DECEMBER 1984

Commission Orders

Administrative Law Judge Decisions

DECEMBER

The following case was directed for review during the month of December:

Secretary of Labor on behalf of I. B. Acton and UMWA v. Jim Walter Resources, Inc., Docket No. SE 84-31-D, etc. (Judge Melick, November 19, 1984).

The following cases were denied review during the month of December:

Secretary of Labor, MSHA v. Pyro Mining Company, Docket No. KENT 83-212. (Judge Fauver, October 25, 1984).

Secretary of Labor, MSHA v. United States Steel Corporation, Docket Nos. LAKE 82-6-RM, LAKE 82-35-M. (Judge Broderick, November 9, 1984).

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 3, 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 83-125-R
v.	:	
KITT ENERGY CORPORATION	:	

ORDER

On November 5, 1984 the Secretary of Labor filed a petition for discretionary review and motion for Summary Disposition of Appeal. On November 13, 1984 the petition was granted and briefing was stayed pending a Kitt Energy Corporation response to the Secretary's motion for Summary Disposition of Appeal. No response to the Secretary's motion was filed by Kitt Energy Corporation.

The motion of the Secretary of Labor for Summary Disposition of Appeal is granted and the case is remanded to the presiding administrative law judge for further consideration and ruling in view of the arguments raised by the Secretary before the Commission. The judge may, at his discretion, require the parties to submit additional evidence or briefs.

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 10, 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEVA 84-200 WEVA 84-308
MABEN ENERGY CORP.	:	

ORDER

On November 21, 1984, the presiding Commission administrative law judge issued a decision approving settlement in this case. On December 4, 1984, the judge filed a statement with the Commission requesting that the Commission return this proceeding to his jurisdiction, pursuant to Commission Procedural Rule 65(c), 30 C.F.R. § 2700.65(c), for the correction of "clerical mistakes and errors arising from oversight or omission" in the decision. The judge's request is granted and this case is returned to his jurisdiction for appropriate correction.

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 21, 1984

LONNIE JONES	:	
	:	
v.	:	Docket No. KENT 83-257-D(A)
	:	
D&R CONTRACTORS	:	

ORDER

On November 21, 1984, the Commission granted the timely petition for discretionary review filed by respondent D&R Contractors. On December 5, 1984, counsel for complainant Lonnie Jones filed a motion to reconsider and vacate the Commission's direction for review. As the basis for this motion, counsel requests the Commission to consider complainant's previously filed opposition to D&R's petition. We will treat complainant's opposition as a memorandum in support of his present motion for reconsideration. 1/ Upon consideration of the motion for reconsideration, complainant's request for vacation of the direction for review is denied.

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ Commission Procedural Rule 70(e), 29 C.F.R. § 2700.70(e), permits the filing of oppositions to petitions for discretionary review, but states that "such filing shall in no way delay Commission action on the petition." Thus, the Commission may grant a petition, as it did here, without awaiting the possible submission of an opposition. Oppositions to petitions must also be filed within 40 days from the date of the administrative law judge's decision concerning which review has been timely sought. 30 U.S.C. § 823(d)(1); Commission Procedural Rule 70(g), 29 C.F.R. § 2700.70(g). We note that in this case, complainant's opposition was received by the Commission on November 28, 1984, one day past the 40-day time limit from the judge's decision below.

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 3 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 84-187 A.C. No. 36-04151-03504
v.	:	Rob Strip Mine
ROB COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Clarence Creel, President, Rob Coal Company, Kittanning, Pennsylvania, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments in the amount of $40 for two alleged violations of mandatory surface mining health standard 30 C.F.R. § 71.208(a).

The respondent filed a timely answer and contest, and pursuant to notice a hearing was held in Pittsburgh, Pennsylvania, on October 23, 1984, and the parties appeared and participated fully therein.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

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

Stipulations

The parties agreed that the mine in question is subject to the Act and that the presiding judge has jurisdiction to hear and decide this case. They also agreed that the respondent is a small mine operator and that the Rob Mine is a small strip mining operation employing a total of three miners (Tr. 6-8).

Petitioner's counsel asserted that the respondent's total history of prior citations consists of two prior "single penalty" violations for which the respondent paid $40 in civil penalties. Counsel also asserted that the two citations in issue in this case involved a low degree of negligence and gravity, and that since no further action was required to be taken by the respondent to achieve compliance, the issue of timely abatement is not relevant to any civil penalty determination (Tr. 8-10).

Discussion

The two section 104(a) non-"S&S" citations in question in this case were issued on May 11, 1984. Citation No. 9951272, charges the respondent with failing to take a valid respirable dust sample during the February-March 1984 bimonthly sampling cycle on designated work position 001-0-368. Citation No. 9951273, charges the respondent with failing to take a valid sample during the same sampling cycle on designated work position 001-0-382.

30 C.F.R. § 71-208(a) provides in pertinent part as follows:

> Each operator shall take one valid respirable dust sample from each designated work position during each bimonthly period beginning with the bimonthly period of February 1, 1981. The bimonthly periods are:
> February 1 - March 31
> * * * *

For purposes of Part 71, of MSHA's mandatory health standards for surface coal mines, the term "valid respirable dust sample" is defined by section 71.2(r), as "a respirable dust sample collected and submitted as required by this part, and not voided by MSHA." (Emphasis supplied.)

Petitioner's Testimony and Evidence

MSHA Inspector Gerald F. Moody confirmed that he issued the citations in this case, and he stated that they were based on information received from MSHA's computer (exhibits G-1 and G-2). Mr. Moody explained that the information that is used to support the citation is gathered by MSHA's district office and that he simply signs the citation forms because the person who prepares the noncompliance data is not an inspector authorized to issue citations (Tr. 10-14).

Nancy MacCumbee, Inspection Compliance Clerk, MSHA Monroeville District Office, testified that she is responsible for monitoring the surface and underground respirable dust reporting program for the mines in her district. She explained the procedures she follows in connection with the dust sample cassettes submitted by mine operators to her office.

Mrs. MacCumbee explained that mine operators submit their respirable dust cassette samples by mail to MSHA's dust analysis laboratory in Pittsburgh. The operator is required to fill out a data card form along with the cassette, (exhibit G-4). She stated that this is a new form which has been in use for about a year, and she identified exhibit G-5, as the old mine data card. These data cards are not MSHA forms, and they are supplied by the company which supplies the sampling cassettes to the mine operator. In the instant case, the cassettes and forms are supplied by the Bendix Company.

Mrs. MacCumbee identified exhibit G-3, as an "Input Transaction Error Report," received in her office on April 2, 1984, and she explained that the form is generated by MSHA's computer center in Denver, Colorado. She confirmed that this particular report indicated that items 9 and 10 on the dust data card submitted with the dust sample cassette by the respondent in this case were not filled out. Since the form was incomplete, the computer rejected the sample cassette as an invalid sample for designated work position 368, Caterpillar dozer operator, and that is why she prepared Citation No. 9951272, for Mr. Moody's signature. She confirmed that a similar error report was received for designated work position 382, Fiat Allis Front-End Loader operator, and that is what prompted the issuance of Citation No. 9951273.

Mrs. MacCumbee identified exhibit G-6, as a copy of a letter dated May 4, 1983, from MSHA's district manager,

to the respondent explaining certain changes in the reporting requirements for respirable dust samples from designated work positions. She indicated that MSHA's district office provided a training program for mine operators in the district to explain the new procedures for submitting the data required with the dust sampling devices.

Mrs. MacCumbee confirmed that both of the citations issued in this case were the result of the failure by the respondent to fill out items 9 and 10 on the new data form. Since the computer which scans this data did not pick up the information, it rejected the cassettes which were submitted as "invalid," and that is what triggered the issuance of the citations by her office. She explained further that if the respondent submitted the old data form with the cassettes, the "computer rejection" result would be the same since the old card form does not utilize coded items 9 and 10 as shown on the new forms. She indicated that mine operators were instructed to submit the new data cards along with any old forms still in use, and that in this case this was apparently not done (Tr. 20-35).

Respondent's Testimony and Evidence

Clarence Creel, the owner and operator of the mine in this case, confirmed that he was issued a prior citation for an invalid dust sample at the mine. However, he explained that the initial sample had become contaminated with dirt, and that an MSHA inspector advised him "to forget it," and to submit a new sample. Although he submitted another sample which indicated that he was in compliance, the first sample was rejected, and as a result, he received a citation. He decided to pay the assessment rather than to contest the citation, and since that time he has been on a regular sampling cycle. He claimed that he has been unable to convince MSHA's district office that since that episode, he has always been in compliance with the respirable dust requirements. Under the circumstances, he decided to contest the instant two citations rather than pay the proposed assessments (Tr. 40-41).

Mr. Creel testified that when he submitted the two dust samples which are in issue in this case he filled out the data cards which were with the sample cassettes supplied to him by the Bendix Company, the supplier. He confirmed that he was not furnished a supply of new data cards until after the citations were issued (Tr. 46). He also confirmed that he does his own sampling, and that after filling out the data cards, he mailed the cassettes and cards to MSHA in a self-addressed container provided for that purpose (Tr. 48-49).

Findings and Conclusions

The facts presented in this case reflect that the respondent took the two samples in question and submitted them to the appropriate MSHA office as required by the regulations. However, since the respondent used an old data card form when he submitted the samples, they were voided by the computer because some of the information required to be submitted on the new form was not programmed, and the computer could not process the data reflected on the old card.

MSHA's counsel conceded that the citations resulted from the respondent's use of old data cards when he submitted the required samples. Since the old cards do not provide for the submission of the kinds of information required by the new data cards, the samples were rejected by the computer as being invalid under MSHA's definition of the term "valid samples." Counsel also conceded that the citations here do not concern a matter of noncompliance with the respirable dust level requirements, but only with the respondent's failure to submit "valid" samples. Counsel agreed that nominal civil penalties are in order for the citations (Tr. 47-50).

I conclude and find that the petitioner has established the fact of violation as to both citations and they are affirmed. However, I have considered the fact that the citations were triggered by a computer which rejected and invalidated the dust samples which the respondent submitted because the data accompanying the samples was incomplete. Under the circumstances, I conclude that there are facts presented here which strongly mitigate any civil penalty assessed for the two citations.

Gravity

I conclude and find that the violations here are nonserious.

Negligence

Although respondent is presumed to know that he was required to submit new data cards with his samples, he denied that this was ever brought to his attention during any MSHA training sessions he may have attended. Having viewed the respondent on the stand during his testimony, I found him to be an honest and straightforward witness, and I believe his assertions that he was somewhat confused over why he was still required to submit dust samples. Although MSHA produced a communication dated May 4, 1983, addressed to Mr. Creel advising him of the new dust reporting procedures, I find Mr. Creel's explanation as to why he used his old supply of data cards to be credible mitigation of his negligence in this case. Accordingly, I conclude that the violations resulted from a low degree of negligence on his part.

Good Faith Compliance

This factor is inapplicable to the facts of this case. MSHA conceded that since the bimonthly sampling had already passed at the time the citations were issued, there was no way for the respondent to abate the citations. The record here supports a conclusion that the respondent has an excellent compliance record, and I have taken this into consideration in assessing the civil penalties for the two citations in question.

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

I conclude and find that the respondent is a small mine operator and that the penalties assessed will not adversely affect its ability to continue in business.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that civil penalties in the amount of $5 for each of the two citations are appropriate in this case.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of $10 for the two citations in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision. Upon receipt of payment, this case is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

David T. Bush, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Mr. Clarence Creel, President, Rob Coal Co., Inc., RD #4, Kittanning, PA 16201 (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 3

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 84-26-M A.C. No. 09-00727-05501
v.	:	Locke's Quarry, Inc.
LOCKE'S QUARRY, INC., Respondent	:	

SUMMARY DECISION

Before: Judge Koutras

Statement of the Case

This case concerns a civil penalty proposal initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for two alleged violations of mandatory safety standard 30 C.F.R. § 56.12-13(b). The proposals seek a penalty assessment of $98 for section 104(a) Citation No. 2243929, issued by an MSHA inspector on October 25, 1983, and a $20 penalty for Citation No. 2243931, issued that same day. The inspector found that the first violation was "significant and substantial," and that the second one was not.

Respondent, by and through its counsel, filed an answer to the petitioner's civil penalty proposals, and while it did not dispute the fact that the violations in question occurred, it did take issue with the inspector's "significant and substantial" finding concerning Citation No. 2243929. However, respondent's counsel stated that respondent did not desire a hearing, and he explained that the respondent simply wanted to make it known that the proposed civil penalties in the amount of $118 are disproportionate for the violations in question.

In view of the respondent's answer, and in particular the fact that it did not contest the fact of violations and indicated that it did not desire a hearing, I issued an Order

on September 18, 1984, directing the parties to show cause as to why this case should not be disposed of by summary decision. I also afforded the parties an opportunity to file further written arguments with me in support of their respective positions.

By motion filed October 22, 1984, counsel for the petitioner filed a motion for summary decision, with supporting arguments and information concerning the six statutory criteria found in section 110(i) of the Act. Respondent has not responded to my order, nor has it filed any response or opposition to the motion filed by the petitioner. Under the circumstances, I conclude and find that the respondent has waived its right to file further arguments with me, and I will summarily decide this case on the basis of the pleadings of record, including the petitioner's motion for summary decision, with supporting arguments.

Findings and Conclusions

I take note of the fact that the respondent does not dispute the fact that on October 25, 1983, it was served with Citations 2243929 and 2243931 for violations of mandatory safety standard 30 C.F.R. § 56.12-13(b), which provides as follows:

> § 56.12-13 Mandatory. Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be: (2) Mechanically strong with electrical conductivity as near as possible to that of the original; (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

Section 104(a), "S&S" Citation No. 2243929, describes the cited condition or practice as follows:

> There was a defective splice in the 110 volt power cable for the quarry flood light. The splice was not insulated to a degree at least equal to that of the original and sealed to exclude moisture. The defective splice was located in an area where quarry personnel have to be regularly.

Section 104(a), non-"S&S" Citation No. 2243931, describes the cited condition or practice as follows:

> There were several defective splices in the 110 volt power extension cable at the compressor building. The splices were not insulated to a degree at least equal to that of the original and sealed to exclude moisture.

Fact of Violations

Included as part of the arguments in support of its case, the petitioner has filed a sworn affidavit executed by the inspector who issued the citations in question in this case. After careful review of this affidavit, including a full explanation by the inspector, I conclude and find that the petitioner has established the fact of violation as to both citations, and they are AFFIRMED.

In support of its "single penalty assessment" of $20 for Citation No. 20243931, the petitioner points out that while the 110 volt extension cable at the compressor building had several defective splices, it was in an area not readily accessible to employees, and there was only one employee who had the responsibility for turning the compressor on in the morning and off in the evening. Also, while there was loose tape wrapped around the bare wires, petitioner concludes that there was no evidence that this violation was reasonably likely to result in a serious injury and it was abated immediately upon notification.

After consideration of the arguments presented by the petitioner, I adopt its proposed findings and conclusions with respect to this citation as my findings and conclusions, and they are affirmed.

In support of the inspector's "significant and substantial" finding with respect to Citation No. 2243929, the petitioner asserts that Inspector Grabner observed that there were four employees exposed to the 110 volt energized wires located on top a handrailing used by employees to travel to and from the quarry. Petitioner argues that this exposure to the energized wires was regular and reoccurring, and that if the exposed wires were contacted by the employees, serious injury or death could have resulted from the 110 volts. In support of this conclusion, the petitioner relies on Inspector Grabner's affidavit, and an attachment to that affidavit which is identified as an excerpt from Bureau of Mines "Monthly Safety Topic" discussion concerning low voltage electrical hazards.

After careful consideration of the record in support of the inspector's "significant and substantial" finding concerning Citation No. 2243929, and absent any input by the respondent, I conclude and find that the petitioner has established that there was a reasonable likelihood of an injury, and the inspector's finding in this regard IS AFFIRMED.

History of Prior Citations

Exhibit 3 submitted by the petitioner is a computer print-out reflecting the respondent's history of prior citation assessments for the period December 6, 1981, through December 5, 1983. The only citations listed are the ones which are contested in this case. Accordingly, for purposes of any civil penalty assessments made by me in this case, I have considered the fact that the respondent has no prior history of violations.

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

The information submitted by the petitioner reflects that the respondent is a small mine operator, employing four employees who work less than 10,000 manhours a year. I therefore conclude that the respondent is a small operator, and in light of any information to the contrary, I further conclude that the civil penalties which I have imposed here will not adversely affect the respondent's ability to continue in business.

Good Faith Abatement

With regard to Citation No. 2243929, the record establishes that abatement was achieved within 15 minutes of the issuance of the citation, and that the defective power cable was removed from service. As for Citation No. 2243931, the record indicates that abatement was achieved the same day the citation issued, and that the respondent repaired the cited defective cable splices. Further, the petitioner concedes that the respondent immediately replaced or repaired the cited cables on notification by the inspector. Accordingly, I conclude that the respondent gave immediate attention to the citations by rapidly correcting and abating the violations, and I have considered this in the civil penalties which have been assessed for the citations in question.

Negligence

I conclude and find that the record here establishes that both of the citations in issue resulted from the

respondent's failure to exercise reasonable care, and that the violations are the result of ordinary negligence on the respondent's part.

Gravity

I conclude and find that the record here supports a finding that Citation No. 20243931 was nonserious, and that Citation No. 2243929, was serious. In the first instance, the inspector concluded that any exposure to a hazard was of very short duration, and that there was an attempt made to cover any exposed wires. As for the second citation, I agree with the inspector's evaluation that the hazard presented constituted a likelihood of injury to several employees.

Civil Penalty Assessment

I take note of the fact that during the initial civil penalty assessment procedure made by MSHA's Office of Assessments for Citation No. 2243929, the initial assessment was in the amount of $140, as computed by MSHA's penalty "point system." A further reduction after application of MSHA's penalty criteria, resulted in a reduction of the penalty to $98, and this is the assessment amount that the petitioner proposes in this case. Absent any further input by the respondent, I cannot conclude that this proposed civil penalty assessment is unreasonable. Accordingly, the petitioner's proposal is accepted, and I adopt it as my civil penalty assessment for this violation.

With regard to Citation No. 2243931, petitioner's "single penalty" assessment of $20 seems reasonable in the circumstances, and I accept and adopt it as my civil penalty assessment for this citation.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $98 for Citation No. 2243929, and a civil penalty in the amount of $20 for Citation No. 2243931. Payment is to be made to MSHA within thirty (30) days of the date of this decision, and upon receipt of payment, this case is dismissed.

George A. Koutras
Administrative Law Judge

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/slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 3 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 84-57 A. C. No. 01-00758-03592
v.	:	No. 3 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Before: Judge Merlin

In lieu of a hearing, the parties submitted stipulations in the above-captioned case for a decision on the record.

The parties stipulate that the condition or practice described in the citation occurred and that the belt described in the citation was a coal-carrying belt. The parties further agree that the decision in Jim Walter Resources, Inc., Docket No. SE 84-23 (July 30, 1984) is controlling. I accept these stipulations.

The decision in Docket No. SE 84-23 held that 30 C.F.R. § 75.1403-5(g) does not apply to coal-carrying belt conveyors. Therefore, in light of the parties' stipulation that this case concerns a coal-carrying belt I find that there was no violation.

Citation No. 2310851 is hereby VACATED.

Paul Merlin
Chief Administrative Law Judge

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Ms. Joyce Hanula, Legal Assistant, UMWA, 900 15th Street, N.W., Washington, DC 20006 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 84-67-M A.C. No. 14-00412-05501
v.	:	Carey Rock Salt Mine
CAREY SALT - DIVISION OF PROCESSED MINERALS, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This proceeding concerns a civil penalty proposal 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 $4,000, for a violation of mandatory safety standard 30 C.F.R. § 57.9-20.

The respondent filed a timely answer contesting the violation, and the case was scheduled for hearing in Witchita, Kansas, on November 27, 1984. However, by joint motion filed by the parties pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, they seek my approval of a proposed settlement of the case, the terms of which include an agreement by the respondent to pay a civil penalty in the amount of $3,000, for the violation in question.

Discussion

In support of the proposed settlement disposition of this case, the parties have submitted a full discussion of the six statutory criteria found in section 110(i) of the Act. The parties state that the respondent is a small operator engaged in the operation of an underground salt mine and that the settlement amount is appropriate to the size of

the operation and will not affect the respondent's ability to continue in business. The parties also state that the respondent has a good compliance history and abated the violation within a reasonable period of time.

The parties are in agreement that the gravity of the violation was serious, and that the violation contributed to an accident. According to the information in the pleadings filed by the petitioner, the citation was issued because four railroad cars, parked on a spur track east of the mill loading dock, were not blocked by a positive action stopblock as required by section 57.9-20. The four parked cars ran off the spur track and struck three cars near the loading dock; these three cars, in turn, moved forward and crushed an employee against the car at the loading dock, causing fatal injuries. The petitioner believes that had the cars on the spur track been securely blocked, the accident would not have occurred.

In further support of the proposed settlement, the parties assert that several mitigating circumstances dictate that the degree of negligence be modified from moderate to low. The parties state that it had been the custom and practice of respondent to park railroad cars on the spur track and to use the parking (hand) brake on the railroad cars to keep them from moving. This practice was in effect prior to MSHA inspections and was not cited. The parties also state that it is probable that some moisture accumulated around the brake shoe which froze and then thawed out, thereby contributing to the brake not holding.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED and the settlement IS APPROVED.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $3,000, in satisfaction of the violation in question, and payment is to be made to the petitioner within thirty (30) days of the date of this decision and order. Upon receipt of payment, 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
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. SE 80-21-M A.O. No. 31-00136-05001 I
v.	:	Docket No. SE 80-61-M A.O. No. 31-00136-05015
CAROLINA STALITE COMPANY, Respondent	:	Docket No. SE 80-73-M A.O. No. 31-00136-05016
	:	Docket No. SE 80-79-M A.O. No. 31-00136-05017
	:	Docket No. 81-6-M A.O. No. 31-00136-05018
	:	Stalite Mill

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

The parties have reached a settlement of the nine violations involved in these five dockets in the total sum of $2000.00. MSHA's initial assessment therefor was $2587.00.

The terms of the settlement are as follows:

Citation No.	Original Assessment	Settlement
SE 80-21-M		
00104454	$1,200	$ 920
SE 80-61-M		
00104519	$ 150	$ 115

Citation No.	Original Assessment	Settlement
SE 80-73-M		
00105537	$ 210	$ 165
00105538	210	165
00110905	195	150
00110906	122	90
SE 80-29-M		
00105539	$ 160	$ 130
00110904	180	140
SE 81-6-M		
00105507	$ 160	$ 125

The settlement appears reasonable and is approved. It should be initially noted that no fatalities resulted from any violation and that Respondent apparently abated the violative conditions in good faith and timely fashion after notification thereof. Also, at the time of issuance of the citations Respondent, according to the parties, was a "moderate-sized" operator employing approximately 48 employees for 118,000 manhours per year in milling light-weight aggregate. The joint motion submitted by the parties indicates inter alia that:

1. Citation No. 00104454 involved an accident in which a crushing plant laborer who was not wearing a safety belt and line allegedly fell 40 feet from the edge of a silo. Instead of a safety belt, the miner had wrapped a rope around his body. However, the fall actually was not 40 feet because the crushed stalite material slopped up toward the top of the silo and the miner received only minor injuries and was immediately pulled out of the silo. The agreed-on penalty of $920 is found appropriate.

2. Citation No. 00104519 was issued for a violation of 30 C.F.R. § 56.17-1. The inspector did not consider the light sufficient at the stairs going up to the preheaters and at the stockpile area. A proposed penalty reduction from $150 to $115 is found appropriate since the MSHA inspector considered the possibility of an accident occurring as "improbable," and because MSHA agrees that the Respondent should be given "good faith abatement" credit for immediately ordering and installing additional lighting.

3. Citation No. 00105537, involving a violation of 30 C.F.R. § 56.14-6, was issued because the guard on the tailpulley and the idlers on the No. 3 raw material conveyor were left open. According to the Solicitor, the mine operator checks this area daily and would testify (1) that it was not aware that the guard had been left open and (2) that it was not in that position when Respondent checked the area earlier on the day in question. Upon notification, Respondent immediately closed the guard. The agreed-on penalty of $165.00 is approved.

4. Citation No. 00105538 (30 C.F.R. § 56.14-7) was issued because the tailpulley guard of the yellow discharge belt was not properly maintained in that the back portion of the guard had been bent, partially exposing a pinch point. According to the Solicitor, (1) this area is not regularly worked by employees, (2) Respondent was not aware that the condition presented any hazard, and (3) Respondent would testify that it believed the guard to be adequate. The proposed penalty of $165 is found appropriate. It also appears that immediately upon notification of the violation, Respondent bent the guard back into position.

5. Citation No. 00110905 was issued for a violation of 30 C.F.R. § 56.9-37. A 930 Cat Loader was left unattended on a 5% grade without emergency brakes or wheels turned into a bank. The parties propose a penalty of $150 which is approved. Respondent contends that it was not aware of the violative condition and that such practice violated company policy. During an inspection the loader operator apparently left the loader to get a drink of water.

6. Citation No. 00110906 was issued for a violation of 30 C.F.R. § 56.15-3 when a maintenance man was handling heavy metal objects without wearing protective footwear. The maintenance man had safety shoes but was not wearing them on the day in question. Respondent was not aware of the condition and company policy required the wearing of safety shoes. The agreed-on penalty of $90.00 is reasonable and approved.

7. Citation No. 00105539, for violation of 30 C.F.R. § 56.20-3, was issued because the elevated walkway was not kept clean. A 8" to 10" build-up of material occurred. The walkway had handrails, and at the time of the inspection, Respondent was in the process of replacing the grates on the walkway to allow the material to pass more easily. Upon notification, Respondent immediately cleared the material from the walkway, thereby achieving prompt abatement. The reduction of $30.00 from the proposed penalty appears warranted and a penalty of $130.00 is approved.

8. Citation No. 00110904, for a violation of 30 C.F.R. § 56.20-813, was issued because the toilet facilities were not kept clean and sanitary. A penalty of $140 for this violation is reasonable and approved since, upon notification of the violation, the toilet facility was cleaned and Respondent assigned an employee to the job on a regular basis.

9. Citation No. 00105507, involving a violation of 30 C.F.R. § 56.9-2, was issued because the 930 Cat Loader had no lights and was working in areas with insufficient lighting. Respondent was not aware that the loader was being used at night since another loader with lights was normally worked at night. There was sufficient lighting in the area, and upon notification, the loader was immediately taken out of service by Respondent and new lights installed. The agreed penalty of $125.00 is approved.

ORDER

Respondent, if it has not previously done so, is ordered to pay $2000.00 to the Secretary of Labor within 30 days from the date of this decision.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 84-45-M A.C. No. 41-02926-05502
v.	:	Crusher No. 2 Mine
PRICE CONSTRUCTION, INC., Respondent	:	

DECISION

Appearances: Ronnie A. Howell, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Bobby Price, Vice-President, Price Construction, Inc., Big Spring, Texas, for the Respondent.

Before: Judge Koutras

Statement of the Case

This case concerns a civil penalty proposal initiated 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 of $20 for an alleged violation of mandatory safety standard 30 C.F.R. § 56.6-20(e).

The respondent filed a timely answer and notice of contest and requested a hearing on the alleged violation. A hearing was convened in Big Spring, Texas, on November 13, 1984, and the parties appeared pursuant to notice.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

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

Stipulations

The parties stipulated that exhibit P-1, is an MSHA computer print-out reflecting the respondent's history of prior violations for the period February 2, 1982 to February 14, 1984 (Tr. 8). The print-out reflects three prior citations for which the respondent paid civil penalty assessments totalling $119, and that none of the citations are repeat violations (Tr. 9).

The parties agreed that the respondent is a small operator, and that it operates two mines engaged in the mining of a limestone crushed base material used for road construction. The mine in question employs approximately 18 miners and had an annual production of approximately 40,060 man-hours (Tr. 8-9).

The parties agreed that the respondent acted immediately in good faith and abated the cited condition on the same day on which it was pointed out to him (Tr. 9).

Respondent also stipulated that payment of the civil penalty assessment for the violation in question will not adversely affect his ability to continue in business (Tr. 9).

Discussion

The respondent was cited for failure to ground two metal constructed explosive magazines located at the site of one of his crushers. Information developed during the hearing indicates that the magazines were the property of a contractor who brought them to the site, and they were left as part of a lease arrangement (Tr. 13). The crusher has since been removed from the site and is no longer operational (Tr. 11).

Respondent's vice-president, Bobby Price, confirmed that the crusher is no longer in operation, and he stated that he assumed that the magazines were properly grounded at the time they were delivered and installed at the site. He pointed out that the magazines are not in the possession of the respondent at all times (Tr. 13-14).

Mr. Price indicated that this case was initially contested by the company safety director, and that he (Price) had only become personally involved on the day prior to the hearing. He conceded the fact of violation and indicated that he would like to dispose of the matter by paying the $20 proposed assessment.

Petitioner's counsel asserted that the magazines in question were located approximately 200 yards away from the major mine operations, and that the inspection in question was the first visit to the site (Tr. 12). He also confirmed that abatement was achieved that same day, and that employee exposure to any hazard was minimal (Tr. 12). Counsel confirmed that upon consultation with the MSHA inspector who issued the citation, and who was present in the courtroom, the inspector would agree that the payment of the assessed civil penalty would be a reasonable compromise for the citation in question (Tr. 16).

Findings and Conclusions

After careful consideration of the facts in this case, including the six statutory criteria found in section 110(i) of the Act, and the arguments presented by the parties in support of their proposed disposition of this case, I rendered a bench decision finding a violation of section 56.6-20(e), and imposing a civil penalty of $20 for the violation. Although the respondent was negligent in permitting the violation to occur, I have considered the fact that the respondent is a small operator, has a good compliance record, and the fact that there was immediate abatement of the cited conditions. I have also considered the fact that the magazines were somewhat isolated from the other mining operation, and the lack of any evidence that there were any hazards presented by the cited conditions. My bench decision is hereby reaffirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $20 within thirty (30) days of the date of this decision and order. Upon receipt of payment by the petitioner, this case is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

DEC 13 1984

THE NACCO MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. LAKE 84-60-R
v.	:	Citation No. 2206677; 2/29/84
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 84-61-R
	:	Order No. 2206678; 2/29/84
	:	
	:	Docket No. LAKE 84-62-R
	:	Citation No. 2326373; 2/29/84
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	
	:	Docket No. LAKE 84-63-R
	:	Order No. 2326374; 2/29/84
	:	
	:	Powhatan No. 6 Mine
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 84-79
	:	A. C. No. 33-01159-03599
	:	
v.	:	Powhatan No. 6 Mine
	:	
THE NACCO MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the parties filed on November 30, 1984, in the above-entitled consolidated proceeding a motion for approval of settlement. Under the parties' settlement agreement, The Nacco Mining Company (Nacco) has agreed to withdraw its notices of contest and Nacco has agreed to pay civil penalties totaling $40 for two alleged violations of section 103(f) of the Federal Mine Safety and Health Act of 1977, instead of the penalties totaling $360 proposed by MSHA.

The issues involved in this proceeding relate to the issuance on February 29, 1984, of Citation Nos. 2206677 and 2326373 alleging that Nacco had violated section 103(f) by refusing to allow persons selected by UMWA as miners' representatives to accompany two different inspectors who were engaged either in holding a close-out conference or in making an inspection. In each instance, the person designated to be the miners' representative was classified as a mechanic. Orders of withdrawal

were issued under section 104(b) of the Act when Nacco failed to allow the mechanics to accompany the inspectors in the performance of their work. The position taken by Nacco in its notices of contest was that UMWA was abusing its discretion to select miners' representatives by designating only miners having the job classification of "mechanic" as the representatives to aid the inspectors. Nacco did not object to UMWA's selecting miners' representatives to assist the inspectors, but claimed that UMWA's choosing of more than one employee from each job classification for that purpose unduly interfered with Nacco's ability to operate its mine safely, if at all, while inspections were being made.

The parties engaged in extensive discovery procedures which culminated on August 15 and 16, 1984, when counsel for the parties took the depositions of 16 persons totaling 513 pages of transcript. A hearing had been scheduled to begin on October 23, 1984. A copy of each deposition was mailed to me a short time prior to the hearing. After I had thoroughly reviewed the depositions, I issued on September 28, 1984, a procedural order which contained some findings of fact and conclusions based on the 16 depositions. The parties' settlement agreement (page 4) provides for the findings and conclusions set forth in the procedural order to be made a part of my decision approving settlement. The pertinent part of the procedural order of September 28, 1984, is quoted below:

> I have carefully read and summarized the statements made by the 16 persons who gave depositions under oath and it is difficult for me to understand why any further testimony is required to decide the issues raised in this proceeding. The depositions clearly show that the union and Nacco's management came to an impasse after management denied Roger Hickman's request to transfer from the position of mechanic to the position of helper to the operator of a roof-bolting machine. The union did not insist on designating only mechanics as the miners' representatives to accompany inspectors pursuant to section 103(f) of the Federal Mine Safety and Health Act of 1977 until after management denied Hickman's grievance (Baker, p. 18; Hoskins, pp. 36-37; Houston, p. 17; Marozzi, pp. 12; 22-24).
>
> It is also clear from the statements of both management and union deponents that the union's designation as representatives on a single shift of up to four miners regularly classified as mechanics and one named as a substitute mechanic would have an adverse impact on safety and, if continued, would have curtailed both production and the ability to operate a safe mine (Kovacs, pp. 8-11; Clyde Reed, pp. 13-16; Vucelich, p. 25).

It was the position of the inspectors that Nacco is required to operate a safe mine regardless of how many persons the union may designate as representatives for purposes of section 103(f) and they believed that it was both the union's and management's obligation to solve their differences without involving MSHA in their dispute (Facello, p. 7; Minear, p. 7; William Reed, pp. 8; 20, 30; 33; Yudasz, pp. 15; 34; 38; Zitko, pp. 9; 18; 22). Both the union's and management's depositions show that the union and management ultimately did resolve their differences because management reversed its denial of Hickman's grievance and awarded him with the job he had requested after management had engaged in a 2-hour counseling session with Hickman and learned that the grant of his request would be in the best interest of all, management, the union, and Hickman (Baker, p. 15; Hoskins, p. 40; Marozzi, pp. 25-30).

The depositions further show that management withdrew its written policy which restricted the selection of representatives to one representative from each job classification, and that the union, after the withdrawal of the written policy, has exercised reasonableness in designating representatives (Forrelli, pp. 10; 15-16; Marozzi, p. 36; Miller, p. 41). Moreover, the general superintendent stated that the policy should at least have allowed the union to designate two representatives from a single job classification, assuming that such a policy was necessary (Marozzi, p. 35). Nacco's president stated that the policy did restrict the union's right to designate representatives under section 103(f) of the Act (Mller, p. 38). Finally, the deposition of Josiah Hoskins, who seems to have been one of the primary designators of mechanics as miners' representatives, stated that Nacco is no longer restricting the union's selection of more than one representative from a given single job classification (Deposition, p. 46).

The depositions also show that management did refuse to allow two of the three representatives designated by Hoskins on February 29, 1984, to accompany an inspector underground in one instance and to attend an inspector's close-out conference in another instance (Forrelli, p. 8; Yudasz, pp. 11; 38; Zitko, pp. 21; 24). So far as I can determine, section 103(f) does not permit me to consider equities in determining whether an inspector properly cites a violation of section 103(f) when a representative designated by the union is not permitted to accompany the inspector. Assuming, arguendo, that section 103(f) does permit me to consider the equities of management's refusal to allow representatives to accompany Inspectors Yudasz

and Zitko, neither the union nor management is entirely free from fault in the impasse which occurred after Hickman's grievance was denied.

The union was at fault in using only mechanics as a means of pressuring Nacco's management to reverse its decision regarding Hickman's grievance (Hoskins, p. 36). Management was at fault for agreeing to give the union to March 2, 1984, to consider the unreasonableness of its position and then arbitrarily imposing the "one-repper-classification" rule on February 29, 1984, without giving the union until the agreed-upon date to reply to management's request made in the communications meeting held on February 27, 1984 (Marozzi, p. 41; Vucelich, p. 23).

The parties also asked that their settlement agreement be made a part of my decision. The settlement agreement is set forth below:

SETTLEMENT AGREEMENT

This settlement agreement is made by and between The Nacco Mining Company ("Nacco"), the Mine Safety and Health Administration ("MSHA"), and the United Mine Workers of America ("UMWA") this 20th day of November 1984.

WHEREAS a dispute arose between Nacco and UMWA on February 29, 1984, regarding UMWA's designation of walkaround personnel at Nacco's No. 6 Mine; and

WHEREAS MSHA became involved in the dispute and issued two § 104(a) citations, bearing numbers 2206677 and 2326373 ("the Citations"), to Nacco, and subsequently issued two related § 104(b) orders, bearing numbers 2206678 and 2326374 ("the Orders"), to Nacco, all for alleged violations by Nacco of § 103(f) of the Federal Mine Safety and Health Act ("the Act"); and

WHEREAS Nacco formally contested the validity of the Citations and the Orders in Notice of Contest proceedings bearing Docket Nos. LAKE 84-60-R, LAKE 84-61-R, LAKE 84-62-R, and LAKE 84-63-R ("the contest proceedings"), which are currently pending before Administrative Law Judge Richard C. Steffey; and

WHEREAS MSHA and UMWA are parties to the contest proceedings and have participated with Nacco in conducting 16 depositions of potential union, management, and MSHA witnesses; and

WHEREAS Judge Steffey had conducted a detailed review of the transcripts of those depositions and issued a Procedural Order dated September 28, 1984 ("the Procedural Order") setting forth his findings of fact based on the deposition records; and

WHEREAS the parties desire to settle the contest proceedings on an amicable basis and without need for further litigation;

NOW, THEREFORE, in consideration of the mutual promises herein made and of the acts to be performed by the respective parties hereto, it is agreed as follows:

1. Nacco shall withdraw its Notices of Contest in the contest proceedings.

2. Judge Steffey has indicated his disposition to assess a civil penalty in the amount of $20 against Nacco for each of the Citations. No other penalties shall be sought or claims made against Nacco based on the Citations or the Orders.

3. Nacco shall promptly pay the civil penalties to be assessed by Judge Steffey, as referred to in paragraph 2 of this agreement, in full settlement and compromise of the contest proceedings. By making that payment, Nacco does not admit that it committed any violation of law. Moreover, Nacco's payment shall be made without prejudice to, and with full reservation of, all rights and defenses of Nacco respecting the alleged violations for which payment is made insofar as the same may to any extent be involved in any further or other proceedings.

4. Nacco acknowledges the right of UMWA under § 103(f) of the Act to designate union walkaround representatives to accompany MSHA inspectors at the No. 6 Mine. UMWA acknowledges that its designation of only mechanics as walkaround representatives at the No. 6 Mine during the period from February 23, 1984, through February 29, 1984, was made for purposes unrelated to the Act's safety objectives and thereby constituted an inappropriate exercise of UMWA's designation right under § 103(f).

5. UMWA will hereafter exercise its § 103(f) designation right with reasonableness, having due regard for Nacco's safety and production objectives at the No. 6 Mine and endeavoring to avoid overuse of any

single job classification, unless clear and present safety needs so require. UMWA specifically agrees hereafter to address such labor grievances as it may have under the provisions of its collective bargaining agreement with Nacco and without resort to § 103 of the Act. Nacco will fully respect UMWA's reasonable exercise of its § 103(f) designation right.

6. Nacco and UMWA shall notify their respective constituencies at the No. 6 Mine of the terms and conditions of this settlement agreement and of their individual and collective obligations to abide by those terms and conditions.

7, The parties shall promptly move Judge Steffey to enter an order approving settlement of the contest proceedings on the basis of this agreement. This settlement is expressly conditioned on the entry of an Order by Judge Steffey which recites his findings of fact as set forth in the Procedural Order (see Annex 1) 1/ as well as incorporating the terms and conditions of this settlement agreement and directing the parties to comply with those terms and conditions.

IN WITNESS WHEREOF the parties acknowledge, by signature of their respective counsel, their agreement this 20th day of November 1984.

Mine Safety and Health Administration

By: Robert A. Cohen
Robert A. Cohen

The Nacco Mining Company

By: John A. Macleod
John A. Macleod

United Mine Workers of America

By: Thomas A. Myers
Thomas A. Myers

1/ The settlement agreement submitted by the parties includes in an Annex to the agreement a quotation of the language from the procedural order which I issued on September 28, 1984. I have already included in this decision the relevant portions of my procedural order and they need not be repeated.

Although I gave some reasons in my procedural order of September 28, 1984, for my belief that a civil penalty of $20 would be appropriate for each of the alleged violations of section 103(f), I believe that the Act requires me to give a fuller exposition of the six assessment criteria listed in section 110(i) of the Act than the one provided in my procedural order. The proposed assessment sheet in the official file in Docket No. LAKE 84-79 shows that MSHA's proposed penalty of $180 for each violation was derived after giving an appropriate evaluation of the six criteria on the basis of the limited facts which were available to MSHA at the time the proposed assessments were made. The assessment sheet shows that Nacco's No. 6 Mine produces about 1,075,000 tons of coal annually and that Nacco's controlling company produces over 14,000,000 tons of coal per year. MSHA applied those production figures under the assessment formula described in 30 C.F.R. § 100.3(b) and correctly assigned 13 penalty points under the criterion of the size of Nacco's business.

The assessment sheet indicates that Nacco has been cited for 712 violations during 2,229 inspection days for the 24-month period preceding the writing of the two citations involved in this proceeding. Using the aforesaid statistics to make the calculation described in section 100.3(c) of MSHA's assessment formula results in the assignment of two penalty points under the criterion of Nacco's history of previous violations.

There is no information in the official file, the pleadings, or the discovery materials pertaining to Nacco's financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd. 736 F.2d 1147 (7th Cir. 1984), that if an operator fails to furnish any evidence concerning its financial condition, a judge may presume that the operator is able to pay penalties. Therefore, I find that payment of civil penalties will not adversely affect Nacco's ability to continue in business. Consequently, it will not be necessary to reduce the penalty, determined pursuant to the other criteria, under the criterion of whether the payment of penalties will cause respondent to discontinue in business.

A brief discussion of the facts is required to evaluate the criteria of negligence and gravity. It is a fact that Nacco refused to allow two of the three mechanics designated by UMWA as miners' representatives to accompany inspectors (Forrelli, p. 8). On the other hand, Nacco did permit one mechanic to accompany an inspector as a miners' representative and Nacco's management was quite willing to permit miners from other job classifications to act as miners' representatives (Forrelli, pp. 7; 19), but the UMWA person who was designating miners' representatives declined to appoint any miners from other job classifications to act as miners' representatives when Nacco declined to allow two of the three mechanics to act

as miners' representatives (Hoskins, p. 39). UMWA claims that miners from other job classifications had already gone underground and that no substitute representatives could be selected (Hoskins, p. 40), but Nacco's management disputes that contention (Forrelli, pp. 41-42). In any event, UMWA made no attempt to appoint substitute representatives and simply insisted that management allow three mechanics to act as miners' representatives to accompany three different inspectors (Hoskins, p. 39; Forrelli, p. 20).

It is hardly surprising that Nacco took the intractable position that it did when one considers that on the previous day UMWA had named four regular mechanics and one miner whom Nacco had asked to work as a substitute mechanic to be miners' representatives to accompany five different inspectors who were making a "saturation" inspection on that day (Forrelli, p. 24). Nacco's management on that day permitted UMWA to use as miners' representatives an extreme number of persons from a single job classification. When one is in possession of some of the extenuating circumstances associated with Nacco's refusal to allow more than one mechanic to act as miners' representatives on the day following UMWA's use of five mechanics for that purpose, it hardly seems appropriate to assess any portion of the penalty under the criterion of negligence since UMWA was using its right to designate miners' representatives as a means of putting pressure on Nacco's management to reverse a decision it had made in a grievance case filed by one of the miners who wanted to transfer from his position of mechanic to the position of helper to the operator of a roof-bolting machine (Marozzi, pp. 11-12).

MSHA's proposed penalty of $180 results in large part from its having assigned 15 penalty points under the criterion of negligence. I believe that the unusual circumstances surrounding the citing of the violations warrant assignment of zero penalty points under the criterion of negligence.

Both of MSHA's inspectors correctly considered that the alleged violations of section 103(f) were nonserious and MSHA's penalties were appropriately proposed by assignment of zero penalty points under the criterion of gravity.

The final criterion to be considered is Nacco's good-faith effort to achieve rapid compliance after the violations were cited. It is a fact that Nacco refused to allow two of the three mechanics named as miners' representatives to act in that capacity. Since UMWA refused to name alternate miners' representatives, each inspector wrote a withdrawal order because of Nacco's refusal to abate the alleged violations within the time period established by the inspectors in their citations. If UMWA had named substitute miners' representatives in other job

classifications, the alleged violations would have been abated promptly and Nacco would have been given full credit for having shown a good-faith effort to achieve compliance. Inasmuch as both inspectors considered the violations to be nonserious, MSHA would have assigned penalties of only $20 for each violation under section 100.4 of MSHA's assessment procedures if the alleged violations had been abated within the time allowed by the inspectors. Therefore, MSHA's failure to find that Nacco had made a good-faith effort to achieve compliance caused MSHA to propose its penalties of $180 by using the assessment formula in section 100.3 instead of proposing $20 penalties under section 100.4.

I believe that UMWA should share the blame for the fact that the alleged violations were not promptly abated. UMWA could have contested Nacco's refusal to allow mechanics to accompany the inspectors just as well if it had named substitute miners' representatives so that the provisions of section 103(f) could have been met by use of substitute miners' representatives selected from other job classifications. For that reason, I believe that the penalty should be assessed by assigning zero penalty points under the criterion of whether the operator demonstrated a good-faith effort to achieve rapid compliance.

In short, since UMWA was equally at fault in bringing about the impasse which resulted in the issuance of the citations, I believe that assessment of more than token penalties in this instance would defeat the deterrent purposes envisioned by Congress for assessment of civil penalties. For the aforesaid reasons, I find that the parties' settlement agreement providing for the assessment of penalties of $20 for each violation should be approved and that the motion for approval of settlement should be granted.

WHEREFORE, it is ordered:

(A) The parties' motion for approval of settlement is granted and their settlement agreement is approved.

(B) Pursuant to the parties' settlement agreement, The Nacco Mining Company, within 30 days from the date of this decision, shall pay civil penalties totaling $40.00 for the violations of section 103(f) alleged in Citation Nos. 2206677 and 2326373 dated February 29, 1984.

(C) The Nacco Mining Company's motion to withdraw its notices of contest is granted, the notices of contest are deemed to have been withdrawn, and all further proceedings in Docket Nos. LAKE 84-60-R through LAKE 84-63-R are dismissed.

(D) Approval of the parties' settlement agreement is conditioned upon the parties' compliance with the terms and conditions of the agreement.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 13 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ROBERT RIBEL, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 84-33-D
	:	MSHA Case No. MORG CD 83-18
	:	Federal No. 2 Mine
v.	:	
EASTERN ASSOCIATED COAL CORP., Respondent	:	

ORDER DENYING ATTORNEY FEES
ORDER AWARDING DAMAGES

Statement of the Case

On November 2, 1984, the Commission remanded this matter to me for the limited purpose of ruling on a motion filed by Mr. Ribel's private counsel, after I decided the case on the merits, for an award of costs, expenses, and attorney's fees purportedly incurred by Mr. Ribel in connection with his discrimination complaint.

My decision with respect to the merits of the discrimination complaint filed on Mr. Ribel's behalf by MSHA was issued on September 24, 1984. I sustained the complaint and ordered that Mr. Ribel be reinstated. In view of the fact that the complaint was filed on his behalf by MSHA, and since no one raised the question of attorney's fees and expenses, my decision did not include those matters.

Mr. Ribel's private counsel filed her motion with the Commission's Executive Director on October 29, 1984, and included as part of the motion are four attachments itemizing expenses allegedly incurred by Mr. Ribel in connection with his discharge by the respondent.

On November 7, 1984, respondent's counsel filed an opposition to the motion for an award of costs, expenses, and attorney's fees.

Attachment 2 to the motion is an itemized statement prepared by counsel Barbara Fleischauer claiming $118.35 for mileage and meal costs, $258.98 for long distance telephone calls, and $8,688.33, for "expenses for legal services." These claims total $9,065.66.

Attachment 2(A) claims mileage and meal costs totaling $118.35, covering a period from September 5, 1983 to October 19, 1984.

Attachment 2(B) claims long distance telephone calls in the amount of $258.98, covering a period from August 22, 1983, to October 4, 1984.

Attachment 2(C) is an itemized list of claimed expenses for legal services in the amount of $8,688.83, covering a period from August 21, 1983, to October 24, 1984. Counsel states that during this period of time she provided 173.77 hours of legal services, billed at $50 per hour, for a total of $8,698.33.

Attachment 3 is a statement of expenses filed by Counsel Fleischauer on behalf of Professor Robert Bastress. Included in this statement are costs for mileage and meals amounting to $138.48, and "expenses for legal services" amounting to $656.25, for a total of $794.73.

Attachment 4 is a statement of expenses filed by Counsel Fleischauer on behalf of Professor Franklin D. Cleckley for "legal services" in the amount of $206.25.

In support of these charges, counsel submits an unsigned typewritten letter dated October 24, 1984, to Mr. Ribel advising him that he owes Professor Bastress $794.73, and Professor Cleckley $206.25 (Attachment 1).

Attachment 5 is a statement of expenses allegedly incurred by Mr. Ribel in connection with his discrimination claim. Included in this claim are mileage and meal costs in the amount of $135.92, long distance telephone calls in the amount of $53.54, and miscellaneous expenses in the amount of $470.88, for a total of $660.34.

Attachment 5(A) and (B) are itemized statements of Mr. Ribel's claimed expenses for mileage, meals, telephone, and miscellaneous expenses incurred by Mr. Ribel (and in one instance, his wife), covering a period from August 24, 1983, to November 15, 1983. Most of the items claimed appear to be for travel to and from the West Virginia University Law Center, and travel to and from Fairmont and Charleston,

West Virginia, and the West Virginia Department of Mines in connection with Mr. Ribel's appeal before the State of West Virginia on his discharge. Further, most of the claimed telephone calls on attachment 5(B), are between Mr. Ribel and an unidentified "witness" or "union representative."

Attachment 5(C), are claims in the amount of $290.88, for prescription medication expenses incurred by Mr. Ribel's family during the time he was off the payroll of the respondent. Mr. Ribel claims that these medical expenses would have normally been covered by his company insurance had he not been discharged.

Attachment 5(C), also includes interest charges in the amount of $180, which Mr. Ribel claims he incurred on loans made to cover expenses resulting from 3 months of lost wages while he was off the respondent's employment rolls.

The sum total of all claimed expenses filed by Counsel Fleischauer amount to $10,726.98.

Respondent's Opposition to the Awarding of Attorneys' Fees

In opposition to the motion for an award of attorneys' fees, respondent's counsel points to the fact that the complaint in this case was brought on Mr. Ribel's behalf by the Secretary pursuant to the provisions of section 105(c)(2) of the Act. Counsel submits that it is only with respect to an action brought by a complainant on his own behalf pursuant to the provisions of section 105(c)(3) of the Act that an award of costs and expenses, including attorneys' fees, is appropriate. Therefore, counsel concludes that an award of costs and expenses, including attorneys' fees, to Mr. Ribel in this case would be inappropriate.

Respondent submits that the language of section 105(c) of the Act is plain as to the question of when an award of costs, including attorneys' fees, should be made. Respondent emphasizes the fact that section 105(c)(2) of the Act requires the Secretary to file a complaint with the Commission on a complainant's behalf when he determines that a violation of that section has occurred. When the Secretary determines that a violation has not occurred, section 105(c)(3) confers upon the complainant the right to file an action in his own behalf before the Commission. Respondent submits that it is only in this instance that section 105 authorizes the award of costs including attorneys' fees. In support of this conclusion, respondent cites the following language of section 105(c)(3):

> When an Order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorneys' fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.

Respondent maintains that there is no similar provision authorizing the award of costs and fees when the Secretary prevails in an action commenced pursuant to the provisions of section 105(c)(2), and that it is only in connection with a successful action commenced pursuant to the provisions of section 105(c)(3) that an award of attorneys' fees is appropriate. In further support of its argument, respondent cites the legislative history of the Act as reported by the Joint Explanatory Statement of the Conference Committee, in pertinent part as follows:

> * * * If the complainant prevailed in an action which he brought himself after the Secretary's determination, the Commission Order would require that the violator pay all expenses reasonably incurred by the complainant in bringing the action. (Emphasis added.)

H. Confer. Rep. No. 95-655, 95th Cong., 1st Sess. (1977) U.S. Code Cong. § Admin. News 1979, p. 3500.

Respondent concludes that it is apparent that Congress intended that an applicant be entitled to an award of fees and costs in an action brought pursuant to the provisions of section 105(c) only when the applicant is required to commence an action with the Commission on his own behalf, and that an award of costs including attorneys' fees, as requested by Mr. Ribel, would be inappropriate and unwarranted under the circumstances of this case.

In further opposition to the motion for award of attorney's fees, respondent's counsel asserts that subsequent to his discharge, Mr. Ribel also filed a petition with the West Virginia Coal Mine Safety Board of Appeals pursuant to the provisions of the West Virginia Coal Mine Health and Safety Act, W.Va.

Code § 22-1-1 et seq., charging that his discharge had been in violation of the anti-discrimination provisions of that Act. Counsel states that a hearing was held on Mr. Ribel's petition before the Board in Charleston, West Virginia on November 15, 1983, but that on November 29, 1983, acting on a motion filed by Eastern, the Board entered an Order staying and deferring any further investigation or hearing with respect to Mr. Ribel's discrimination petition, and that Mr. Ribel's petition for discrimination is pending with the Board at this time.

Respondent's counsel also asserts that he believes that subsequent to his discharge, Mr. Ribel filed a claim for unemployment compensation with the West Virginia Bureau of Unemployment Compensation, and that a hearing was held on Mr. Ribel's claim on or about September 5, 1983.

Respondent submits that the requested attorneys' fees for Mr. Ribel's private counsel for work performed in connection with his proceedings before the State of West Virginia are inappropriate because any work done by counsel was not work which was necessary to the preparation and presentation of the issues before the Commission in this case. Moreover, counsel asserts that Mr. Ribel may be entitled to the award of fees under attorneys' fees provisions of the West Virginia Coal Mine Safety Act and the Unemployment Compensation Act. Counsel argues that any fee awarded under the Federal Mine Safety and Health Act for services performed in connection with the State proceedings would result in double recovery for Mr. Ribel. Under the circumstances, counsel maintains that any fee award by the Commission should be reduced so as to exclude all hours charged in connection with the proceedings before the State of West Virginia.

Assuming arguendo that the Act can be construed to authorize the award of fees for the efforts of private attorneys in an action brought by the Secretary on behalf of a complainant pursuant to section 105(c)(2), respondent's counsel cites the "intervenor" cases of Donnell v. United States, 682 F.2d 240 (D.C. 1982); Alabama Power Co. v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982) and Busch v. Bays, 463 F.Supp. 59, 66 (E.D. Va. 1978), and argues that the test which has evolved from these decisions requires the Commission to make a determination as to the role played by the "intervenor" before making any fee award. Respondent submits that if the "intervenor" has contributed little or nothing of substance to the litigation, then no fee award is appropriate.

On the facts of the instant case, respondent's counsel asserts that the action commenced by the Secretary on Mr. Ribel's behalf before the Commission, including the necessary steps leading to my decision were as follows: the filing of the complaint by the Secretary; the representation of Mr. Ribel at the temporary reinstatement hearing on November 28, 1983; the representation of Mr. Ribel at his deposition which was taken for purposes of preparation for the hearing on the merits of his complaint; representation of Mr. Ribel at the hearings on the merits which were held on January 11 and 12, 1984,; and the preparation and filing of a post hearing brief with me. Since Mr. Ribel was represented by the Secretary in all of these matters, counsel concludes that the function performed by his personal attorney was limited to showing up at hearings and depositions and reading documents prepared by others. Counsel maintains further that there is no showing here that Mr. Ribel's personal attorneys contributed anything of substance or value to the outcome of the action commenced on his behalf by the Secretary. Under the circumstances, and in light of the principles set forth in his cited cases, counsel submits that an award of fees to Mr. Ribel for the hours logged by his personal attorneys would be inappropriate.

With regard to Attorney Fleischauer's fee charges in connection with the temporary reinstatement hearing held on November 28, 1983, and the hearing on the merits held on January 11 and 12, 1984, respondent's counsel points out that in both instances the hearings were handled by counsel for the Secretary and that Ms. Fleischauer's participation was strictly as an observer. Counsel submits that the same is true for the fee charges by Ms. Fleischauer in connection with the taking of Mr. Ribel's deposition in preparation for the hearing on the merits of his complaint. Further, counsel notes that Ms. Fleischauer has listed numerous charges for reviewing and reading documents prepared by other counsel, and he suggests that these charges should be reduced or eliminated as excessive and unnecessary.

Although the respondent takes the position that no attorney fee award is appropriate, it nonetheless submits that if a fee is awarded, the following is a schedule of reasonable hours and rates in light of Ms. Fleischauer's "minor role" in this matter:

1)	Client interview	2.0
2)	Review Complaint prepared by Secretary	.5
3)	Attendance at temporary reinstatement hearing	6.0

4)	Attendance and assistance at hearings on the merits	10.0
5)	Review Secretary's posthearing brief	1.0
6)	Review Judge Koutras' decision and meeting with client	1.0
		20.5
20.5 at $50.00		$1,025.00

Attorney Fleischauer's Arguments in Support of the Motion for Attorney Fees

By memorandum filed with me on November 26, 1984, Ms. Fleischauer maintains that the plain meaning of section 105(c)(3) of the Act authorizes the award of private attorneys fees and expenses reasonably incurred by Mr. Ribel in connection with the discrimination complaint brought on his behalf by the Secretary of Labor. In support of this argument, Ms. Fleischauer relies on the Supreme Court decision in New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), a case litigated pursuant to Title VII of the Civil Rights Act of 1964. Ms. Fleischauer argues that the factual similarities between Mr. Ribel's case before this Commission and the facts presented in the New York Gaslight Club, Inc. are controlling on the question of the award of attorneys fees to her for the work performed on Mr. Ribel's behalf. She concludes that the Supreme Court's holding in the case stands for two separate propositions that are relevant to this case: (1) private attorneys who intervene in federal agency proceedings on the complainant's behalf may be reimbursed for their time under the federal statute, and (2) private attorneys who participate in state agency proceedings which are related to or have a connection with the federal proceedings, may also recover attorneys fees for the state proceedings under the federal statute.

In further support of her request for attorney fees, Ms. Fleischauer includes an affidavit from Mr. Ribel and an affidavit executed by MSHA attorney Moncrief and filed with me on November 29, 1984. While taking no position on the award of attorney fees to Ms. Fleischauer, Mr. Moncrief states that during a period prior to the reinstatement hearing, he conferred with Ms. Fleischauer by telephone for the purpose of exchanging information, clarifying their understanding of the facts, and discussing "theories and approaches to the case." Mr. Moncrief also asserts that he conferred with Ms. Fleischauer the day before the hearing, and during the trial at counsel table and during recesses. He concludes that "my representation of Mr. Ribel was significantly enhanced by the collaboration with Ms. Fleischauer."

In Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974), the court set down 12 criteria for a judge's consideration in determining an award of attorney fees. At 488 F.2d 720, the Court made the following observation:

> * * * The trial judge is necessarily called upon to question the time, expertise, and professional work of a lawyer which is always difficult and sometimes distasteful. But that is the task, and it must be kept in mind that the plaintiff has the burden of proving his entitlement to an award for attorneys' fees just as he would bear the burden of proving a claim for any other money judgment.

In Donnell v. United States, 682 F.2d 240 (D.C. Cir. 1982), a case involving attorney fees to intervenors on the side of the United States under the Federal Voting Rights Act, the Court observed as follows at 682 F.2d 248, 249:

> Where Congress has charged a governmental entity to enforce a statutory provision, and the entity successfully does so, an intervenor should be awarded attorneys' fees only if it contributed substantially to the success of the litigation. This inquiry primarily entails determining whether the governmental litigant adequately represented the intervenors' interests by diligently defending the suit. It also entails considering both whether the intervenor's proposed different theories and arguments for the court's consideration and whether the work it performed was of important value to the court.
>
> By providing for attorneys' fees to be awarded in actions brought to vindicate the civil rights laws, Congress did not intend to allow private litigants to ride the back of the Justice Department to any easy award of attorneys' fees. Obviously, if an intervenor did nothing but simply show up at depositions, hearings, and the trial itself and spend lots of time reading the parties' documents, an award of attorneys' fees would be inappropriate. The same would be true if the intervenors' submissions and arguments were mostly redundant of the government's or were otherwise unhelpful. (Emphasis added.)

The record in this case reflects that prior to the hearings concerning Mr. Ribel's complaints, Ms. Fleischauer failed to file any formal appearances as his counsel. Further, although her after-the-fact arguments in support of attorney fees suggest that she is an intervenor, the record reflects that at no time has she availed herself of the opportunity to file a motion of intervention pursuant to Commission Rule 29 C.F.R. § 2700.4(c).

With regard to Ms. Fleischauer's participation at the temporary reinstatement hearing held in Pittsburgh on Monday, November 28, 1983, I take note of the fact that she did not actively participate in the hearing, questioned no witnesses, presented no arguments, and simply sat at counsel table as an observer. Her appearance was noted after MSHA Counsel Moncrief introduced her on the record as "an attorney retained by Ribel originally in anticipation of [sic] 105(C)(3) case, as well as certain matters in the State of West Virginia which are similar in nature to these proceedings" (Tr. 5). Mr. Moncrief also stated that "With me is Barbara J. Fleischauer, who has been privately retained by Mr. Ribel to represent him in ancillary matters, that is, matters ancillary to the proceeding" (Tr. 6).

The trial transcript consisting of 321 pages in Mr. Ribel's reinstatement hearing reflects that Ms. Fleischauer's participation was limited to responding to questions from me concerning the location of a mine phone (Tr. 198-199), the identity of two miners at a mine meeting (Tr. 237-238), and a question as to whether Mr. Ribel was receiving unemployment compensation (Tr. 291). I find nothing to support the conclusion that her participation was critical to Mr. Ribel's case, or that it significantly contributed to the presentation of his case, or the making of the record before me. In a trial transcript consisting of 321 pages, Ms. Fleischauer's name appears on three pages, and I cannot conclude that her participation made any significant contribution to the case as it was being presented by MSHA counsel Moncrief. Accordingly, Ms. Fleischauer's reliance on MSHA Counsel Moncrief's affidavit in support of her contention that she made a significant contribution at the hearing is rejected.

Ms. Fleischauer's reliance on Mr. Ribel's affidavit in support of her suggestion that she made a significant contribution to the presentation of his case before me is also rejected. Mr. Ribel's assertion at page 2 of his affidavit that during his reinstatement hearing, Ms. Fleischauer "cleared up some confusion about the direction the air was flowing across the face," and that this was an "important part of my case," is nonsense. The ventilation flow in the mine had nothing to do with Mr. Ribel's discharge for allegedly sabotaging a mine phone.

With regard to the hearing on the merits of Mr. Ribel's discharge, Ms. Fleischauer claims 13 hours of work in connection with the "hearing at Ramada Inn in Morgantown" on January 11, 1984, and "second day of hearing, consultation with client," on January 12, 1984. The hearing transcript for January 11, 1984, reflects that she entered an appearance that day. However, the transcript for the second day, January 12, 1984, does not show that she was present, or that she entered an appearance. However, even assuming that she was present for the full two days of hearings, a review of the 743 pages of trial transcripts concerning Mr. Ribel's case, and two other complainants not represented by Ms. Fleischauer, reflects that Ms. Fleischauer is not mentioned at all. In short, the transcripts reflect that she was a nonparticipant.

In my view, Mr. Ribel's statement at page 3 of his affidavit that Ms. Fleischauer's presence at the hearing on the merits of his discharge "gave us an opportunity to gather information and observe how witnesses acted in case we needed to have a hearing at the state level," accurately portrays the role played by Ms. Fleischauer in the hearings before me. As I stated earlier, her role in both hearings before me was that of an observer monitoring the hearings. Ms. Fleischauer admits as much when she states at page eleven of her memorandum that she would have been negligent if she had not monitored Mr. Ribel's case before this Commission.

At pages 9 and 10 of her memorandum, Ms. Fleischauer asserts that in a discrimination case brought by MSHA on behalf of a complainang miner, the first duty of MSHA's attorneys is to see that the Act is enforced, and its obligation to the miner is only of secondary importance. In support of this conclusion, Ms. Fleischauer maintains that MSHA's lack of committment to Mr. Ribel "is shown by the fact that to date three different MSHA attorneys have been assigned to represent his case."

I find Ms. Fleischauer's self-serving criticism concerning MSHA's asserted lack of committment to Mr. Ribel to be unwarranted and lacking in substance. MSHA Counsel Moncrief, who represented Mr. Ribel at the reinstatement hearing, and MSHA Counsel Rooney, who represented him at the hearing on the merits, more than adequately represented and protected Mr. Ribel's interests.

I assume that the third attorney referred to by Ms. Fleischauer is the MSHA staff attorney who will represent

MSHA and Mr. Ribel in the appeal filed with the Commission by the respondent. The fact that three MSHA staff attorneys have pursued Mr. Ribel's case before this Commission reflects committment, rather than a lack thereof.

I believe it is clear from the record in this matter that Ms. Fleischauer provided no active input at the hearings which I conducted, asked no questions of witnesses, presented no evidence, did not participate in any cross-examination, and filed no post-hearing briefs or proposed findings and conclusions. In short, her role was that of a passive observer and nonparticipant. The work in connection with the presentation of Mr. Ribel's case before me, both at the temporary reinstatement hearing, and the hearing on the merits, was carried out by the Secretary's staff attorneys. The record reflects that both attorneys (Moncrief and Rooney), provided more than adequate legal support for Mr. Ribel's position, and that his interests were protected and pursued in a competent manner by government counsel. The record here does not support a conclusion that Ms. Fleischauer made any meaningful contribution to the final outcome of Mr. Ribel's case before me.

Most of the claimed legal expenses itemized in Attachment 2(C) of Ms. Fleischauer's motion, appear to be claims associated with her work in connection with Mr. Ribel's state unemployment compensation claim and his state appeal in connection with his discharge. In each instance where she claims that she spent a designated amount of time on a particular matter, she has failed to indicate that it was in connection with Mr. Ribel's discrimination case before this Commission. For example, at page 1 of attachment 2(C), she states that on August 24, 1983, she spent 2 hours and forty-five minutes reading portions of the West Virginia Mine Safety Statute. On September 2, 1983, she claims that she spent approximately 3 hours researching state unemployment compensation laws, and that on September 5, 1983, she spent 6-1/2 hours preparing for Mr. Ribel's state unemployment compensation claim hearing. On October 8 and 22, 1983, she claims she spent approximately 4 hours reviewing and analyzing the transcript of Mr. Ribel's arbitration hearing. On November 7, 1983, she claims she spent over 7 hours meeting with an unidentified witness, and that on November 11, 1983, she spent over 9 hours for work connected with the "Appeal Board." On November 23, 1982, she claims she spent over 7 hours meeting with a representative of the West Virginia Department of Mines Appeal Board.

In her itemized expenses for legal services shown in Attachment 2(C), Ms. Fleischauer includes the following charges for researching, preparing, and computing the amount

of claimed attorneys fees, and it includes the time spent in preparing her billings:

12/9/83	45 minutes	
2/5/84	65 minutes	
10/5/84	90 minutes	
10/12/84	105 minutes	
10/20/84	120 minutes	
10/23/84	165 minutes	(unspecified portion)
	590 minutes	

Based on a fee of $50 per hour, Ms. Fleischauer has claimed a fee of approximately $500 for compiling and computing how much Mr. Ribel owes her for her legal services.

The New York Gaslight Club, Inc., case involved a racial discrimination complaint filed under Title VII of Civil Rights Act of 1964, with the Federal Equal Employment Opportunity Commission. Pursuant to certain procedures established by the EEOC for processing such complaints, the case was referred to the appropriate State of New York administrative Agency. The complainant was represented by private counsel throughout the state proceeding, and after completion of the state administrative and judicial proceeding, the state agency's determination in favor of the complainant was affirmed.

The critical issue presented in the New York Gaslight Club, Inc. was the question of whether or not attorney fees could be awarded for work performed by a private attorneys in connection with proceedings pursuant to a federal statute before a state adjudicatory agency where there was no state provision for the payment of fees for private counsel. In holding that attorneys fees were payable, the Supreme Court relied on the broad language found in section 706(k) of Title VII, allowing discretionary court approval of such fees "in any action or proceeding under this title," the fact that the complaint was initially referred to the state agency for resolution, the fact that Title VII gave the complainant the right to sue in Federal Court for attorneys fees regardless of the posture of the state proceeding, and the fact that the legislative history of Title VII reflected a broad and comprehensive enforcement provides for an initial state and local resolution of the complaint, with the ultimate compliance authority residing in the federal courts.

Ms. Fleischauer asserts that the facts presented in Mr. Ribel's case are similar to those which prevailed in

New York Gaslight. She maintains that MSHA's inspectors encouraged Mr. Ribel to retain private counsel; that MSHA's attorneys somehow viewed Mr. Ribel's interests as of secondary importance and lacked committment to his case; that she made a positive contribution to the development of the record before me in Mr. Ribel's case; that her work in connection with Mr. Ribel's state proceeding "aided in the protection and preservation of Mr. Ribel's federal rights"; and that the state's proceedings were inadequate.

Ms. Fleischauer's reliance on the asserted shortcomings and inadequacies of the State of West Virginia's procedures for adjudicating mine safety discrimination cases to support her claims for attorneys fees in the case before me is irrelevant. Mr. Ribel's complaint under the Federal Mine Act has afforded him a full and fair opportunity to be heard before this Commission, and I remain unconvinced that Ms. Fleishcauer's limited participation in the proceedings before me contributed in any meaningful way to the adjudication of his case. I am also not convinced that her work in connection with Mr. Ribel's state complaints, including his claims for unemployment compensation, contributed in any meaningful way to my adjudication of his case.

Ms. Fleischauer's reliance on the New York Gaslight case in support of her claimed attorneys fees for work in connection with Mr. Ribel's state proceedings IS REJECTED. In Mr. Ribel's case, it seems clear to me that the complaint filed on his behalf by MSHA before this Commission was separate and apart from any remedy which may have been available to him under state law. In these circumstances, I am of the view that Ms. Fleischauer should look to the State of West Virginia to recover any attorneys fees incurred by Mr. Ribel in connection with counsel's legal work in that forum.

Ms. Fleischauer does not adequately explain the services purportedly rendered by "Professor" Bastress and "Professor" Cleckley on behalf of Mr. Ribel. It would appear to me that these services were in connection with Mr. Ribel's claims before several state agencies. In any event, these individuals are totally unfamiliar to me, and they entered no appearances and did not participate on the record in any proceeding before me in connection with Mr. Ribel's discrimination complaint. Under the circumstances, these claims ARE REJECTED as unsupported and unwarranted.

In Secretary of Labor, ex rel Michael J. Dunmire and James Estle v. Northern Coal Co., 4 FMSHRC 126 (February 5, 1982),

the Commission affirmed a decision by Judge Morris awarding two miners expenses they incurred while attending hearings concerning their discrimination complaints brought on their behalf by MSHA. In granting this relief, the Commission noted as follows at 4 FMSHRC 143-144:

> Regarding incidental, personal hearing expenses incurred by Estle and Dunmire in connection with their attendance, Northern argues that because section 105(c)(3) of the Mine Act expressly provides for hearing expenses, while section 105(c)(2) does not mention the subject, Congress must have intended that such expenses were outside the scope of a section 105(c)(2) remedial award. We agree with the judge that the differences in language between the two sections are not as significant as Northern argues. Section 105(c)(2) expressly provides that the relief it authorizes is not limited to the reinstatement and back pay mentioned. Furthermore, the "illustrative" nature of the relief listed in section 105(c)(2) is made clear by the legislative history we quoted above. Estle and Dunmire would not have borne such expenses (and inconvenience) but for Northern's discrimination. We therefore hold that reimbursement of their hearing expenses is an appropriate form of remedial relief.

In his decision of May 27, 1981, in the Northern Coal Co. case, Judge Morris made the following findings and conclusions with respect to the question of reimbursement of expenses in connection with attending the hearings, 5 FMSHRC 1342-1343:

> * * * Under Section 105(c)(2), in a discrimination proceeding brought by the Secretary, the Commission may direct 'other appropriate relief,' including an order incorporating affirmative action to abate and 'back pay and interest.' A Section 105(c)(2) case brought by the Secretary does not directly authorize costs and expenses.
>
> On the other hand, in a proceedings [sic] brought by a miner on his own behalf under Section 105(c)(3), in addition to back pay and interest, the Commission shall award a sum for 'all costs and expenses.' The apparent conflict, as outlined above, is resolved by a review of the legislative history:

> 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 re-instatement with full seniority rights, back-pay with with [sic] 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.

S. Rep. No. 95-181, 95th Cong. 1st Sess. 37, reprinted in (1977) U.S. Code Cong. & Ad News 3400 , 3437.

Application of the statutory standard has resulted in the reimbursement of lost equity in a truck (Secretary on behalf of E. Bruce Noland v. Luck Quarries, Inc., 2 FMSHRC 954), an employment agency fee (Secretary on behalf of William Johnson v. Borden, Inc., SE 80-46-DM, April 13, 1981), transcript, court costs, and attorneys fees (Frederick G. Bradley v. Belva Coal Company, supra. Here the expenses incurred in participation in the hearings are special damages necessarily resulting from complainants' prosecution of their claims. The statute intended these expenses to be borne by the individual whose conduct occasioned them.

Northern also argues that no expenses should be awarded Dunmire for the hearing on the temporary reinstatement order because the Secretary asserted that no testimony could be taken regarding the merits of the case. This point has been thoroughly discussed (supra, pages 8-11). In addition, there is no doubt that the presence of Dunmire was necessary in the prosecution of his claim.

In the Borden case cited to by Judge Morris, former Commission Judge Laurenson awarded the complainant $951.33, an amount he paid as a fee to an employment agency which found him a job after his discharge. Judge Laurenson held that "this employment agency fee is the type of consequential damages which is authorized by section 105(c)(2) of the Act," 3 FMSHRC 926, 938 (April 13, 1981). However, Judge Laurenson denied the complainant's request for reimbursement of $20 paid by him for tape recordings of his unemployment compensation hearing, and in so doing ruled that "Johnson failed to establish a valid reason for the need for these tape recordings as a reimbursable item of consequential damages," 3 FMSHRC 938.

In the Bradley case cited by Judge Morris, Commission Judge Broderick authorized payment of $60.60 to the complainant for the cost of the hearing transcript in his case before this Commission, but denied a claim of $90 for the transcript of the complainant's hearing before the West Virginia Coal Mine Safety Board of Appeals.

In Secretary of Labor, MSHA v. Metric Constructors, Inc., 6 FMSHRC 226 (February 29, 1984, a case brought by MSHA on behalf of seven miners, the Commission affirmed Judge Lasher's findings sustaining their discrimination claims. However, the Commission remanded the case for a determination as to certain remedial aspects of the case, particularly with regard to Judge Lasher's award of $125 per day to five of the complainants for the time spent attending their hearings. The awards were in the amount of $375 to four of the complainants and $250 to the other one for the three day hearings. Judge Lasher noted that in the absence of any specific input from the parties as to the amounts that should be awarded, "an award of $125.00 for each day of hearing attended by a Complainant is fair and reasonable reimbursement," 4 FMSHRC 811 (April 20, 1982).

In remanding the case, the Commission noted as follows at 6 FMSHRC 226, 234 (February 29, 1984):

> Recovery of expenses incurred in bringing a successful claim may be part of the relief necessary to make a discriminatee whole. Northern Coal, 4 FMRHRC at 143-44. The burden of establishing a claim for expenses is upon the Secretary. It is he who must introduce sufficiently detailed evidence so that a determination may be made whether the complaints' claims are justified. When he does not do so and when, as here, the judge's award is without record support, we have no basis for meaningful

> review. We therefore vacate the award of expenses. However, in view of the statutory duty to make these miners whole, we remand in order to afford the parties the opportunity to submit evidence concerning the appropriate amount, if any, of the expenses to be awarded the complainants.

The Metric Constructors, Inc. case was assigned to me on remand. The parties stipulated and agreed to the relief due the complainants, and with regard to hearing expenses, they agreed that three of the complainants should be paid $72 each for the time spent attending the hearing, and that one other complainant should be paid $48. The stipulation and agreement was finalized in my decision of April 26, 1984. A subsequent appeal taken by MSHA in the case was denied by the Commission on June 6, 1984, and Judge Lasher's decision, as well as mine, became final.

In a recent decision by Chief Judge Merlin in Secretary of Labor, MSHA, ex rel Thomas L. Williams v. Peabody Coal Company, 6 FMSHRC 1920 (August 3, 1984), he considered a request for special damages filed pursuant to the "other appropriate relief" clause under section 105(c)(2). In that case, the complainant's privately retained counsel sought money damages, including attorney fees, for losses purportedly incurred in real estate and business ventures after the complainant was laid off. Judge Merlin rejected both claims after finding that the wrongful layoff of the complainant was not the proximate cause of his real estate and business losses and expenses. Judge Merlin also rejected a claimed expense of $1,418.64, purportedly incurred by the complainant while job hunting after his layoff, and he did so after noting that MSHA's brief cited no case law to support an award of such damages, and that the solicitor advised him during the hearing that decisions under the National Labor Relations Act indicated such an award would not be made, 6 FMSHRC 1925.

In the Williams case, the parties agreed that he was entitled to recover for unreimbursed medical expenses in the amount of $710, and for the cost of obtaining recertification as an electrician. In approving payment for these costs, Judge Merlin noted as follows at 6 FMSHRC 1925:

> It should be noted that an award of damages in these two instances would be appropriate under the principles set forth herein. The medical expenses would have been paid for by health insurance if Complainant had been

working and the electrical certification would not have expired if Complainant had not been laid off. The layoff was the proximate cause of these particular losses.

In Secretary of Labor, MSHA, ex rel Larry D. Long v. Island Creek Coal Company and Langley & Morgan Corporation, 2 FMSHRC 2640 (September 18, 1980), Commission Judge Fauver awarded compensation to a complainant for costs and expenses incurred in connection with the institution and prosecution of his discrimination claim by MSHA. Judge Fauver awarded compensation for (1) lost wages in the amount of $247.04; (2) mileage expenses in the amount of $199.24; and (3) telephone expenses in the amount of $57.47, and his awards were substantially less than the total amount requested by MSHA on behalf of the prevailing miner. As noted in the October 1, 1981, issue of the CCH Employment Safety and Health Guide, No. 542, page 9, Judge Fauver's decision was upheld on September 4, 1981, in an unpublished opinion (No. 80-1799) by the Fourth Circuit Court of Appeals.

On the basis of the aforementioned cases concerning MSHA instituted discrimination complaints, damage awards have been made for expenses incurred by a complainant while attending his own hearing, including claims for mileage and telephone calls, and the cost of Commission hearing transcripts. Conversely, claims for costs incurred by a complainant in collateral matters such as state unemployment compensation claims and state-filed discrimination complaints have been rejected. In each instance where costs were awarded, the Judge viewed them as consequential or special damages within the meaning of the term "other appropriate relief" language found in section 105(c)(2) of the Act. Except for the Williams case decided by Judge Merlin, none of the other cases concerned private attorney fees for MSHA-initiated complaints.

Except for the Williams case decided by Judge Merlin, none of the other cited cases concerned awards for private attorney fees for MSHA-initiated complaints. In the Williams case Judge Merlin denied a fee request after finding that the requested fees were in connection with claimed business losses which were not the direct result of the discriminatory conduct.

After careful review and consideration of the arguments presented by the parties in support of their respective positions on the issue of attorney fees in MSHA-initiated discrimination complaints, I cannot conclude that such fees are available as special or consequential damages pursuant

to section 105(c)(2). On the facts of this case, I conclude and find that Mr. Ribel's decision to retain private counsel was of his own doing, and that private counsel was not necessary to pursue his complaint before this Commission. Since his complaint was pursued at all stages before me by MSHA's attorneys, I conclude that any fee award to private counsel here would be inappropriate, particularly where the record shows that private counsel did little or no work in the proceedings before me, and made little or no contribution to the outcome of Mr. Ribel's case. Accordingly, Ms. Fleischauer's assertion that she is entitled to attorney fees under section 105(c)(2) of the Act ARE REJECTED, and her claims ARE DENIED.

Even if I were to hold that section 105(c)(2) authorizes an award of private attorney fees as part of the special or consequential damages available to a prevailing complainant, on the facts of this case, I remain unconvinced that Ms. Fleischauer earned the substantial fees that she is claiming for her legal efforts on behalf of Mr. Ribel in the proceedings before me. In any event, in such a case, I would award her the amount suggested by respondent ($1,025) as a reasonable fee for her input in the proceedings which I adjudicated.

With regard to Mr. Ribel's claim for $290.88, for prescription medication expenses incurred by his family during the time he was off the respondent's payroll, I conclude and find that these expenses may be recovered as consequential damages. In this regard, I assume that any such expenses incurred by Mr. Ribel during the period he was off the respondent's employment rolls would have been covered by his company provided medical insurance plan. Had he not been discharged, these expenses would have been paid or at least compensated by any applicable insurance plan. If my assumptions are correct, and assuming the itemized expenses can be verified, RESPONDENT IS ORDERED to compensate Mr. Ribel for these personal expenses.

With regard to Mr. Ribel's claims for $180 in interest charges for personal loans totalling $1500 to cover certain expenses resulting from three months loss of wages, I conclude and find that these expenses are recoverable as consequential damages flowing from the discriminatory conduct. Assuming these amounts can be verified, RESPONDENT IS ORDERED to compensate Mr. Ribel for these personal expenses.

With regard to Mr. Ribel's mileage and meal costs for the periods 8/24/83 to 11/15/83, in the amount of $135.92, as itemized in Attachment 5(A), they are all DENIED. These claims are for expenses preceding Mr. Ribel's hearings before this Commission, and I conclude that they are not recoverable under section 105(c)(2) of the Act.

With regard to Mr. Ribel's long distance telephone call expenses totalling $53.54, as itemized in Attachment 5(B), and encompassing a period from 8/5/83 to 8/11/84, I note that many of the itemized calls were made before and after the hearings which I conducted. Since it is difficult to verify and separate an itemized listing, I will award Mr. Ribel the sum of $35.00, as a reasonable amount to compensate him for his out-of-pocket claimed phone calls, and RESPONDENT IS ORDERED to pay him that amount.

The parties are advised that my findings and conclusions with respect to the requested attorney fees and expenses have been made after careful consideration of all of the arguments presented by Ms. Fleischauer in her memorandum in support of the requested awards, the oppositions and replies filed by the respondent's counsel, and the affidavit filed by Mr. Moncrief. I take particular note of the fact that MSHA has taken no position with respect to the merits of Ms. Fleischauer's claims for fees and damages, and that MSHA Counsel Rooney and respondent's Associate General Counsel Rock have not been heard from.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DEC 14 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 84-149
	:	A.C. No. 15-02705-03539
v.	:	
	:	Camp No. 2 Mine
PEABODY COAL COMPANY, Respondent	:	

AMENDED DECISION AND ORDER

Before: Judge Melick

In the Decision and Order in the captioned civil penalty proceeding dated November 20, 1984, the amount of penalty assessed for the violation charged in Citation No. 2338148 was inadvertently omitted. Accordingly that Decision and Order is amended to direct the Peabody Coal Company to pay a civil penalty of $100 for the violation charged in Citation No. 2338148 within 30 days of the date of this amended decision. Commission Rule 65(c), 29 C.F.R. § 2700.65(c).

Gary Melick
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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METTIKI COAL CORPORATION, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. YORK 84-13-R
	:	Order No. 2261376; 5/30/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	A-Mine

DECISION

Appearances: Timothy M. Biddle, Esq., and Adrienne J. Davis, Esq., Crowell & Moring, Washington, D.C., for Contestant;
Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent.

Before: Judge Melick

This contest proceeding was brought by the Mettiki Coal Corporation (Mettiki) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge an order of withdrawal issued by the Secretary of Labor under Section 104(d)(1) of the Act.

The order at issue (Order No. 2261376) alleges a violation of the standard at 30 C.F.R. § 75.200 and reads as follows:

> There were two resin grouted rods (made up for installation) standing in an upright position against the right rib a distance of 5 feet inby the TRS [temporary roof support] on the Fletcher roof bolting machine located in the last open crosscut between the LT Mains (004) sections No. 2 and No. 3 intake entries at break No. 85. These roof bolts were inby permanent roof supports (last row) a distance of 11 feet. This section is supervised by Paul Baker section foreman. The approved roof control plan states that "Miners shall not advance inby the last row of installed roof bolts except to install

supports," and all indications indicated that a miner had to advance inby the last row of installed roof bolts to place these above listed roof bolts against the rib.

At the conclusion of the evidentiary phase of the hearing Mettiki moved for dismissal. In a bench decision the undersigned granted the motion. That decision appears below with only non-substantive changes.

> I'm going to grant the operator's motion to dismiss. First of all the applicable Roof Control Plan states that miners shall not advance inby the last row of installed roof bolts, except to install supports. The Government acknowledges however that an additional exception is permitted so that a miner can advance inby the last row of installed roof bolts so long as there is temporary support providing protection.
>
> The undisputed testimony of the Government witnesses is that two roof bolts were found positioned some five feet inby the temporary support. However the only evidence that the Government has produced to indicate that the individual miners had themselves been inby the temporary roof support is its speculation that it would have been virtually impossible to have two roof bolts positioned or lined up so closely together and parallel against the rib unless the miners had themselves been under unsupported roof.
>
> Against that speculation, however, there is the direct sworn testimony of Mssrs. Riggleman and Shifflett. Mr. Riggleman, in particular, as the most likely person to have positioned the cited roof bolts where they were, demonstrated how, while remaining under the protection of the temporary support he would place one or two of these six foot roof bolts against the rib inby the temporary support by placing one end on the mine floor about 5 feet inby and tossing it up against the rib. According to Riggleman it would ordinarily align itself upright alongside the rib.
>
> When you compare this credible and corroborated direct testimony against the Government's speculation, I am obligated to accept that testimony--and I have no reluctance in accepting that testimony. I therefore find that the miners were at all times under the protection of at least temporary roof support in spite of the fact that the roof bolts themselves were found

some five feet inby. The position of the roof bolts has been satisfactory explained and therefore, I find no violation. The order must accordingly be dismissed.

ORDER

The bench decision is affirmed and Order No. 2261376 is dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 84-42-M A.C. No. 14-00139-05501
v.	:	Chetopa Quarry
O'BRIEN ROCK COMPANY, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

The parties have reached a settlement of the three electrical violations involved which resulted in a fatality in the total sum of $9000.00. MSHA's initial assessment therefor was $12,000.00.

The terms of the settlement are as follows:

Citation No.	Assessment	Settlement
02095892	$10,000	$8,000
02095893	1,000	500
02095894	1,000	500

Attachments to the settlement agreement show that this family-owned business, as of October 31, 1983, had total assets of a value less than one million dollars and for fiscal year 1983 (ending October 31, 1983) sustained a net loss. Since the fatality which occurred on October 3, 1983, Respondent has liquidated its mining operations and now operates only a ready-mix concrete operation.

MSHA's motion for approval indicates inter alia that the "penalty reductions proposed in this particular case are based solely on factors separate and a part from negligence, gravity and the good faith of the operator, i.e., the subsequent cost of abatement, respondent's poor business showing the year of the accident, and respondent's decision to get out of the mining business."

The parties also agree that if the settlement is approved that payment of the proposed penalty amount of $9,000 be made in the following manner: $375 to be paid upon the signing of this agreement and 23 consecutive payments of $375, to be paid on the first of each month thereafter. If any payment is more than 30 days delinquent then the remaining balance will become due and owing immediately.

Although culpability is clear and is conceded, the economic considerations established in the record justify the 25% reduction from the special assessment originally issued by MSHA in this matter; approval thereof appears appropriate.

ORDER

Respondent is ordered to pay $9000.00 to the Secretary of Labor over a 24-month period and in the manner specified in their agreement.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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STEVE LEWIS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 83-279-D
v.	:	
	:	BARB CD 83-23
LEECO CORPORATION, Respondent	:	No. 29 Mine

DECISION AND ORDER AFFIRMING DISMISSAL

Before: Judge Lasher

The Complainant, Steve Lewis, failed to respond to Respondent's "Renewed Motion for Termination of Proceedings and Dismissal" filed on October 9, 1984, which sought dismissal for failure of the complaint to state a claim or cause of action. Pursuant to 29 C.F.R. § 2700.10 Complainant had the right to file an opposition to such motion within 10 days. Complainant did not appear at the hearing on November 27, 1984, one of the purposes of which was to determine if indeed a valid cause of action did exist under the Federal Mine Safety and Health Act of 1977. Accordingly, upon Respondent's renewal of its motion on the record at the commencement of the hearing, such motion was granted.

It also appears that Complainant has abandoned the prosecution of his claim, in view of his having failed to respond to (1) the prehearing requirements contained in the Notice of Hearing herein, (2) a letter from Respondent's counsel, and (3) Respondent's motion to dismiss. Inasmuch as Complainant further failed to appear at the hearing without notice or explanation even though duly served with written notice thereof, this proceeding was dismissed from the bench on November 27, 1984, and that ruling is hereby AFFIRMED.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 19 1984

JEFFREY L. FANKHAUSER, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. LAKE 84-87-D
GEX HARDY, INC., Respondent	:	MSHA Case No. VINC CD 84-06
	:	Holmes Strip Mine

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

This matter is before me on the parties motion to approve settlement of the captioned anti-retaliation matter.

Based on an independent evaluation and de novo review of the circumstances, I find the relief afforded the miner under the stipulated terms of settlement are in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the conditions for settlement set forth in counsel's letter of November 30, 1984, be, and hereby are, APPROVED. It is FURTHER ORDERED that said terms be, and hereby are, incorporated herein and that the operator FORTHWITH proceed to:

1. Expunge from Mr. Fankhauser's personnel file all disciplinary actions connected with the incidents challenged.

2. Reimburse Mr. Fankhauser for the three days suspension without pay previously effected.

3. Upon receipt of his claim, promptly certify Mr. Fankhauser's Workmen's Compensation Claim.

4. Pay for the repair of Mr. Fankhauser's artificial leg and any medical bills or other expense incurred as a result of the injuries suffered by Mr. Fankhauser.

Finally, it is ORDERED that subject to compliance with this order the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	
WINDSOR POWER HOUSE COAL COMPANY, Respondent	:	Docket No. WEVA 82-303 A.C. No. 46-01286-03089
	:	Beech Bottom Mine
PRICE RIVER COAL COMPANY, Respondent	:	Docket No. WEST 83-2 A.C. No. 42-00165-03504
	:	Price River No. 3 Mine
WINDSOR POWER HOUSE COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 82-243-R Citation No. 860872; 3/29/82
	:	Beech Bottom Mine
PRICE RIVER COAL COMPANY, Contestant	:	Docket No. WEST 82-166-R Citation No. 1129455; 4/16/82
	:	Price River No. 3 Mine
SOUTHERN OHIO COAL COMPANY, Contestant	:	Docket No. LAKE 82-76-R Citation No. 1120486; 4/8/82
v.	:	Meigs No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
UNITED MINE WORKERS OF AMERICA, Intervenor	:	

DECISION

Before : Judge Kennedy

The captioned review-penalty proceedings were before me on the parties' cross motions for summary decision at the time the Supreme Court denied certiorari in UMWA v. FMSHRC, 671 F.2d 615 (D.C. Cir.), cert. denied 459 U.S. 927 (1982).

Shortly thereafter the case of Secretary v. SOCCO, FMSHRC Docket No. LAKE 80-142 (SOCCO I) was assigned to this trial judge under an order from the Court of Appeals to dispose of the matter in a manner "not inconsistent with its decision" and adjudication in UMWA v. FMSHRC, supra. Order in No. 81-2299 (D.C. Cir., April 27, 1982). The limited nature of the remand was underscored by the Commission which directed the case to the trial judge for "further proceedings consistent with the court's order." 1/ 4 FMSHRC 456 (1982).

Despite the clarity of these directions, the operator (SOCCO) filed a motion, after remand, for summary decision invoking the doctrine of administrative nonacquiesence and urging the trial judge ignore the court of appeals and the Commission and to make a de novo review of the matter. 2/ SOCCO I, 5 FMSHRC 479 (1983).

The Secretary and the Union contended that "law of the case" principles precluded reconsideration of the question of law decided by the court of appeals and I agreed. Ibid.

The Commission, over the objection of then Chairman Collyer, denied discretionary review, whereupon SOCCO petitioned

1/ SOCCO I had been before the court of appeals on a petition by the Secretary and the UMWA for review of a trial judge's decision that followed the Commission's narrow interpretation of the walkaround pay provision in Helen Mining, et al., 1 FMSHRC 1796 (1979). See Secretary v. SOCCO, 3 FMSHRC 2531 (1981).

2/ The phrase "de novo" means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy. United States v. Raddatz, 447 U.S. 667, 690 (1980) (dissenting opinion). At the same time, the operator made clear that its request for nonacquiesence and a de novo review ran only one way. It did not extend, the operator asserted, to the point of permitting the trial judge to disagree with the Commission's Helen Mining decision. As to the latter, the operator claimed that the trial judge was bound to follow Helen Mining. This Catch-22 presented not only an ethical but also a doctrinal problem as the trial judge's earlier decision on the walkaround pay provision had disagreed with that of the Commission in Helen Mining and been affirmed by the court of appeals. Secretary v. Allied Chemical Corporation, 1 FMSHRC 1451 (1979), reversed 1 FMSHRC 1947 (1979), reinstated 671 F.2d 615 (1982).

for review in the Sixth Circuit. 3/ Thereafter, the Sixth Circuit transferred the appeal to the D.C. Circuit, largely because of the remand order. Southern Ohio Coal Company v. FMSHRC, Order in No. 83-3346 (September 22, 1983). By its memorandum decision and order of June 14, 1984, the court of appeals for the D.C. Circuit granted the government's and the Union's motion for summary affirmance of the trial judge's decision. The court held that "SOCCO'S persistent attempt to avoid UMW v. FMSHRC was clearly futile and frivolous." Southern Ohio Coal Company v. FMSHRC No. 83-2046 Slip Op. at 3. Subsequently, the Court of Appeals awarded attorney fees in the amount of $1,964.00 to the Secretary. Southern Ohio Coal Co. v. Secretary, et al. (Order of August 27, 1984).

The avowed purpose of this further litigation of the walkaround pay issue is to produce, if possible, a split in the circuits that will afford the mining industry a further opportunity to seek review of the D.C. Circuit's interpretation of section 103(f) by the Supreme Court. These particular proceedings brought by SOCCO and its affiliated corporations, Windsor Power House Coal Company and Price River Coal Company are designed to posit the walkaround pay issue for review in the Fourth, Sixth, and Tenth Circuits. Other operators have proceeded along parallel lines in the Third and Seventh Circuits in what appears to be a program of massive resistence by the industry to the walkaround pay provisions of the Mine Act. The effort, to date, has been singularly unsuccessful but demonstrates the power of corporate America to tie the administrative and judicial systems up for years in repetitious relitigation.

While no one presently contends that the after-tax cost of walkaround pay for spot inspections outweighs the socio-economic benefits, the industry's dogged pursuit of the issue reflects not only a concern with cost but also its view that it is fundamentally unfair to require an operator to pay miners to assist federal inspectors to police an operator's mining practices. Rightly or wrongly, the industry views section 103(f) as an unwarranted intrusion into management's

3/ At this point, action on these matters was stayed pending resolution of the correctness of the trial judge's decision in SOCCO I. The wisdom of allowing the issues presented to mature through full consideration by the courts of appeals was subsequently confirmed. By eliminating subsidiary arguments, the Third and Seventh Circuits have vastly simplified my task and affirmed the reasonableness of the view I believe must ultimately prevail.

control over working conditions. Furnishing miners with a tool for monitoring safety practices in a manner that is largely independent not only of management but also of MSHA raises concerns of seismic proportions. 4/ When the 103(f) authority to inspect is coupled with the aggressive use of the miners' authority to oversight MSHA's enforcement activity conferred by section 103(g)(1), (2), the miners are provided a self help mechanism that, properly employed, can do much to redress the present imbalance in vigorous enforcement that flows from MSHA's policy of nonadversarial policing of the mandatory health and safety standards. The teaching of bitter experience--an experience of which Congress was well aware--is that miners' involvement through participation in spot inspections is vital to an effective enforcement scheme, especially in an era of stringent budgetary constraints on federal enforcement activity.

It is axiomatic that the cost of safety directly affects the cost of production. The temptation to minimize compliance with the safety standards and thus shave costs is ever present and magnified in times of economically depressed markets. To offset this temptation, the D.C. Circuit has recognized that "The miners are both the most interested in health and safety protection, and in the best position to observe compliance or noncompliance with the mine safety laws. Sporadic federal inspections can never be frequent or thorough enough to insure compliance." Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 778 (D.C. Cir. 1974), cert. denied 420 U.S. 938.

The regrettable result of MSHA's emasculation of the federal enforcement effort is that death and disabling injuries are on the rise in the nation's mines. Public perception of working conditions in the mines was accurately depicted in a series that ran in the Louisville Courier-Journal in May 1982. In a summary of its findings, the paper's managing editor concluded that "in spite of repeated attempts at reform, coal remains an outlaw industry--operating outside the normal restraints that apply to other American enterprises." "Dying for Coal," An American Tragedy, Reprint December 1982 of a series that ran from May 2 to May 10, 1982 in The Courier-Journal, Louisville, Kentucky. In an editorial published on July 11, 1984, the Courier-Journal noted that "Mine inspectors who hear more talk from the higherups about 'cooperation' with safety

4/ See Cost/Benefit Analysis of Deep Mine Federal Safety Legislation and Enforcement, Consolidation Coal Company, December 1980, at 95. This study recommends outright repeal of miners' rights to participate in safety inspections.

law violators than about firmness are likely to feel that safety isn't the first order of business."

The legislative history of section 103(f) shows these public perceptions moved Congress to provide for walk-around pay when it amended the Mine Safety Law in 1977. In 1982, the D.C. Circuit held the participation and pay rights were coextensive and included spot inspections. Recently the Third and Seventh Circuits agreed. The time is ripe, therefore, for disposition of these matters.

I

SOCCO II - Docket LAKE 82-76-R

On March 30, 1982, a contract miner participated in the physical inspection of the Meigs No. 1 Mine for the purpose of determining compliance with the provisions of the mandatory safety standards relating to the control, suppression and removal of excessive accumulations of explosive and noxious gasses. This spot inspection for extrahazardous conditions was accomplished under the authority of sections 103(a) (3), (4), and (i) of the Mine Act. When the operator refused to pay the walkaround pay mandated by section 103(f), a federal mine inspector issued a 104(a) citation. The citation was abated when the operator paid the miner for the time spent in participating in the 103(i) spot inspection. Thereafter, the operator filed a timely notice of contest of the citation claiming section 103(f) of the Act does not provide for compensation of miners' representatives who accompany MSHA inspectors during spot inspections.

The Union challenges SOCCO's right to review on the ground that payment of the penalty assessed, $20, mooted the issues contested and requires dismissal of the review proceeding. I find it unnecessary to address this question because I find SOCCO's challenge is barred by its prior litigation of the identical legal issue in SOCCO I, supra.

There is no merit to SOCCO's claim that collateral estoppel does not apply to "unmixed" or pure questions of law. Restatement (Second) Judgments §§ 27, 28 (1982). While it is true that issue preclusion has never been applied to issues of law with the same rigor as issues of fact, it is today well settled that issue preclusion applies to "issues of law and issues of fact if those issues were conclusively determined in a prior action." United States v. Stauffer, 78 L Ed. 388, 393 (1984); United States v. Mendoza, 78 L Ed. 379, 383-384 (1984); Montana v. United States, 440 U.S. 147, 153 (1979); Carr v. District of Columbia, 646 F.2d 599, 608 (D.C. Cir. 1980).

Nor are the factual difference between this case and SOCCO I of any significance. Here as in Stauffer and Montana, supra, the separable facts exception is inapplicable. Where there is a close alignment of time and subject matter between two violations so that they stem "from virtually identical facts" relitigation of a question of law predicated on those facts is precluded. United States v. Stauffer, supra at 393-394; Montana v. United States, supra at 162-163. The underlying policy considerations are well stated in the Restatement:

> When the claims in two separate actions between the same parties are the same or are closely related . . . it is not ordinarily necessary to characterize an issue as one of fact or of law for issue preclusion . . . . In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded as one of "law." Restatement (Second) Judgments § 28 comment b (1982).

Where, as here, there is an identity of parties and legal issues and where, as here, SOCCO has twice had a full and fair opportunity to litigate the right of a miner to walkaround pay, I find accepted principles of issue preclusion, whether characterized as res judicata or collateral, estoppel operate to bar further redundant litigation by SOCCO of the controlling question of law involved. I further find that even if principles of issue preclusion were inappliable relitigation or reconsideration of the question of law presented is foreclosed by the doctrine of stare decisis or controlling precedent. UMWA v. FMSHRC, supra; Consolidation Coal Company v. FMSHRC, No. 83-3463 (3d Cir. August 13, 1984); Monterey Coal Company v. FMSHRC, No. 83-2651 (7th Cir. September 14, 1984).

Accordingly, I find SOCCO's challenge to the instant citation must be denied.

II

SOCCO's Affiliates

On March 29, 1982, a contract miner participated in a spot physical inspection of Windsor Power's Beech Bottom Mine for the purpose of determining whether a violation of the Mine

Act or a mandatory health or safety standard existed. 5/ When the operator refused to compensate the walkaround for his time, a federal mine inspector issued a 104(a) citation for a violation of section 103(f) and a penalty of $84 was proposed.

On March 31, 1982, a contract miner participated in a spot physical inspection of Price River's No. 3 Mine for the purpose of determining compliance with the mandatory safety standards relating to the control, suppression and removal of explosive and noxious gasses. 6/ This inspection was accomplished under the authority of section 103(i) of the Mine Act. When the operator refused to compensate the walkaround for his time, a federal mine inspector issued a 104(a) citation for a violation of section 103(f) and a penalty of $20 was proposed.

There is no dispute about the fact that both inspections were compliance or enforcement inspections conducted pursuant to the authority of section 103(a)(3) and (4) of the Mine Act. UMW v. FMSHRC, supra, at 623-624, nn. 27, 28. It is also conceded that both inspections were spot inspections that were not part of a regular inspection. Although not defined in the statute the accepted understanding is that a "regular" inspection is one of the four complete inspections required each year under section 103(a). In addition to these "regular" inspections of the entire mine, the Secretary is authorized to conduct "spot" inspections. 7/ These inspections are more limited in scope and purpose. See 43 Fed. Reg. 17547 (1978). Typically they involve the physical inspection of a particular area or problem in the mine and usually focus on one or more types of safety or health hazards such as electrical, roof control, ventilation, haulage or respirable dust control. Under section 103(i), spot inspections are required to be conducted with a certain frequency at mines which liberate

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5/ Docket Nos. WEVA 82-243-R and 82-303. This inspection was initiated by a code-a-phone (hotline) complaint. See section 103(g)(1), (2) of the Act, 30 C.F.R. Part 43.

6/ Docket Nos. WEST 82-166-R and 83-2.

7/ Section 103(a) provides the general authority for all physical inspections of mines. In addition to the four regular inspections, it directs the Secretary to make "frequent inspections and investigations" for the purpose of "(3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order or other requirements of this Act."

excessive amounts of methane or have other extrahazardous conditions. Spot inspections may also be triggered by a miner's complaint of a hazardous condition under section 103(g) of the Act. Sections 202(g) and 303(x) also provide for inspections for the purpose of determining compliance with the respirable dust standards and with all the safety and health standards in the case of newly reopened mines.

Windsor and Price River, filed timely challenges to both the validity of the citations and the penalty assessments. The ground asserted was that previously litigated by their affiliate, SOCCO, namely whether section 103(f) of the Mine Act requires an operator to pay a walkaround for the time spent in participating in a spot inspection.

Windsor and Price River are together with SOCCO wholly owned subsidiaries of two public utility operating companies, Ohio Power Company and Indiana and Michigan Electric Company. The operating companies are in turn wholly owned subsidiaries of American Electric Power Company (AEP), a public utility holding company. The AEP Companies operate approximately thirty underground and surface coal mines throughout the United States. They provide service to residential and industrial utility customers in a seven state region. As a group the AEP Companies constitute one of the largest coal producers in the United States, and the American Electric Power System is the largest user of coal in the United States. Because of the cost and labor relations considerations involved, the AEP Companies have been in the forefront of the industry's efforts to limit the scope of the walkaround pay and self-help policing provisions of the Mine Act.

Under the control and direction of counsel for the AEP Companies, SOCCO has twice previously litigated through the Commission and the United States Court of Appeals for the District of Columbia Circuit the precise issue presented in these proceedings by Windsor and Price River. SOCCO I, supra. Because of the substantial identity of interest of AEP and its three subsidiaries with respect to the controlling issue of law twice previously decided adversely to SOCCO, the Secretary and the UMWA claim Windsor and Price River are estopped either as parties or privies, or both, to relitigate the issue decided in SOCCO I.

In response, Windsor and Price River, without admitting or denying there is a sufficient identity of interest to create an estoppel or that the AEP Companies have had a full and fair opportunity to litigate the controlling question of statutory interpretation, urge that as a matter of policy

collateral estoppel (issue preclusion) should never be invoked to preclude relitigation across the circuits of a legal issue of national import or with substantial public policy implications. See American Med. Intern. v. Sec. of HEW, 677 F.2d 118, 121-124 (D.C. Cir. 1981).

In the wake of Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) offensive, as well as defensive, collateral estoppel is available to protect litigants from the burden of relitigating an identical issue with the same party or his privies. 8/ Id. at 326. Consequently, where a right, or question of fact or law is distinctly put in issue and directly determined by a court of competent jurisdiction a party or his privy is collaterally estopped from relitigating the issue in a subsequent action. The fact that the parties are not precisely identical is not fatal to the assertion of issue preclusion. A judgment is "res judicata in a second action upon the same claim between the same parties or those in privity with them." Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402 (1940).

But while Parklane made the doctrine of mutuality a dead letter under the federal law of collateral estoppel, the case left undisturbed the requisite of privity, i.e., that collateral estoppel can only be applied against parties who have had a prior "full and fair" opportunity to litigate their claims. 439 U.S. at 332. The right to a full and fair opportunity to litigate an issue is, of course, protected by the due process clause of the Constitution. Blonder-Tongue Labs, Inc. v. Univ. of Illinois Foundation, 402 U.S. 313, 329 (1971). To ensure that nonparty preclusion comports with the Constitution federal courts have established guidelines for application of res judicata and collateral estoppel to nonparties. Foremost among these is that the question should be approached on a case-by-case basis, looking at the "practical realities" of individual litigation. Butler v. Stover Bros.

8/ Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party. Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party. Parklane Hosiery, supra, at 326, n. 4.

Trucking Co., 546 F.2d 544, 551 (7th Cir. 1977); Carr v. District of Columbia, 646 F.2d 599, 605 (D.C. Cir. 1980). It is also pertinent to observe that the burden of avoiding nonmutual preclusion is on the party who asserts lack of a full and fair opportunity to litigate in the first action. 18 Wright-Cooper-Miller, Federal Practice and Procedure § 4465, p. 592 (1981).

Several types of corporate relationships are considered sufficiently close to justify preclusion by privity. Among these is an unrebutted showing that a nonparty parent such as AEP who presumably financed and certainly controlled much of the SOCCO I litigation has also financed and controlled the instant litigation by Windsor and Price River. See United States v. Montana, 440 U.S. 147, 158-162 (1979). Although subsidiaries are not in privity with their parent merely by virtue of complete ownership other factors may establish the privity necessary to support an assertion of claim preclusion. Thus, where, as here, the undisputed facts show that AEP not only controlled the prior litigation but has been represented in both by the same corporate or in-house counsel who dominated and controlled both litigations it is appropriate to find the necessary privity. IT&T v. General Tel. & Electronics Corp., 380 F. Supp. 976, 982-984 (D.N.C.) remanded on other grounds 527 F.2d 1162 (4th Cir. 1975). Further, I find that in view of the commonality, if not identity, of financial and proprietary interests of the AEP Companies in the walkaround pay issue and the control over the legal strategy exercised by AEP's corporate counsel, nonparty preclusion with respect to Windsor and Price River is appropriate. In IT&T, supra, the court held that, "If identity of interest were the sole criteria in determining privity, the Court would have no hesitancy in finding that the subsidiaries to be sufficiently represented by GTE to be in privity with it" in the prior action. Id. at 982. Especially pertinent to this case was the court's finding that "Privity may be established by showing that a person was represented in a prior action by a dominant personality, as well as by showing that the person actually controlled the prior action." Ibid.

The record shows the walkaround pay issue is one common to the corporate business of all the AEP Companies. Consequently, when AEP undertook to litigate the walkaround issue through SOCCO it undertook an action that affected the entire corporate business of the AEP Companies. As the holding company, there is no doubt that AEP has substantially dominated, directed and controlled all of the AEP Companies' walkaround litigation. That a subsidiary corporation is in privity with its parent with respect to the common corporate business is well settled. Jefferson School of Social Science v. SACB, 331 F.2d 76, 83 (D.C. Cir. 1963).

Another test of the propriety of nonparty preclusion is whether the interest of the nonparties, Windsor and Price River, was adequately represented by AEP and SOCCO in the prior litigation. I find that it was.

The record in the SOCCO I litigation and this litigation conclusively demonstrates that corporate counsel for the AEP Companies employed outside counsel in these cases to present the same arguments in favor of bifurcation of the walkaround rights as were presented to the Commission and the Court of Appeals in the original SOCCO and Helen Mining matters. While those arguments and proofs did not prevail, there is no suggestion that the failure was due to any lack of incentive or competence in their presentation.

Finally, the record shows that Windsor and Price River could have intervened and fully participated in the prior litigation as well as that the AEP Companies had full control over the resources necessary to permit them to exhaust their opportunities for appeal and to petition for certiorari in the prior litigation. Restatement (Second) Judgments § 39 comment c (1982); Motion of AEP Companies to file Amicus Brief and Amicus Brief in Support of Petition for Certiorari in Helen Mining Company, et al. v. Donovan and UMWA, Supreme Court Docket No. 82-33, October Term 1982, filed September 9, 1982.

Under the circumstances, I find it fair and just to preclude AEP and its affiliates, Windsor and Price River, from relitigating further the spot inspection-walkaround issue. 9/ Pan American Match Inc. v. Sears Roebuck & Company, 454 F.2d 871, 874 (1st Cir.), cert. denied 409 U.S. 892 (1972) (judgment in action in which wholly owned subsidiary was a party binding on parent where it was aware of the litigation and participated in the defense); Astron Industrial Associates, Inc. v. Chrysler Motors Corp., 405 F.2d 958, 961 (5th Cir. 1968); Restatement (Second) Judgments § 59(3) comment e (a controlling owner such as a parent corporation ordinarily has full opportunity and adequate incentive to litigate issues commonly affecting it and its

9/ In United States v. Montana, supra, the Court observed that all the policy considerations that underlie res judicata and collateral estoppel "are . . . implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest." It further noted that it is inaccurate to refer to the principle of nonparty preclusion as a matter of "privity" where, as here, a non-party like AEP has taken a "laboring oar" in the conduct of the earlier litigation. Such circumstances, the Court held, actuate all the principles of party estoppel. 440 U.S. at 154-155.

subsidiaries especially where it is a single enterprise entity operating under a multiple legal form).

The federal law of res judicata and collateral estoppel holds a person may be bound by a judgment or administrative adjudication 10/ even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative. In the present context it is apparent that Windsor and Price River had a substantial identity of interest and therefore privity with AEP and SOCCO in the first litigation of the spot inspection-walkaround issue. Further since AEP and SOCCO were responsible for protecting the beneficial interest of Windsor and Price River in the single enterprise entity's common interest in avoiding liability for walkaround pay it is appropriate to apply the principles of collateral estoppel to their attempt to relitigate the issue. Restatement (Second) Judgments comment c; Aerojet-General Corporation v. Askew, 511 F.2d 710, 719 (5th Cir. 1975); Lawlor v. National Screen Service Corporation, 349 U.S. 322, 329 n. 19 (1955); Chicago, R.I. Ry. Co. v. Schendel, 270 U.S. 611 (1926); Sea-Land Services v. Gaudet, 414 U.S. 573 (1974). 11/

The doctrinal and conceptual basis for the virtual representation doctrine is that:

> Society allows a reasonable adjustment of the demands of due process. Thus an individual apparently can be held by a prior adjudication so long as his interests were adequately represented in the prior suit. The concept of preclusion against a nonparty is strikingly similar to the class suit in that if there is adequate representation of the interests of the nonparty he can be bound by the judgment in the earlier suit. The interest of society in preventing unnecessary duplicative litigation is closely akin to the interest of society--the expedient

10/ The same policy reasons that underlie use of collateral estoppel in judicial proceedings are equally applicable when an administrative agency acts as an adjudicatory body. Chisholm v. Defense Logistics Agency, 656 F.2d 42 (3d Cir. 1981); Restatement (Second) Judgments § 83 (1982).

11/ In Performance Plus Fund, Ltd. v. Winfield & Co., 443 F. Supp. 1188, 1191 (D. Calif. 1977), commonality of interest and common control of formally separate parties was invoked in applying the virtual representation doctrine.

> administration of justice--which was urged for the use of the class suit. Vestal, Res Judicata/Preclusion: Expansion, 47 So. Cal. L. Rev. 357, 378-379 (1974).

See also, Note, Collateral Estoppel of Nonparties, 87 Harv. L. Rev. 1485, 1502 (1974), which suggests that parties' apparent tactical maneuvering to create multiple opportunities to prevail upon the same issue justifies giving less weight to a litigant's attempt to manipulate due process concerns in order to relitigate.

I conclude that in view of the parent-subsidiary relationship between and among the AEP Companies, the control exercised by the parent AEP over the prior litigation, and the identity and commonality of interest both financial and proprietary of the entire AEP enterprise entity in the walkaround issue, the AEP Companies have had a full and fair opportunity to litigate that issue both directly and vicariously. For these reasons, I reject the suggestion that Windsor and Price River be permitted to relitigate the walkaround issue previously determined in SOCCO I.

With respect to the claim that application of the doctrine of collateral estoppel would, in this case, violate the policy against freezing important questions of law on the basis of a single circuit's interpretation, I note that the Supreme Court has recently held that while the presence of such a question does preclude the use of nonmutual estoppel against the government, it may be employed against a private party. United States v. Mendoza, 78 L Ed 379, 386-387 (1984). In Mendoza, the Court confirmed that while its expanded concept of nonmutual offensive estoppel is fully applicable to disputes between private parties or between private parties and the government where the government prevails, it is for reasons peculiar to government litigation not applicable where the government loses the first suit.

Thus the Court found that while "no significant harm flows from enforcing a rule that affords a [private] litigant only one full and fair opportunity to litigate an issue" nonmutual estoppel in cases where the government does not prevail "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several court of appeals to explore a difficult question before this Court grants certiorari." Id. at 384, 385. With respect to the lack of symmetry of such a rule, the Court cited its earlier decision in Standefer v. United States, 447 U.S. 10 (1980) where it

held that "While symmetry of results may be intellectually satisfying, it is not required. 12/ Id. at 25.

The asymmetrical rule with respect to nonmutual estoppel does not apply however to cases where a private party seeks to preclude relitigation by invoking the principle of mutual defensive estoppel against the government. In United States v. Stauffer Chemical Co., 78 L Ed 388 (1984), the Court held that Stauffer Chemical could prevent the EPA from relitigating a question of law of nationwide application with Stauffer. Application of an estoppel against the government in a case where it is litigating the same issue with the same party avoids the problem of freezing development of the law since the government is free to litigate the same issue in the future with other litigants. Id. at 395; United States v. Mendoza, supra, at 387. Accord: Continental Can Co. v. Marshall, 603 F.2d 590 (7th Cir. 1979).

I conclude, therefore, that the operators assertion that nonmutual estoppel, whether offensive or defensive, may not be applied to preclude relitigation by Windsor or Price River of the spot inspection-walkaround pay issue is without merit.

Finally, the operators contend that under the doctrine of administrative nonacquiesence the trial judge should decline to follow the decision of the D.C. Circuit in UMWA v. FMSHRC, supra because it is patently erroneous. 13/

12/ In American Med. Intern. v. Sec. of HEW, supra, relied upon by Windsor and Price River, the D.C. Circuit recognized the lack of symmetry in the rule. It noted: "If private parties can litigate the issue between themselves, the law cannot be frozen by a single ruling, for they will not be bound by prior adjudications with which they were not associated. Furthermore, the governmental unit must have lost the first case presenting the question; for if it won the first but loses subsequently, it is sheltered by Parklane's caveat on inconsistent prior decisions." 677 F.2d at 121 n. 24. Compare Jack Faucett Associates, Inc. v. AT&T, No. 83-1735, D.C. Cir. September 11, 1984, Slip Op. at 22-23.

13/ The operators have not suggested that an agency may use a policy of nonacquiesence to avoid application of nonmutual preclusion within a circuit. The adoption of such a policy by the Department of Health and Human Services with respect to disability benefit cases arising under Titles II and XVI of the Social Security Act has been the subject of much debate. See, Legislative History, Social Security Disability Benefits Reform Act of 1984, Congressional Record for September 19, 1984, Conference Report, at H9831.

I accept for the purposes of deciding this issue that an administrative agency charged with the duty of formulating uniform and orderly national policy in adjudications is not bound to acquiesce in the views of the U.S. courts of appeals that conflict with those of the agency. S & H Riggers & Erectors, Inc. v. OSHRC, 659 F.2d 1273, 1278-1279 (5th Cir. 1981). 14/ Even so, the Commission has not opted to declare its nonacquiesence in the D.C. Circuit's interpretation of the walkaround pay provision. In remanding Helen Mining, SOCCO and the other walkaround decisions the Commission explicitly directed that they be disposed of in a manner consistent with the D.C. Circuit's interpretation. 4 FMSHRC 856 (1982). Since then the Commission has repeatedly declined to revisit the issue.

Moreover, if I were free to "nonacquiesce" in the decision of the D.C. Circuit I would not do so. As my decisions show, I have from the beginning firmly adhered to the position enunciated by the D.C. Circuit. Further, my confidence that the result reached was, and is, correct has been reinforced by recent decisions of the Third and Seventh Circuits, supra. Both stare decisis and collateral estoppel are, in part, reflections of confidence in the correctness of a prior decision. At this juncture my confidence in the correctness of the D.C. Circuit's decision is close to absolute. 15/ Any doubts as to the application of mutual or nonmutual collateral estoppel against Windsor and Price River, which are located in circuits that have not passed on the reach of the walkaround pay provision, are, of course, resolved by

14/ Chief Judge Godbold's opinion, "assumed without deciding that the Commission is free to decline to follow decisions of the courts of appeals with which it disagrees, even in cases arising in those circuits." Other circuits have not been so generous. Ithaca College v. NLRB, 623 F.2d 424 (2d Cir.) cert. denied 449 U.S. 975 (1980); Allegheny General Hospital v. NLRB, 608 F.2d 965 (3d Cir. 1979); Mary Thompson Hospital, Inc. v. NLRB, 621 F.2d 858 (7th Cir. 1980); Yellow Taxi Company of Minneapolis v. NLRB, 721 F.2d 366 (D.C. Cir. 1984); NLRB v. HMO Int'l, 678 F.2d 806 (9th Cir. 1982); NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666 (1st Cir. 1979).

15/ In passing, I note that the Solicitor General has taken the position that the Supreme Court's decision in United States v. Mendoza, supra, furnishes support for the view that intra-circuit nonacquiesence is constitutionally sound, except to the extent that application of such nonacquiesence would contravene the doctrines of res judicata or mutual offensive or defensive collateral estoppel. Ltr. of May 7, 1984 from Rex Lee to Senator Dole, Chairman, Senate Finance Committee (reprinted in Congressional Record for September 19, 1984, S11454-55). Compare United States v. Estate of Donnelly, 397 U.S. 286, 294-295 (1970).

application of the principle of state decisis. See United States v. Stauffer Chemical Co., supra, (reliance on stare decisis is no more burdensome than reliance on collateral estoppel where refusal of preclusion is dictated by considations of evenhanded application of the law to different parties similarly situated).

With respect to the claim that inquiry by other, as yet uncommitted, circuits should not only not be foreclosed but should be encouraged, I am constrained to point out that since these cases arose two other circuits have announced their agreement with the D.C. Circuit. Thus, in August 1984, the Third Circuit upheld an ALJ's decision against Consolidation Coal Company that assessed a penalty of $100 for a violation of the walkaround provisions of section 103(f). There the court stated:

> We find ourselves in agreement with the District of Columbia Court--that spot inspections of the type challenged here are authorized by and made "pursuant to subsection 103(a)." The narrow reading urged by the company is inconsistent with the declared intent of Congress to promote safety in the mines and encourage miner participation in that effort. See Magna Copper Company v. Secretary of Labor, 645 F.2d 694, 697 (9th Cir. 1981).

The Court also rejected the suggestion that the interpretation of subsection 103(f) by the late Congressman Perkins should be considered controlling. Consolidation Coal Company v. FMSHRC, No. 83-3463, decided August 13, 1984, Slip Op. at 6-7.

In September 1984, the Seventh Circuit after a comprehensive review of the identical issue declined Monterey Coal Company's invitation to disagree with the D.C. Circuit and upheld an ALJ's decision that followed that of the D.C. Circuit. In concluding that miners "walkaround pay rights" are coextensive with their "participation rights" the court held (1) that all spot compliance or enforcement inspections create walkaround pay rights and (2) that the late Congressman Perkins' remarks to the contrary cannot be given decisive weight. Addressing the latter, the court, after an exhaustive and conscientious review of the possible motive and reasons for Mr. Perkins' otherwise inexplicable action stated it agreed with the D.C. Circuit's conclusion which was that the

Congressman's remarks were inspired by a desire to provide in the legislative history a basis for undermining in the courts what the miners had won from Congress. A more charitable view is that Congressman Perkins, an acknowledged master of the legislative compromise, inserted the spurious legislative history as part of a political tradeoff for industry support for the Black Lung Benefits Reform Act of 1977.

In conclusion, it appears that events have overtaken all of the operators arguments. Consequently, whether they are rejected on the ground of collateral estoppel and issue preclusion or under the rubrics applicable to res judicata or stare decisis makes little practical difference at this time. Needless to say, even if this trial judge were to revisit the walkaround pay issue de novo he would once again conclude that section 103(f) of the Mine Act provides for compensation to miners who participate in spot safety and health inspections. I find, therefore, that the violations charged did, in fact, occur.

Turning to the amounts of the penalties warranted for the violations found, I conclude, after considering the applicable statutory criteria, that because the operator's actions were (1) knowing and (2) constituted a repetitive and deliberate flouting of the law the penalties best calulated to deter future violations and encourage voluntary compliance are $500 each for the two penalty cases that are before me.

Accordingly, it is ORDERED that the three challenges to the validity of the citations in question be, and hereby are, DENIED. It is FURTHER ORDERED that for the two violations found the operator pay a total penalty of $1,000 on or before Friday, January 25, 1985, and that subject to payment the captioned matters be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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