not tram to the right. That is why the machine was backed up and left 2 blocks from the face. I find that the defective condition (inability to tram to the right and causing de-energizing of the whole machine by attempting to tram to the right) was an "unsafe" operating condition. Respondent was required to remove the machine from service until the switch could be replaced or adjusted. This could have been done by de-energizing the machine and tagging it out of service pending repairs. However, Respondent left it parked and energized, so that another machine operator might operate the machine in a defective condition.

I find that Respondent was negligent, in that the unsafe condition was known by Respondent and the violation could have been prevented by removing the machine from service pending repairs. This was a serious violation, because of the risk of serious injury if the machine were operated with a defective tramming system. Considering these factors and Respondent's size, compliance history, and prompt, good-faith abatement of the violation, I find that a civil penalty of \$100 for this violation is appropriate.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of the above proceedings.

2. Respondent violated 30 CFR 75.1405 as charged and is ASSESSED a civil penalty of \$195 for this violation.

3. Respondent violated 30 CFR 75.1725(a) as charged and is ASSESSED a civil penalty of \$100 for this violation.

Proposed findings of fact or conclusions of law inconsistent with the above are rejected.

#### ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above assessed civil penalties, in the amount of \$295.00, within 30 days from the date of this decision.

*William Fauver*  
William Fauver  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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December 28, 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. HOPE 79-323-P  
Petitioner : A.C. No. 46-05121-03008F  
 :  
v. : Wayne Mine  
 :  
MONTEREY COAL COMPANY, :  
Respondent :

DECISION GRANTING  
SECRETARY'S MOTION TO AMEND  
AND  
DENYING RESPONDENT'S  
MOTION TO DISMISS

Before: Judge Fauver

The Secretary has moved (1) to amend his petition for assessment to include as a party respondent Frontier-Kemper Constructors, Inc., an independent contractor, and (2) to amend Exhibit A of his petition for assessment to cite a violation of 30 CFR 77.1900-7 instead of 30 CFR 77-1900-1.

Part (2) of the motion is intended to correct a clerical error, and it conforms to the original § 107(a) imminent danger order on which the petition is based. No prejudice will result from allowing this technical amendment. Accordingly, part (2) of the Secretary's motion will be granted.

Respondent moves to dismiss this proceeding on the ground that Respondent is not a proper party respondent. It also opposes the Secretary's motion to amend to include Frontier-Kemper as a respondent.

Frontier-Kemper opposes the Secretary's motion to amend to include it as a respondent, on the ground that the Commission has no jurisdiction to include Frontier-Kemper because it was never issued a citation or order as the basis for this civil penalty proceeding.

## DISCUSSION

The 1977 Federal Mine Safety and Health Act, 30 U.S.C. § 801, et seq., became effective on March 9, 1978. The Act expands the definition of "operator" beyond the 1969 Mine Act to include "any independent contractor performing services or construction [at a mine]." 30 U.S.C. § 802(d). The charges in this case were issued to Monterey in a § 107 imminent danger order on May 8, 1978. At that time it was the policy of MSHA to cite owner-operators such as Monterey for violations caused by the acts of independent contractors. This policy was upheld in a number of court and Commission decisions. See, e.g., Bituminous Coal Operators Association v. Secretary of Interior, 547 F. 2d 240 (4th Cir. 1977); Cyprus Industrial Minerals Company v. FMSHRC, 664 F. 2d 1116 (9th Cir. 1981); Old Ben Coal Co., 1 FMSHRC 1480 (1979), aff'd, No. 79-2367, D.C. Cir., January 6, 1981; and U.S. Steel Corporation, 4 FMSHRC 163 (1982).

In explaining the basis for its decision in the Old Ben case, the Commission stated in Phillips Uranium Corporation, 4 FMSHRC 549 (1982):

In our decision in Old-Ben Coal Co., we emphasized that, although an owner-operator can be held responsible without fault for a violation of the Act committed by its contractor, the Secretary's decision to proceed against an owner for such a violation is not insulated from Commission review. 1 FMSHRC at 1483-1484. For the reasons stated in Old Ben we hold that the Commission may review the Secretary's decision in these cases to proceed against Phillips.

The test applied by the Commission in reviewing the Secretary's choice is "whether the Secretary's decision to proceed against an owner for a contractor's violation was made for reasons consistent with the purposes and policies of the 1977 Act." 1 FMSHRC at 1485. Our upholding of the Secretary's choice in Old-Ben, albeit with considerable doubts expressed as to the wisdom thereof, was largely based on the particular chronology of events in that case. The citation in Old Ben was issued only thirty-four days after the 1977 Mine Act had taken effect. 1 FMSHRC 1486 n.7. Recognizing that responsibility for enforcement of the nation's mine safety program had only recently been transferred to the Department of Labor from the Department of Interior, we found that the Secretary's decision to cite Old Ben under an "interim" agency-wide policy to proceed only against owner-operators was, at least at that early stage, a decision not inconsistent with the purposes and policies of the 1977 Act.

On July 1, 1980, the Secretary published a rule changing his enforcement policy. Under the new policy, independent contractors may be cited for their own violations and in certain cases the "production-operator" may be cited instead of or in addition to the independent contractor. 45 Fed. Reg. 44494-44498.

The facts in the present case place them fundamentally in the same light as the Old Ben case. The order was issued to Monterey less than 2 months after the effective date of the 1977 Mine Act. In line with the Commission's holding in Old-Ben, I find that the Secretary's decision to cite Monterey under an "interim" agency-wide policy to proceed only against owner-operators was, at least at that early date, "a decision not inconsistent with the purposes and policies of the 1977 Act." Accordingly, Monterey's motion to dismiss should be denied.

Considering the long stay of this proceeding pending Monterey's appeals on the issue whether Monterey is a proper party, I find that the Secretary's motion to join the independent contractor as a respondent is not barred by estoppel and is not prejudicial to either Monterey or Frontier-Kemper. Both companies are presumed to have been aware of the specific charges and factual contentions in the § 107 order since its issuance in May 1978. First, the order was issued to Monterey, and in its answer to the petition for assessment of civil penalties, Monterey alleged that if there was a violation it was committed by Frontier-Kemper as an independent contractor. Second, the close contractual relationship between Monterey and Frontier-Kemper warrants the presumption that Frontier-Kemper has been on notice, since May 1978, that its contract performance in May 1978 is the subject of the MSHA charges against Monterey.

ORDER

WHEREFORE IT IS ORDERED that:

1. The Secretary's motion to amend is GRANTED and he shall have 15 days from this decision to file the amendments to his petition.

2. Monterey's motion to dismiss is DENIED.

  
William Fauver  
Administrative Law Judge

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