DECEMBER 1985

Commission Decisions

Administrative Law Judge Decisions

Administrative Law Judge Order

DECEMBER

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

Secretary of Labor, MSHA v. ASARCO, Inc., Docket No. WEST 84-48-M. (Judge Carlson, October 28, 1985.)

Secretary of Labor, MSHA v. Youghiogheny & Ohio Coal Company, Docket No. LAKE 85-90. (Judge Melick, October 29, 1985.)

Secretary of Labor, MSHA v. Hobet Mining and Construction Company, Docket Nos. WEVA 84-113-R, etc.. (Judge Broderick, November 6, 1985.)

Jimmy R. Mullins v. Beth-Elkhorn Coal Corporation, and UMWA, Docket No. KENT 83-268-D. (Judge Steffey, November 13, 1985.)

There were no cases filed where review was denied.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 4, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. LAKE 81-190-M LAKE 82-65-M
TAMMSCO, INC. & HAROLD SCHMARJE	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this consolidated civil penalty proceeding arising under sections 110(a) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), we are asked to decide whether Tammsco, Inc. violated a mandatory health standard, 30 C.F.R. § 57.5-5 (1984), and whether Harold Schmarje, manager of the Tammsco Company Mill, knowingly authorized the violation. 1/ The Secretary of Labor challenges the

1/ 30 C.F.R. § 57.5-5 (1984) was a mandatory health standard for metal and nonmetal underground mines and surface operations of such mines. The standard limited the exposure of miners to airborne contaminants. The standard stated in part:

> § 57.5-5 Mandatory. Control of employee exposure to harmful contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. ...

30 C.F.R. § 57.5-5 was an exception to 30 C.F.R. § 57.5-1 (1984). 30 C.F.R. § 57.5-1 stated in part:

> § 57.5-1 Mandatory. Except as permitted by § 57.5-5:
> (a) ... [T]he exposure to airborne contaminants shall not

(footnote 1 continued)

decision of a Commission administrative law judge concluding that the Secretary had not proved the violation and dismissing the proceedings against both Tammsco, Inc. and plant manager Schmarje. 5 FMSHRC 1063 (June 1983) (ALJ). For the reasons that follow, we affirm the judge's decision.

Tammsco, Inc. is an Illinois corporation engaged in the processing and sale of various grades of silica products used primarily in the manufacture of paints. The Company mill facility is a building of about 100,000 sq. ft. In the mill, silica-bearing ore extracted from nearby underground mines is crushed, dried and heated, then fine ground by a series of pebble mills. The finely ground material is air-swept into classifiers where it is separated into various product grades. The coarsest product is called "ruff-buff". From the crusher section, the various grades of crushed silica are conveyed to storage bins. From there, the silica is conveyed to another section of the building and is placed in cone-shaped hoppers. The hoppers are located above and attached to three bagging machines which package the silica in 50-pound bags. The bagging machines are designed to be equipped with a hood or shroud device connected to a central dust collection system. The shroud acts as a vacuum to collect fugitive dust, protecting the worker, and preserving the product. Packed bags are placed on pallets and transported by forklift to the warehouse section of the mill to await sale and shipment. Tr. 325; 5 FMSHRC at 1110.

On May 7, 1981, Federal Mine Safety and Health Administration ("MSHA") inspector George LaLumondiere, accompanied by Max Slade of MSHA's Metal and Nonmetal Health Division, MSHA supervisor Raymond Roessler, and plant manager Harold Schmarje, conducted an inspection of the mill. There is no evidence in the record that employees were working in the mill or that any machinery was in operation during the inspection. MSHA performed no testing or sampling of exposure levels to airborne contaminants during the inspection. On the warehouse floor, settled dust showed tracks from the forklift, and the floor and equipment throughout the mill were covered with dust. Air leaks which emitted dust into the mill were observed. Dust in the air was visible.

Footnote 1 end.

> exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1 through 54, which are hereby incorporated by reference and made a part hereof. ... Excursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference.

30 C.F.R. §§ 57.5-1 and 57.5-5 were recodified without change in 1985 as 30 C.F.R. §§ 57.5001 and 57.5005. 50 Fed. Reg. 4048 (January 29, 1985).

Mr. Slade testified that the dust he observed in the plant was "general dust from the entire plant, from all three bagging machines and from the various leaks around the plant." Tr. 326. Slade also confirmed that he had no way of identifying with any certainty the specific source of the dust he observed on the floor. At the classifiers and at the milling machines, dust was everywhere. At the ruff-buff bagging machine, the shroud was disconnected from the machine and lying on the floor several feet away. Both the floor around the machine and the shroud were covered with heavy accumulations of dust. Based on the thickness of silica dust covering the shroud, Slade estimated the shroud had been on the floor for several weeks.

A pallet partially filled with bags containing ruff-buff was adjacent to the ruff-buff bagger. Also, seven pallets stacked with filled bags were located nearby. From the packaging dates stamped on the bags, Inspector LaLumondiere estimated that since the installation of the ruff-buff bagger in January 1981, the machine had been in operation at least five times through May 5, 1981, although he had never personally seen it in operation. Because of its infrequent use, MSHA had never tested the ruff-buff bagger for compliance or sampled the levels of employee exposure to silica dust generated by the bagger. Tr. 232-241. An MSHA analysis of a ruff-buff sample taken from an opened bag at the mill on August 21, 1981, three and one-half months after the citation was issued, showed that 94% of the tested ruff-buff was not of sufficiently small size to be considered respirable. However, an employee of the National Institute of Occupational Safety and Health ("NIOSH") testifying for the Secretary stated that of the remaining 6%, 98% would be respirable. Tr. 124-25, 127-28.

Mr. Schmarje and several Tammsco witnesses testified that the shroud had been on the machine until several days prior to the May 7 inspection, when it was damaged by a forklift and removed. Schmarje specifically denied admitting to the inspector on May 7 that the bagging machine had been used previously without the shroud attached. Tr. 410-13, 451.

After inspecting the ruff-buff machine and the pallets, the inspector issued a citation under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), alleging a violation of 30 C.F.R. § 57.5-5. The citation described the violation as follows:

> The Ruff Buff bagging machine was not hooked into the dust collection system of the mill. The dust control plan submitted on 4-14-80 states that all bag machines will have dust collectors as engineering controls to control silica dust. This bagger is in use and a pallet of Ruff Buff was partially loaded. This is an unwarrantable failure. 2/

2/ The statement in the citation that, "[t]his bagger is in use" was explained by MSHA witnesses to mean not that the machine was being used on May 7, 1981, but that it must have been used at times between January 1981 and May 5, 1981 as evidenced by the dates stamped on filled bags of ruff-buff. Tr. 206-09.

Much of the voluminous record developed at the hearing concerns the evolution of the "dust control plan" referred to in the citation. Following an inspection of the mill in July 1979 by NIOSH health experts and the issuance of several section 104(b) closure orders based upon sample results showing silica dust in excess of the applicable threshold limit value ("TLV"), MSHA furnished Tammsco with a copy of a "dust control procedure plan" used by a competitor silica mill to maintain permissible levels of air quality. MSHA suggested that the Tammsco mill could reopen if a similar plan were put into effect. On April 14, 1980, Tammsco submitted to MSHA the "dust control plan" referred to in the citation, and the closure orders were terminated.

In his decision vacating the citation, the judge concluded:

> Although the citation issued in these proceedings implies a violation of "the dust control plan submitted on April 14, 1980", I fail to understand how MSHA believes it can establish a violation of such a plan when there is no mandatory standard requiring an operator to submit or adopt any dust control plan.

5 FMSHRC at 1139.

The judge also held that "the application of section 57.5-5 is specifically conditioned on a finding that exposure to airborne contaminants is in excess of the permissible limit defined in section 57.5-1," and that such finding "has consistently been determined by testing and sampling to establish that employee exposure to such dust exceeded the recognized TLV." 5 FMSHRC at 1124, 1132; (emphasis deleted). The judge noted that MSHA had not conducted timely testing or sampling to establish employee exposure levels prior to issuing the citation. The judge concluded, "MSHA has failed to establish that the levels of employee exposure to any harmful silica dust generated by the bagging of the ruff-buff product without the dust shroud attached to the cited bagging machine exceeded the acceptable threshold limit value mandated by section 57.5-1." 5 FMSHRC at 1132-33.

As to the section 110(c) proceeding brought against plant manager Schmarje, the judge found that MSHA had proved that Schmarje "knew or had reason to know" that the bagger had been operated without the shroud on May 5, 1981. 3/ However, the judge held, in effect, that because a

3/ Section 110(c) of the Mine Act, 30 U.S.C. § 820(c)(1982) states:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

violation of the cited standard was not established, there was no basis to assess a civil penalty against Schmarje. 5 FMSHRC at 1139.

We agree with the judge that in order to establish a violation of section 57.5-5, the Secretary must first prove a violation of section 57.5-1. It is clear from the language of the Secretary's standard that section 57.5-5 establishes an exception to the general mandate of section 57.5-1 which requires that airborne contaminants not exceed their TLV, and that the application of section 57.5-5 is conditioned specifically on a determination that miners are exposed to excessive levels of airborne contaminants in violation of section 57.5-1. 4/ These exposure levels are to be determined by actual sampling, not by inference. 5/ As the judge noted, however, the citation at issue alleges a failure to comply with a provision of the "dust control plan", and does not allege over-exposure to airborne contaminants. We agree with the judge that the Part 57 air quality standards do not provide for the adoption and approval of a dust control plan which can be enforced as a mandatory health standard. Cf. Carbon County Coal Co., 7 FMSHRC 1367, 1370 (September 1985)(discussing the approval and adoption of dust control plans required by 30 U.S.C. § 863(o)). For this reason, and because no monitoring, testing or sampling of employees or the atmosphere was performed by MSHA during the inspection, the judge correctly dismissed the proceedings.

In light of our decision it is unnecessary to reach the technical questions concerning proper sampling procedures and methods of material analysis addressed at length in the Secretary's brief. 6/ Nor do we need to reach the Secretary's contention that the judge erred in considering the ruff-buff and the ruff-buff bagger in isolation from all

4/ In Climax Molybdenum Company, the Secretary conceded that there could be no violation of section 57.5-5 without first proving a violation of section 57.5-1, and we affirmed a Commission judge's vacation of five alleged violations of 30 C.F.R. § 57.5-5 based on the Secretary's representation that he could not prove that excess concentrations occurred due to "problems" with his sampling procedures. 2 FMSHRC 2748, 2750-51 (October 1980), aff'd, 703 F.2d 447 (10th Cir. 1983).

5/ This conclusion is consistent with MSHA's own procedures as stated in the Metal and Nonmetal Mine Safety and Health Inspection and Investigation Manual (1981). 65-AA1 and 66-D-2-3. This manual is an official MSHA publication. It contains guidelines to aid MSHA inspectors in citing violations of the mandatory safety and health standards for metal and nonmental mines.

6/ There is pending a motion by the Secretary to strike the first full paragraph on page 4 of Tammsco's brief filed February 1, 1984, which contains comments on the Secretary's brief by an authority who had not testified at the hearing. Citing section 113(d)(2)(c) of the Mine Act, 30 U.S.C. § 823(d)(2)(c)(1982), the Secretary argues that the Commission's consideration on review is limited to evidence in the record before the administrative law judge. Tammsco responded to the motion. Upon consideration, the Secretary's motion is granted.

other sources of airborne contaminants throughout the mill. While these issues and considerations might be relevant in other cases, they represent issues unrelated to the controlling issue here. The Secretary also urges us to read into section 57.5-1 and section 57.5-5 a premise that once excessive exposure levels have been established through monitoring, and engineering controls have been implemented, proof of a subsequent failure to maintain those controls, without proof of overexposure through further monitoring, constitutes a violation of the cited standards. This, however, is not what the standards provide. If the Secretary desires to cite an operator for failure to maintain engineering controls without first needing to resort to proving overexposure to airborne contaminants through accepted sampling procedures, the Secretary must amend his standards.

Accordingly, we affirm the decision of the judge vacating the section 104(d)(1) citation and dismissing these proceedings. 7/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

7/ Commissioner Doyle assumed office after this case had been considered at a Commission decisional meeting and took no part in the decision. A new Commissioner possesses legal authority to participate in pending cases but such participation is discretionary and is not required for the Commission to take official action. The other Commissioners reached agreement on the disposition of the case prior to Commissioner Doyle's assumption of office, and participation by Commissioner Doyle would therefore not affect the outcome. In the interest of efficient decision making, Commissioner Doyle elects not to participate in this case.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 12, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 85-90
YOUGHIOGHENY & OHIO COAL COMPANY	:	

ORDER

On December 4, 1985, the Commission granted a petition for discretionary review filed by the Youghiogheny & Ohio Coal Company ("Y&O") in this case. In the petition for review, Y&O challenged the administrative law judge's finding that a violation of 30 C.F.R. § 75.305 ("weekly examinations for hazardous conditions") was "significant and substantial" as that term is used in section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d)(1) (1982). Y&O also challenged the judge's assessment of a $750 penalty for the violation of section 75.305, arguing that the penalty is excessive and that the judge failed to explain sufficiently the basis for his penalty assessment. In directing review of this case, we suspended the parties' briefing schedule.

Upon further consideration, we remand this proceeding so that the judge may enter the necessary findings as to each of the six statutory penalty criteria supporting his $750 penalty assessment. 30 U.S.C. § 820(i). Cf. Sellersburg Stone Co., 5 FMSHRC 287 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984). Following the judge's supplemental decision on remand, Y&O may again seek Commission review on any issues as to which it remains aggrieved in accordance with the provisions of section 113 of the Mine Act. 30 U.S.C. § 823.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 18, 1985

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of ROBERT A. RIBEL	:	
v.	:	Docket No. WEVA 84-33-D
EASTERN ASSOCIATED COAL CORPORATION	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("the Mine Act"), and it involves cross-petitions for review filed by Eastern Associated Coal Corporation ("Eastern") and miner Robert Ribel. The principal issues presented are: (1) whether the administrative law judge correctly held that Eastern unlawfully discharged Mr. Ribel in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1); and (2) whether the judge correctly held that attorneys' fees for privately retained counsel are not to be awarded where, as in this case, the discrimination proceeding is initiated on the prevailing miner's behalf by the Secretary of Labor pursuant to section 105(c)(2) of the Act. 30 U.S.C. § 815(c)(2). On the bases explained below, we affirm the judge's finding of discriminatory discharge and we affirm in part and reverse and remand in part on the attorneys' fees issue. While we recognize a general right to attorneys' fees for privately retained counsel in a Secretary-initiated section 105(c)(2) proceeding, we hold that under the particular facts of this case and the standard that we adopt for determining an award of a fee to private counsel, Ribel's counsel is entitled only to a limited attorneys' fees award.

I. Merits

The issue here is whether Ribel was discharged by Eastern in retaliation for his having made safety complaints to mine management and for his having filed a safety-related discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") as the Secretary claims, or whether as Eastern claims, he was discharged

for sabotaging a telephone on a longwall mining unit. A Commission judge rejected Eastern's charge of sabotage and held that Ribel was fired because of his protected safety activities and his having filed a discrimination complaint with MSHA, i.e., that Eastern had violated section 105(c)(1) the Mine Act. 1/ The judge ordered Eastern to reinstate Ribel to his former (or equivalent) position with full seniority rights and benefits, and to expunge from Ribel's personnel records all references to the discharge. The judge also awarded Ribel back pay from the date of his discharge to the date of Eastern's compliance with the judge's earlier order of temporary reinstatement, issued pursuant to Commission Rule 44, requiring that Ribel be reinstated pending the outcome of this case. 29 C.F.R. § 2700.44. 2/

Upon review of the extensive record in this case, and after having heard oral argument, we conclude that substantial evidence supports the judge's holding that Eastern violated section 105(c)(1) of the Act when it suspended and subsequently discharged Ribel. 30 U.S.C. § 823(d)(2)(A)(ii)(I). Our discussion follows.

1/ Section 105(c)(1) provides:

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

30 U.S.C. § 815(c)(1)(emphasis added).

2/ The judge's decision is reported at 6 FMSHRC 2203 (September 1984)(ALJ). Following our direction for review, we remanded the merits portion of the case for additional findings of fact and analysis. 7 FMSHRC 874 (June 1985). The judge's supplemental decision issued on remand is reported at 7 FMSHRC 1059 (July 1985)(ALJ).

Prior to his discharge in August 1983, Ribel was employed as a shield setter with a longwall mining unit at Eastern's Federal No. 2 Mine, an underground bituminous coal mine located in Fairview, West Virginia. As a shield setter Ribel's chief duty involved advancing the hydraulic roof supports, or shields, of the longwall miner. Until his discharge, Ribel had worked as a shield setter at the Federal No. 2 Mine for approximately six years. There is no record evidence of any disciplinary action having been taken by Eastern against Ribel during his tenure.

In early May of 1983, Ribel and fellow shield setters on the 7-Right Section midnight shift, John Kanosky and Danny Wells, complained to mine management about Eastern's practice at the Federal No. 2 Mine of "double cutting" with the longwall miner. 3/ The three shield setters claimed that they were exposed to unhealthy and unsafe levels of coal dust when advancing the roof supports of the longwall miner during the double cut phase. As a result of the shield setters' complaint, Eastern discontinued the practice of double cutting on the 7-Right Section midnight shift. Eastern, however, continued to double cut on its other shifts, a practice that it had followed during the previous six years while complainant Ribel had been employed at the Federal No. 2 Mine.

On May 18, 1983, an incident occurred on the midnight shift involving Ribel, Kanosky, and Wells and their shift foreman, Jack Hawkins. The three shield setters claimed that on May 18 foreman Hawkins had threatened them, stating that if they did not agree to double cutting on their shift they would be given unfavorable work assignments and no longer would they be permitted to work overtime either during their lunch period or after the completion of their shift. Hawkins denied threatening the shield setters. On May 31, 1983, Ribel, Kanosky, and Wells filed a complaint with MSHA alleging that Hawkins had carried out his threats against them because of their continued refusal to double cut. The Secretary in turn filed a discrimination complaint with the Commission on the shield setters' behalf and the matter was docketed as WEVA 84-4-D. 4/

3/ In double cutting the longwall miner shearer cuts the coal both as it proceeds from the tailgate section of the longwall unit to the headgate section, and as the shearer returns from the headgate back to the tailgate. In single cutting the shearer cuts the coal only as it proceeds from the tailgate to the headgate.

4/ Docket No. WEVA 84-4-D was consolidated by the trial judge for hearing and decision with the proceeding now before us on review, Docket No. WEVA 84-33-D, inasmuch as Ribel contends in this case that he was fired by Eastern because of the discrimination complaint that he, Kanosky, and Wells had filed with MSHA in May of 1983. In Docket No. WEVA 84-4-D, the judge held in favor of Eastern and dismissed the miners' complaint, concluding that the Secretary had failed to prove that double cutting was either unlawful or unsafe. See 6 FMSHRC 2203, 2271-75 (September 1984)(ALJ). Commission review of the judge's adverse decision in Docket No. WEVA 84-4-D was not sought by the Secretary or by Ribel.

Following the May 18, 1983 incident between shield setters Ribel, Kanosky, and Wells and foreman Hawkins and up until the time of Ribel's discharge, the midnight shift on the 7-Right Section continued to single cut. On August 5, 1983, the events immediately preceding Ribel's discharge occurred.

At the beginning of the August 5 midnight shift Michael Toth, the longwall coordinator responsible for coal production on the 7-Right Section, held a special meeting with that section's longwall mining crew. Toth, who ordinarily worked on the day shift, testified that the purpose of the meeting was twofold: to settle personal differences between members of the crew and foreman Hawkins concerning the manner in which Hawkins conducted his preshift examination of the 7-Right Section; and to discuss what mine management believed was an increasing incidence on the midnight shift of damage to the telephones on the 7-Right Section's longwall unit. The meeting was conducted in the miners' dinner hole and among those present were shield setters Ribel, Kanosky, and Wells, shift foreman Hawkins, and shift mechanic Russel Toothman.

Ribel and Toothman left the August 5 meeting before it was concluded in order to complete their previously assigned task of checking the telephones on the longwall miner prior to the start of the shift. There were seven telephones on the 7-Right Section longwall mining unit, spaced approximately 100 feet apart. Toothman remained at the longwall miner's headgate in order to receive the phone calls from Ribel who had proceeded down the 500-foot longwall unit toward the unit's tailgate. Ribel reported to Toothman that phones No. 52 and No. 89 were not working properly. Upon completing the phone check, Ribel remained at the tailgate section and awaited the start-up of the longwall miner in order to complete another assigned task.

At this time, longwall coordinator Toth arrived at the face and was informed by Toothman that phones No. 52 and No. 89 were reported by Ribel not to be working properly. Toth checked the two phones and claimed that they were in working order. Toth then instructed Toothman to assist him in rechecking all seven telephones. It was during this second check that a wire inside the No. 32 phone leading to the phone's paging system was discovered to be severed. Toth immediately discussed the matter of the severed wire with Ribel and Toothman. During that discussion Toth charged Ribel with sabotage and suspended him with intent to discharge. Following his dismissal, Ribel filed a grievance under the governing collective bargaining agreement. An arbitrator denied Ribel's grievance and this litigation ensued.

The focus of the hearing before the Commission judge was whether Ribel had cut the No. 32 phone wire. In his initial decision, the judge regarded that inquiry as being the "crucial question" in this case. 6 FMSHRC at 2281. After reciting the evidence in great detail, the judge concluded that Eastern had failed to establish that it was Ribel who sabotaged the No. 32 phone and that Eastern had failed to rebut Ribel's

prima facie case of discriminatory discharge. 6 FMSHRC at 2285-87. In our subsequent remand order, we directed the judge "to analyze in detail whether a prima facie case of discrimination was established" and "to determine what actually occurred at the August 5, 1983 meeting between longwall coordinator Michael Toth and the miners on the midnight shift, and that meeting's relationship, if any, to the allegation that the decision to suspend Ribel with intent to discharge was a violation of section 105(c)." See n. 2, supra.

On remand, the judge concluded that in suspending Ribel on August 5, 1983, longwall coordinator Toth was unlawfully motivated by Ribel's safety complaints concerning double cutting, as well as by Ribel's May 31, 1983 discrimination complaint filed with MSHA against foreman Hawkins which also involved the issue of double cutting. The judge further concluded that the reason given by Toth for suspending Ribel with intent to discharge -- the allegation of sabotage -- was, in effect, a pretext and that Toth had opportunistically "seized upon" the sabotage incident as a means of getting rid of Ribel, with the intended result being a return to double cutting on the 7-Right Section midnight shift and an increase in coal production. 7 FMSHRC at 1064-65. We hold that the judge's material factual findings regarding the discrimination claim are supported by substantial evidence of record and that his conclusions must be upheld.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish that (1) he engaged in protected activity, and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not in any part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983); Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984)(specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983).

In his initial decision the judge found that "Mr. Toth knew Mr. Ribel was one of the individuals causing 'problems' and filing complaints over safety questions" and that Ribel's safety complaints were "lurking in the background" at the time of his discharge. 6 FMSHRC at 2284-85. On remand the judge further found that it was "abundantly clear" from the record that both Hawkins and Toth were hostile towards Ribel because of Ribel's protected safety complaints concerning the matter of double cutting and his discrimination complaint filed against Hawkins which stemmed from Ribel's refusal to double cut. 7 FMSHRC at 1063. Substantial evidence supports the judge's conclusion that a hostile atmosphere existed between Hawkins, Toth, and the miners of the 7-Right Section midnight shift. The judge found that: (1) Toth was aware of the problems that existed between Hawkins and the midnight shift crew and that those problems adversely affected coal production; (2) Toth had a "definite interest" in the problems between Hawkins and his crew inasmuch as Toth was responsible for coal production on the 7-Right Section; (3) in the past Toth had talked with the United Mine Workers of America safety committee "several times" about double cutting; and (4) Toth had been aware of the fact that Ribel had filed a discrimination complaint against Hawkins with MSHA over the issue of double cutting. 7 FMSHRC at 1061-62.

Further evidencing this hostile atmosphere, the judge recounted the crucial meeting between Toth and the midnight shift crew which took place prior to the start of the August 5, 1983 shift and which immediately preceded Ribel's discharge. Crediting the testimony of shield setters Wells and Kanosky, the judge found that Toth stated that he was getting tired of safety complaints being filed and that miners could end up losing their jobs if the complaints did not stop. The judge also credited the testimony of miners Steve Reeseman and Larry Hayes concerning Toth's comments to Wells after Toth had observed Wells laughing during the meeting. Reeseman testified that Toth told Wells, "all of this petty stuff that has been going out to the safety department, every day, and every day, is going to stop, or you will be next." Hayes testified that Toth told Wells that "he would be next" and that Wells would "come out on the shitty end of the stick" because of the safety complaints. 7 FMSHRC at 1062. The judge rejected Toth's explanation that his statements to the miners had not been intended as threats. These findings are supported by substantial evidence.

The judge's findings depict a simmering, tense atmosphere on the 7-Right Section's midnight shift at the time of Ribel's discharge because of the continued refusal of Ribel, Kanosky, and Wells to double cut, their complaint to MSHA, and Hawkin's and Toth's frustration as a result of the corresponding decrease in coal production. In fact, the judge specifically found that due to the double cutting dispute Ribel's relationship with mine management was fraught with "animosity and acrimony." 7 FMSHRC at 1063. As the judge noted, "this hostility was the result of the disruptive and protracted safety confrontations between Mr. Hawkins and his crew, and the fact that Mr. Ribel and several of his co-workers

chose to make safety and discrimination complaints over the practice of double cutting and other mining practices." 7 FMSHRC at 1064. Thus, the judge's conclusion that Ribel established a prima facie case of discrimination is supported by substantial evidence.

The judge further rejected Eastern's argument that Ribel was fired due to Toth's asserted belief that Ribel had cut the phone wire on the longwall section. In his initial decision the judge reviewed the evidence and stated:

> I cannot conclude that the respondent has established that Mr. Ribel is the guilty party. To the contrary, I conclude and find that at least one or more individuals (Toth, Hawkins, Reeseman) were on the section at the time of the incident at question, and that they had access to the telephone and had as much opportunity to cut the wire as did Mr. Ribel. In short, I reject the motion that strong circumstantial evidence points only to Mr. Ribel as the culprit, and I conclude that there is reasonable doubt as to his guilt.

6 FMSHRC at 2287. In his supplemental decision the judge expanded on his previous findings, stating: "Given all of this turmoil ... Mr. Toth seized upon the opportunity to blame the wire cutting on Mr. Ribel, and rather than conducting a thorough investigation into the matter, he made a rather cursory decision that Mr. Ribel was the guilty party ... [and] somehow hoped to end all of the conflict which had directly affected his operation." 7 FMSHRC at 1065 (emphasis added). We conclude that these findings are supported by substantial evidence.

Accordingly, we affirm the judge's holding that Eastern discharged Ribel in violation of section 105(c) of the Mine Act. Our affirmance is based on the narrow ground that substantial evidence supports the judge's holding that longwall coordinator Toth "seized upon" the phone sabotage incident as a pretext to retaliate against Ribel for his protected activities associated with the double cutting dispute. In reaching that conclusion, the judge made several critical credibility determinations in favor of Ribel and we can find no reason on review for taking the unusual step of overturning them. See William A. Haro v. Magma Copper Company, 4 FMSHRC 1935, 1943 (November 1982).

II. Attorneys' Fees

Although this discrimination proceeding was initiated and litigated on Ribel's behalf by the Secretary pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), 5/ Ribel also retained private (i.e., non-government) counsel to represent him in this matter. The attorneys' fees

5/ Section 105(c)(2) provides:

> Any miner or applicant for employment or representative of miners who believes that he has been discharged,

(footnote 5 continued)

issue involves the Commission judge's denial of Ribel's application for a fee award for expenses incurred in his retention of private counsel. 6 FMSHRC 2744 (December 1984)(ALJ). Specifically, Ribel had sought $9,065.66 for expenses associated with his retention of attorney Barbara Fleischauer and a total of $1,000.98 for services rendered by two law professors, Professor Robert Bastress and Professor Franklin Cleckley.

Footnote 5 end.

> interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

(Emphasis added.)

The judge denied Ribel's fee application on the ground that attorneys' fees are not awardable where, as in this case, the proceeding is initiated and litigated on the prevailing miner's behalf by the Secretary pursuant to section 105(c)(2). 30 U.S.C. § 815(c)(2). We disagree and we hold that private attorneys' fees may be awarded to a prevailing miner in a Secretary-initiated section 105(c)(2) discrimination proceeding, provided that private counsel's efforts are non-duplicative of the Secretary's efforts and further, that private counsel contributes substantially to the success of the litigation.

The general principle of what has become to be recognized as the "American Rule" is that absent an express statutory grant allowing for the awarding of attorneys' fees, each party is to bear his own litigation expenses. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). The Secretary proceeded in this matter under section 105(c)(2) of the Act. Section 105(c)(2) does not provide specifically for the awarding of attorneys' fees. See n. 5, supra. We note, however, that it is not the Secretary who is seeking a fee award; it is the prevailing miner. 6/ In that regard, the subject of attorneys' fees is mentioned specifically in section 105(c)(3) of the Act. 30 U.S.C. § 815(c)(3). Section 105(c)(3) allows a miner to file a discrimination complaint with this independent Commission on his own behalf if the Secretary declines to do so under section 105(c)(2). 7/ Regarding the awarding of attorneys' fees, section 105(c)(3) states:

> ... Whenever 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 attorney's 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....

(Emphasis added.)

6/ The Secretary has taken no position on the attorneys' fees issue.

7/ Section 105(c)(3) in part provides:

> Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complaintant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination, or interference in violation of paragraph (1)....

We conclude that the fee shifting provisions contained in section 105(c)(3) authorize the awarding of private attorneys' fees to a prevailing miner in a Secretary-initiated section 105(c)(2) proceeding. In reaching that conclusion we recognize the interplay between these two key enforcement provisions. While subsection (c)(2) focuses upon the Secretary's prosecution of a miner's discrimination complaint and subsection (c)(3) focuses upon a miner's prosecution of his own complaint, it is clear that these two statutory provisions are but parts of the whole arsenal that Congress intended to be available to miners who have been victims of unlawful discrimination. In fact, in section 105(c)(2) Congress contemplated that miners could separately participate in Secretary-initiated proceedings by providing, "The complaining miner ... may present additional evidence on his own behalf during any hearing held pursuant to this paragraph." 30 U.S.C. § 815(c)(2).

The Mine Act's legislative history supports the conclusion that a prevailing miner may obtain private attorneys' fees in a section 105(c)(2) proceeding. Regarding the relief provisions contained in section 105(c), the Senate Report on the Mine Act states:

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

S. Rep. No. 181, 95th Cong., 1st Sess. (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978)(emphasis added). Thus, it would be inconsistent with the remedial purpose of the Mine Act in general and more specifically with the "make whole" provisions of the Act's legislative history, particularly in view of the express statutory grant of attorneys' fees in section 105(c)(3), to deny a prevailing miner private attorneys' fees solely on the ground that the proceeding was initiated by the Secretary under section 105(c)(2).

Our holding in this case is consistent with the decision in Secretary, on behalf of Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982). In Northern Coal, we awarded certain relief specified only in section 105(c)(3) to two miners, even though the proceeding in that case was initiated by the Secretary under section 105(c)(2). We held:

> 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.

4 FMSHRC at 143-44 (fn. omitted and emphasis added).

Finally, additional support for the awarding of private attorneys' fees in a section 105(c)(2) proceeding is found in the use of the terms "subsection" and "paragraph" in sections 105(c)(2) and (c)(3). These sections indicate that when Congress referred to the term "subsection" it meant subsection (c) of section 105, and that when Congress referred to the term "paragraph" it meant the numbered paragraph specifically mentioned. Accordingly, Congress' providing for an award of attorneys' fees in section 105(c)(3), "Whenever an order is issued sustaining the complainant's charges under this subsection," (emphasis added) encompasses private attorneys' fees sustained by a miner in an action prosecuted by the Secretary.

Having concluded that private attorneys' fees are awardable in a Secretary-initiated discrimination proceeding our next inquiry is the proper standard for determining the amount of the fee award. Section 105(c)(3) specifically sets forth two requirements: the first is that an order be issued "sustaining the complainant's charges"; the second is that the attorneys' fees awarded be "reasonably incurred." Construing these provisions in the context of a section 105(c)(2) proceeding, we hold that private attorneys' fees are awardable in a Secretary-initiated section 105(c)(2) proceeding only to the extent that the efforts advanced by the prevailing miner's private counsel are non-duplicative of the Secretary's efforts and that private counsel has contributed substantially to the success of the litigation.

This requirement stems from the enforcement scheme of section 105(c) of the Act, 30 U.S.C. § 815(c), which clearly establishes the Secretary as the chief prosecutor in discrimination matters. Section 105(c)(2) places upon the Secretary the primary responsibility for enforcing the anti-discrimination provisions contained in section 105(c)(1). See n. 5, supra. It requires the Secretary to conduct an investigation of a miner's complaint within specified time limits and to proceed on

the miner's behalf before this Commission if the Secretary determines that unlawful discrimination has occurred. Thus, despite the fact that a miner may present evidence in a proceeding initiated by the Secretary under section 105(c)(2), and may proceed on his own behalf under section 105(c)(3) if the Secretary declines to prosecute his discrimination claim, the enforcement scheme of section 105(c) clearly establishes the Secretary as the chief prosecutor in discrimination matters.

The standard that we adopt for fixing the fee award for private counsel in a Secretary-initiated section 105(c)(2) proceeding balances Congress' intent that the discriminatee-miner be made whole, with Congress' designation of the Secretary as the chief prosecutor in discrimination cases. Also, it is consistent with the approach followed by the D.C. Circuit in an analogous context in Donnell v. United States, 682 F.2d 240 (1982), cert. denied, 459 U.S. 1204 (1983). Donnell arose under the Voting Rights Act, 42 U.S.C. § 1973c, and it involved a claim for attorneys' fees by private citizens who had intervened in a successful action brought by the United States against a County Board of Supervisors. Regarding the fee award issue, the court held:

> Where Congress has charged a government 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 intervenors 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 an 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.

682 F.2d at 248-49 (emphasis added). See also Alabama Power Co. v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982); Seattle School Dist. No. 1 v. Washington, 633 F.2d 1338 (9th Cir. 1980), aff'd, 458 U.S. 457 (1982); and Johnson v. Georgia Hwy. Express, 488 F.2d 714, 717-19 (5th Cir. 1974).

Insofar as the present case is concerned, the judge correctly anticipated the applicability of a Donnell-type standard. Applying Donnell, the judge stated that he "remained unconvinced that [Ribel's private counsel's] limited participation in the proceedings before me contributed in any meaningful way to the adjudication of [Ribel's] case." 6 FMSHRC at 2756. The judge noted that Ribel's complaint was "pursued at all stages before me by MSHA's attorneys" (6 FMSHRC at 2762) and stated that "it is clear from the record in this matter that [private counsel] 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." 6 FMSHRC at 2754. Based on his assessment of private counsel's non-duplicative substantive contribution to the proceeding before him, the judge denied Ribel attorneys' fees stemming from private counsel's participation. 6 FMSHRC at 2756. The judge nevertheless proceeded to make an alternative finding stating that, if any attorneys' fees were due, the appropriate amount would be $1,025. The judge awarded Ribel reimbursement for certain other costs and expenses incurred following his discharge.

For the reasons that follow we affirm the judge's denial of the major portion of the claimed attorneys' fees, but find that an award for a very limited portion of the claimed fees is appropriate. Also, we vacate the judge's alternative attorneys' fees award and remand for further limited proceedings.

An attorneys' fees award is a matter that lies within the sound discretion of the trial judge. Webb v. Board of Education of Dyer County, 471 U.S. ____, 85 L.Ed. 2d 233, 243 (1985)(reviewing court must evaluate the reasonableness of district court's fee award "with appropriate deference"); Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) (district court has discretion in setting fee award in view of "superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters"). Applying this standard of review, examining the judge's application of the Donnell standard, and reviewing the entire record, we must uphold the judge's assessment of private counsel's non-duplicative contribution to the merits of the proceedings before him.

It is clear from the record, including the materials submitted in support of the attorneys' fee request, that the bulk of the attorneys' fees claimed were incurred in preparation for a separate state discrimination claim and other state administrative proceedings. Furthermore, insofar as Ribel's federal claim under the Mine Act is concerned, the record demonstrates, as the judge found, that MSHA promptly and fully discharged its statutory obligation to investigate Ribel's discrimination complaint and to vigorously prosecute it at all necessary stages, including the temporary reinstatement proceeding, the proceeding on the merits before the judge and the appeal to the Commission. At each of these stages the

Secretary appropriately represented Ribel's interests and, in fact, prevailed. Thus, we conclude that under the standard we adopt for determining whether private attorneys' fees are awardable to a miner in a discrimination proceeding brought by the Secretary of Labor, the judge, with one minor exception, correctly denied an award for the private attorney fees claimed. Our only disagreement with the judge's decision is that it fails to take into account that private counsel's participation resulted in his award of certain costs and expenses to Ribel, totalling approximately $605.00, that had not been requested as relief by the Secretary. Thus, to the extent that the claimed private attorneys' fees were incurred in connection with successfully obtaining this non-duplicative portion of Ribel's claim, a fee award is due. We remand for an expedited determination of this limited amount. 8/

Regarding the attorney's fees incurred in connection with proceedings initiated by Ribel before the West Virginia Coal Mine Safety Board of Appeals and the West Virginia Bureau of Unemployment Compensation, the judge found no basis for a fee award inasmuch as those state proceedings are separate and distinct from any remedy available to a miner under the Mine Act. 6 FMSHRC at 2756. We agree. As the judge suggested, Ribel's recourse, if any, is in the state forum in which the attorneys' fees were incurred.

Finally, we affirm the judge's denial of attorneys' fees for services rendered by two law professors. The judge noted that it appeared that the services performed by the law professors were in connection with the state proceedings discussed above. The judge added, "In any event, these individuals are totally unfamiliar to me, and they entered no appearance and did not participate on the record in any proceeding before me." 6 FMSHRC at 2756. Accordingly, given the standard for the awarding of private attorneys' fees in a Secretary-initiated section 105(c)(2) proceeding that we set forth earlier, and given the judge's assessment of the services rendered by the two law professors, we find no abuse of discretion in the judge's decision not to award attorneys' fees.

III. Miscellaneous

On review Ribel raises two additional points which warrant our consideration. First, Ribel argues that the judge erred in denying a claim of $135.92 for mileage and meal costs for the period from August 24, 1983 to November 15, 1983. The judge held that the expenses were not recoverable under the Mine Act because they were incurred prior to the initiation of the present Commission proceedings. 6 FMSHRC at 2762. Ribel also claims that the judge erred in awarding only $35 for telephone

8/ We express the hope that this determination can be made by agreement of the parties thereby avoiding further protraction of the final resolution of these administrative proceedings. We vacate the judge's alternative fee award of $1,025 because it apparently was not determined in accordance with the test set forth in the judge's decision and adopted here.

expenses of a total of $53.54 that had been sought. The judge noted that many of the itemized telephone calls were made "before and after" the proceedings before the Commission. 6 FMSHRC at 2763. We have reviewed the record and we find no basis for overturning the judge's holding as to these matters.

The second point raised by Ribel concerns the tone of the Commission judge's decision involving the attorneys' fees aspect of the case. Ribel, through private counsel takes exception to what counsel characterizes as the judge's "unduly condescending and patronizing tone." Upon a review of the judge's opinion, as well as counsel's response filed on review, we find no basis to support counsel's assertion and we perceive no reason to further pursue this matter.

IV. Conclusion

In sum, we hold that substantial evidence supports the judge's findings that Mr. Ribel was discharged because of his safety complaints involving double cutting with the longwall miner and his related discrimination complaint against shift foreman Hawkins, and that his firing for the phone-sabotage incident was a pretext. Accordingly, the judge's decision on the merits is affirmed.

Insofar as the remedy aspects of the case at issue before us are concerned, we reverse the judge and we hold that attorneys' fees for privately retained counsel may be awarded in a Secretary-initiated section 105(c)(2) discrimination proceeding, provided that private counsel has not duplicated the efforts of the Secretary and further, that services of private counsel have contributed substantially to the success of the litigation. As measured against this fee award standard, we reverse and vacate the judge's alternative attorney's fee award of $1,025 for services rendered by private counsel, we affirm the judge's denial of attorneys' fees for services rendered by two law professors, we affirm the judge's denial of Mr. Ribel's claim of $135.92 for mileage and meal expenses, as well as the judge's partial award of telephone expenses, and we remand to the judge for the limited purpose of determining the fee award due in connection with the services performed by private counsel in obtaining for Ribel an award of certain costs and

expenses. The judge shall afford the parties the opportunity to file promptly additional pleadings or stipulations in this regard and shall enter his finding on an expedited basis. 9/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

9/ Commissioner Doyle assumed office after this case had been considered at a Commission decisional meeting and took no part in the decision. A new Commissioner possesses legal authority to participate in pending cases but such participation is discretionary and is not required for the Commission to take official action. The other Commissioners reached agreement on the disposition of the case prior to Commissioner Doyle's assumption of office, and participation by Commissioner Doyle would therefore not affect the outcome. In the interest of efficient decision making, Commissioner Doyle elects not to participate in this case.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

DEC 2 1985

UNITED MINE WORKERS OF AMERICA (UMWA), ON BEHALF OF EUGENE RONCHETTO, GARY GENE RONCHETTO, RANDALL T. McQUAY, Complainants	:	DISCRIMINATION PROCEEDINGS Docket No. CENT 85-111-D MADI CD 85-6 Docket No. CENT 85-112-D MADI CD 85-7
v.	:	Docket No. CENT 85-113-D MADI CD 85-8
ASSOCIATED ELECTRIC COOPERATIVE, INC., Respondent	:	Prairie Hill Mine

DECISION APPROVING SETTLEMENT

Before: Judge Morris

These are consolidated discrimination proceedings initiated by complainants in accordance with the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Prior to a hearing the parties reached an amicable settlement and they have now filed a written agreement herein.

The agreement provides that it is contingent upon the settlement of all proceedings, including the civil penalty proceeding docketed as Associated Electric Cooperative, Inc. (AECI), Docket No. CENT 85-66.

In addition, it appears that the proposed settlement is satisfactory to the individual complainants.

In consideration of the proposed settlement respondent agrees to refrain from directing any rear lug "band-aid" welding on any dragline while it is in operation.

Discussion

I have reviewed the proposed settlement and I find that it is reasonable and it should be approved.

The judge further finds that his decision approving a settlement in Associated Electric Cooperative, Inc. (AECI), Docket No. CENT 85-66, was issued November 19, 1985.

Accordingly, I enter the following:

ORDER

1. The settlement agreement is approved.

2. The discrimination proceedings are dismissed.

John J. Morris
Administrative Law Judge

Distribution:

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 3, 1985

BARNES AND TUCKER COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 85-83-R
	:	Order No. 2255533; 12/12/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Lancashire No. 24-B Mine

DECISION

Appearances: Michael T. Heenan, Esq., Smith, Heenan & Althen, Washington, D.C., for Contestant; David Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the application for review filed by the Barnes and Tucker Company (B & T) under section 107 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge the issuance by the Secretary of Labor of an imminent danger withdrawal order on December 12, 1984. The general issue before me is whether the conditions existing at the time the withdrawal order was issued constituted an "imminent danger" within the meaning of section 3(j) of the Act. "Imminent danger" is there defined as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

The order at bar (Order No. 225533) issued pursuant to section 107(a) of the Act,[1] reads as follows:

---

[1]Section 107(a) of the Act provides that "[i]f, upon any inspection or investigation of a coal or other mine which is subject to the Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist."

> A hazardous condition exists on the automatic elevator at the main portal of this mine. There are two 1/2 inch suspension wire ropes out of their respective grooves in the shieve [sic] wheel above the counterweight for this automatic elevator. It is reasonable to assume that with these ropes out of grooves, they could be tangled and cause the car to come to abrupt stop which would cause persons in this car to strike the sides or bottom of the car causing them serious injuries.

During the course of a special electrical inspection on December 12, 1984, Inspector Leroy Niehenke of the Federal Mine Safety and Health Administration (MSHA) found conditions on the main portal elevator to be an "imminent danger". Niehenke and MSHA Inspector William Davis were performing their inspection on the roof of the elevator at about the 30 to 40 foot level when Niehenke observed that the elevator ropes were changing positions.

Upon closer examination only 2 feet from the ropes he found that two of the six ropes were out of their corresponding grooves on the sheave wheel above the counterweight and were riding on the flange. In addition he found that one of the ropes had crossed over and overlapped another rope on the sheave wheel. The grooves are designed to keep the elevator ropes in proper alignment on the sheave wheel. They are ordinarily separated by an inch but according to Niehenke the ropes riding on the flange were 3 to 4 inches from the other ropes.

Niehenke observed that if the elevator had continued to operate with the ropes out of alignment as described, the ropes could have become lodged between the sheave wheel and its guard. They could then have become entangled and/or severed. In either case the elevator car could come to an abrupt halt thereby seriously injuring passengers inside or inspectors riding outside on the roof. If one or more ropes became severed it is not disputed that they were of sufficient weight to also cause serious injuries to anyone riding on top of the elevator who might be performing inspections. Severed ropes would also be expected to twist violently and could knock persons off the elevator into the shaft. Under these circumstances Niehenke believed an imminent danger withdrawal order was warranted. Accordingly the elevator was brought to the top, evacuated and closed down.

Inspector Davis was riding on top of the elevator with Niehenke. He also saw that two of the ropes were overlapped

and riding out of their respective grooves on the flange of the sheave wheel. Contemporaneous notes taken by both inspectors indicate that the ropes appeared to be overlapped.

MSHA electrical engineer and elevator inspector Ronald Gossard thereupon expressed an opinion of the danger presented by the conditions described by Inspectors Niehenke and Davis. Gossard opined that if the elevator continued to operate under these conditions, the two ropes would be expected to further migrate off the sheave wheel toward the wheel housing. Eventually the ropes would move into the gap between the wheel and its housing and scrape the ropes if not immediately lock up the wheel. According to Gossard, the continued rubbing and scraping over a period of time would reduce the rope diameter and weaken it to the point where the rope would sever. Upon severance the rope could tangle in the other ropes or in the sheave wheel thereby halting the elevator abruptly. Gossard also opined that should even one rope become severed, the counterweight, which ordinarily passes within 6 inches of the elevator, could strike the elevator with serious effect. He observed that the counterweight weighs approximately 1 ton and would be approaching the car at a speed of 6 to 8 feet per minute.

B & T maintains, on the other hand, that although the No. 5 and No. 6 ropes were admittedly not in their proper grooves when the elevator was later examined by a repairman none of the ropes were overlapped. B & T contends that under these conditions no imminent danger could have existed. It maintains that, at worst, the No. 6 rope which was out of its groove and riding on the flange of the sheave wheel would wear flat and the rope strands would eventually begin breaking. The entire rope would break, according to this scenario, only after a period of at least 6 months. B & T argues that these deficiencies would be discovered by the inspection process well before any danger existed.

Robert Singer, an experienced repairman for the Otis Elevator Company (Otis), examined the elevator ropes later on the same day the order was issued. He found that rope No. 5 was in the groove for rope No. 6 and that rope No. 6 was riding on the flange of the sheave wheel but none of the ropes was overlapped. He realigned the ropes in a few minutes with a screw driver and adjusted the "keeper" by moving it about 1/16 inch closer to the sheave wheel. According to Singer the No. 6 rope would have eventually worn flat, the strands in the rope would begin breaking and only after a minimum of 6 months would the entire rope possibly break. He did not believe that the ropes would have continued to move toward the outside of the sheave flange because of the steep slope of the flange. Singer found no immediate danger but agreed that under the circumstances he would have shut the elevator down, just as Inspector Niehenke did. It is noted that Singer's employer, Otis, had at the

time the withdrawal order was issued, and continues to have, a maintenance contract with B & T which includes a weekly examination of the cited elevator.

George Anderson, an experienced service attendant for the Schindler Elevator Corporation (Schindler) examined the subject ropes in April 1985, some 4 months after the order had been lifted. Schindler too had a continuing service contract with B & T. Anderson opined that the ropes had not overlapped. He based this opinion on his observation that there were no marks on the keeper. Anderson testified that had the ropes in fact been overlapped major effort would have been required to uncross them i.e., detaching one of the ropes from the end fasten point after resting the counter-weights on the ground, grounding the elevator car to get slack then backing off and removing the keepers. Anderson concluded that in any event there was no possibility of physical injury even if the ropes had been crossed.

James Anderson, a self-employed mine elevator consultant, also examined the subject elevator about 4 months after the order had been lifted. He opined that so long as the ropes did not come off the sheave itself there was no danger whatsoever. He thought that in any event the ropes would be inspected and the defect discovered before anything happened. He agreed however that if he had found the cables overlapped he too would have stopped the elevator and corrected the condition.

Recalled as a witness by the court, MSHA electrical engineer Ronald Gossard explained how the ropes could have been overlapped when seen by Niehenke and Davis and not been overlapped when later seen by Robert Singer. According to Gossard a rock or piece of concrete could have falled onto the sheave wheel and caused the No. 6 rope to jump over the No. 5 rope. The ropes would then have been crossed in two locations one of which was not seen by the inspectors. As the elevator was raised after the inspection the ropes could have then uncrossed explaining why Singer later found them in that condition. This explanation of the apparent inconsistency in testimony is unchallenged. For this additional reason I accept the testimony of Inspectors Niehenke and Davis as a credible description of conditions existing at the time the order was issued.

In assessing whether these conditions constituted an "imminent danger" I am particularly pursuaded by the disinterested testimony of Gossard. This expert testimony amplifies and fully corroborates the testimony of Inspector Niehenke and clearly establishes that the conditions found by Niehenke could reasonably have been expected to cause death or serious physical harm before the conditions could have been abated. Accordingly an "imminent danger" then existed and the order at bar was properly issued.

Even assuming, arguendo, that the ropes had not been crossed I would nevertheless find that an "imminent danger" had existed. In this regard Mr. Gossard was asked to assume that none of the ropes were overlapped and that conditions existed as depicted in the diagrams and photographs in evidence as Exhibits A-5, A-6, A-7. On these assumptions he opined that the No. 6 rope would become stretched over a relatively short period of time because it would be absorbing greater weight. In turn, because of the stretched condition, the No. 6 rope could then cross over the No. 5 rope and produce the same dangerous conditions previously described. Indeed one of the mine operator's experts, service repairman Robert Singer, opined that even if the ropes had not overlapped, the No. 6 rope would eventually have worn flat, the strands would have broken and the rope would have failed.

Under the circumstances the subject order is affirmed and these proceedings dismissed.

Gary Melick
Administrative Law Judge

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rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 4, 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 85-21
Petitioner	:	A.C. No. 44-05385-03522
v.	:	
	:	No. 3 Mine
WHITE OAK COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Petitioner seeks a civil penalty assessment in the amount of $500 for an alleged violation of mandatory safety standard 30 C.F.R. § 75.200, as stated in a section 104(d)(1) Citation No. 2153645, served on the respondent by MSHA Inspector Larry Coeburn on December 6, 1984. The condition or practice cited is as follows:

> The approved roof-control plan was not being complied with on the 001 active working section in that the following conditions existed:
>
> (1) The No. 2 and No. 3 entries were driven from 22 to 24 feet wide beginning at the inby corner of the last open crosscuts and extending inby for 25 feet in the No. 2 entry and 30 feet in the No. 3 entry.

(2) The No. 5 entry was mined from 22 to 23 feet wide beginning at the inby end of the last connecting crosscut inby for 30 feet.

(3) Roof bolts were installed to within 5 to 6 feet of the left coal rib in the No. 5 entry beginning at the inby corner of the last connecting crosscut extending inby for 20 feet.

(4) Reflectorized warning devices were not installed on the last row of permanent roof supports in the Nos. 1, 2, 3, 4, 5, 6, & 7 entries as required by the approved plan.

The approved plan stipulates entry widths shall not exceed 20 feet and roof bolts will be 4 feet from face and ribs.

The respondent filed a timely notice of contest and requested a hearing. Pursuant to notice served on the parties, a hearing was convened on October 3, 1985, in Duffield, Virginia. The petitioner appeared, but neither the respondent or his counsel entered an appearance. Under the circumstances, the hearing proceeded without them and the respondent was subsequently held in default.

Issue

The issue presented in this case is whether or not the respondent has violated the cited mandatory safety standard, and if so, the appropriate civil penalty that should be imposed for the violation. The matter concerning the respondent's failure to appear at the hearing and its default in this case is discussed in the course of the decision.

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.

Petitioner's Testimony and Evidence

The following petitioner exhibits were offered and received in evidence in this case:

1. A copy of respondent's MSHA approved roof-control plan (P-1).

2. A copy of the citation and termination issued by the inspector, including a "citation review" form signed by the inspector and his supervisor (P-2).

3. A copy of the inspector's notes regarding the cited conditions or practices (P-3).

4. A copy of the petitioner's prehearing Request for Admissions, and the respondent's responses thereto (P-4).

5. An MSHA computer print-out reflecting the respondent's compliance record for the period December 6, 1982 through December 5, 1984 (P-5).

6. An MSHA "Proposed Assessment Data Sheet" summarizing the respondent's compliance record, including information concerning the respondent's operation of the No. 3 Mine (P-6).

7. A sketch of the 001 active working section depicting the locations where the alleged roof conditions existed at the time of Inspector Coeburn's inspection (P-7).

MSHA Inspector Larry Coeburn testified as to his experience and background, and he confirmed that he inspected the mine on December 6, 1984, and that he issued the citation in question. He confirmed that he is a member of MSHA's District No. 5 roof fall accident investigation team, that he is familiar with the respondent's roof-control plan, and that his duties as an inspector include the review and evaluation of mine roof-control plans submitted to MSHA for approval. He confirmed that his inspection on December 6, was a regular mine inspection, and he stated that he had previously inspected the mine five or six times.

Mr. Coeburn testified that the mine is in the "Upper Banner Coal Seam," and he stated that the coal seam height in the mine ranges from 36 to 40 inches, and that the mine roof consists of shale which ranges from 3 to 24 inches in thickness. He described the overall roof conditions as laminated

shale with slips and breaks. He confirmed that he reviewed the applicable mine roof control provisions prior to his inspection. He described the roof conditions which he observed as stated on the face of his citation, and explained why he issued the citation. He referred to a sketch of the active working where the cited roof conditions were observed, and he confirmed that the sketch accurately portrays what he observed (exhibit P-7).

Mr. Coeburn stated that he visually observed the wide places in the entries which he cited, and he stated that he confirmed his visual observations by measuring the distances noted with a tape. He also confirmed that he measured the distance of the placement of the roof bolts to support his observations that they were not within the required 4-foot distances from the rib, and he observed no supplemental roof support installed in the cited wide entries.

Mr. Coeburn stated that the cited wide entries and lack of adequate roof support were readily observable, and he believed that a trained foreman should have detected the violative conditions during his required preshift and onshift inspections. The extent of the mining cycle at the time of his inspections led him to conclude that the conditions existed for not less than 2 days. In his opinion, the cited roof conditions and excessive wide entries presented a roof fall hazard, and he believed that it was "reasonably and highly likely" that an unintentional roof fall would have occurred had he not acted to cite the conditions.

Mr. Coeburn explained that in his experience, most roof falls in the mines occur at intersections where entries are driven wide, and by doing this, an operator removes more roof materials than are necessary to drive an entry, and that the removal of this material necessarily takes away the natural roof support. He explained that the approved roof-control plan which requires that an entry shall be driven 20 feet wide takes into account the roof conditions for the mine, and when the entry is driven for widths in excess of the 20-foot requirement, roof support is also taken away. In the instant case, the lack of additional support in the wide areas, the excessive distances for roof bolt placement, and the fact that the coal is mined by undercutting and blasting, all contributed to the likelihood of a roof fall.

Mr. Coeburn confirmed that he found no roof reflectors in place at the cited locations, and he indicated that such reflectors are required by the roof-control plan. He explained that the reflectors are used as warning devices to

put miners on notice that the areas beyond the reflectors are not permanently supported. The failure to install such devices could result in a miner walking into an area which is not supported, thereby exposing him to a hazard. He described these areas as places where a miner would normally be at any time during his working shift, and he believed that it was very likely that a miner would walk into these areas if the reflectors were not in place to warn him.

Mr. Coeburn identified the applicable roof-control plan (exhibit P-1), and he stated that the applicable provisions concerning wide entries appear at page 4, paragraph Q, the applicable provisions concerning reflectors appear at page 5, paragraph 3(a), and the applicable roof bolt spacing requirements appear at page 14, sketch No. 3. He confirmed that respondent's representative Benny Owens, who accompanied him during the inspection, offered no excuses for the cited conditions.

With regard to the existence of "duck's nests," or indentations in the rib which may be caused by erratic cutting methods, Mr. Coeburn stated that the entries he measured were deliberately mined at the widths which he measured and noted in his citation, and that they were not caused by "duck's nests."

Mr. Coeburn stated that one or two miners would be present in the normal course of mining at each of the locations cited, and that in the event of a roof fall, one could except a fatality to result. Since the areas cited are considered to be "low coal" areas, any miners in the area would be slouched or on their knees, and this would contribute to the hazard since they would be slowed down in any attempts to escape a roof fall.

Ewing C. Rines, confirmed that he is an MSHA supervisory inspector, and he testified as to his background and experience. Although he did not inspect the mine on December 6, he has been in the mine on three occasions for the year prior to this time, and he was familiar with the citation issued by Inspector Coeburn.

Mr. Rines testified that by driving an entry wider than permitted by the roof-control plan, part of the main roof support is removed, thereby weakening the roof. He pointed out that approved roof-control plans are only the minimum requirements, and that the likelihood of a roof fall increases as the entries are driven wider than the minimum widths required by the plan. He confirmed that numerous roof

fall investigations which he has conducted reflect that falls begin at intersections which have already been weakened by the removal of materials to facilitate the construction of the entries.

Mr. Rines described the Upper Banner seam as a seam of coal composed of a laminated roof strata which contains many "slip planes." These conditions have been taken into consideration in requiring the entries to be driven 20 feet wide, and driving them any wider simply increases the probability of an unintentional roof fall. Since blasting is going on all the time, this contributes to a real potential for a roof fall in those mine areas where the entries are driven wider than required by the roof-control plan. In view of the fact that miners were working in the areas where the entries were driven wide, Mr. Rines agreed with Inspector Coeburn's assessment of the hazards presented, and he agreed that a permanently disabling injury or fatality would result from a roof fall.

Findings and Conclusions

The respondent admits that it is the owner and operator of the subject mine, and that the operations of the mine are subject to the Act (Admission Nos. 1 and 2 filed August 14, 1985).

The respondent denied that I have jurisdiction to hear and decide this case. Absent any support for this conclusion, I conclude that I do have jurisdiction to hear and decide this case, and the respondent's unsupported conclusion to the contrary is rejected.

The respondent admits that a true copy of Citation No. 2153645 was served on the respondent or its agent as required by the Act. Respondent also admitted to the authenticity of a copy of the citation served on it by the petitioner (Admissions No. 5 and No. 7).

Fact of Violation

Respondent's response to my show-cause order IS REJECTED, and I conclude and find that the respondent has failed to establish any valid reasons for its failure to appear at the scheduled hearing in this case. Accordingly, pursuant to Commission Rules 29 C.F.R. § 2700.63(a) and (b), I find that the respondent is in default and has waived all further rights to be heard on the civil penalty matter before me for adjudication. I have decided this case on the basis

of the evidence and testimony adduced by the petitioner in support of the violation in question.

After consideration of the unrebutted testimony of the witnesses presented by the petitioner during the hearing, as well as the evidence and arguments advanced by the petitioner in support of its case, I conclude and find that the petitioner has established a violation of mandatory safety standard 30 C.F.R. § 75.200, as stated in the section 104(d)(1) Citation No. 2153645, issued by Inspector Coeburn on December 6, 1984. The evidence adduced by the petitioner establishes that the respondent failed to follow its approved roof-control plan by (1) driving the entries wider than permitted by the plan, (2) by installing roof bolts wider than the 4-foot spacing permitted under the plan, and (3) failing to install roof reflectors as required by the plan. A violation of the roof plan provisions constitutes a violation of 30 C.F.R. § 75.200. Accordingly, the citation IS AFFIRMED.

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

The respondent admits that petitioner's proposed civil penalty of $500 will not affect its ability to continue in business (Admission No. 6).

The respondent admits that the size of its company is under 100,000 tons of coal production per year, and that the size of the mine subject to this proceeding is between 50,000 and 100,000 tons of coal production (Admission No. 14).

I conclude that the respondent is a small operator and that the payment of the civil penalty assessment for the violation in question will not adversely affect its ability to continue in business.

History of Prior Violations

The respondent admits that the history of compliance as reflected in petitioner's computer print-out for the 2-year period prior to the December 6, 1984, citation is accurate (Admission No. 13).

The computer print-out reflects that the respondent has paid civil penalty assessments in the amount of $1,245 for 32 of the 36 violations at the mine during the period December 6, 1982 through December 5, 1984. Three of these prior assessments are for violations of section 75.200, but I note that two were assessed as "single penalty" violations

for which the respondent paid a total of $40 in penalties. The remaining citation was assessed at $63, and it was paid. I also note that with the exception of the section 104(d)(1) citation which was issued in this case, respondent's history of compliance as reflected in the print-out consists entirely of section 104(a) citations, most of which are "single penalty" $20 violations.

In view of the foregoing, I cannot conclude that the respondent's compliance record is such as to warrant any additional increases in the civil penalty which I have assessed for the violation in question.

Good Faith Compliance

Inspector Coeburn confirmed that he returned to the mine the day after the inspection to ascertain whether abatement had been achieved. He found that the respondent had installed a double row of roof support posts in the affected entries which were driven wide, and that additional permanent roof support was installed in the entries where the bolts were more than 4 feet from the rib. Mr. Coeburn also confirmed that the required reflectors had to be obtained from other areas in the mine, and that they were installed at the locations noted in his citation. He also confirmed that he discussed the roof control requirements with the miners, and he was satisfied that the respondent exercised good faith compliance in abating the violation.

Under the circumstances, I conclude that the respondent abated the cited violation in good faith and that compliance was achieved within the time fixed by the inspector.

Negligence

Inspector Coeburn testified that the roof conditions in question were readily observable and that based on the mining conditions which he observed, he believed the conditions had existed for no less than 2 days. He also believed that the conditions should have been detected by a trained foreman during the preshift and onshift inspections. Under the circumstances, I conclude and find that the respondent knew or should have known of the violative conditions and that its failure to correct the conditions which resulted in the violation constitutes a high degree of negligence on its part. I have taken this into account in the civil penalty assessed for the violation.

Gravity

The testimony of Inspector Coeburn supports a conclusion that the cited roof conditions and wide entries presented a potential roof fall hazard for the miners who would be travelling or working in the areas in question. With regard to the lack of reflectors, Mr. Coeburn's testimony also indicated that miners would more than likely walk by the areas where there were no reflectors, thereby exposing them to a hazard of being under unsupported roof. Under the circumstances, I conclude and find that the violation in question was very serious and I have taken this into account in the civil penalty assessed for the violation.

Significant and Substantial

Inspector Coeburn testified that the excessive wide entries, coupled with the roof conditions which he observed, presented a reasonable likelihood of a roof fall which would have inflicted injuries to the miners working in the affected areas of the mine. Under the circumstances, I conclude and find that Mr. Coeburn's "significant and substantial" finding is fully supported by the record, and IT IS AFFIRMED.

Respondent's Failure to Appear at the Hearing

This case was originally scheduled for hearing in Pikeville, Kentucky, on September 12, 1985. The notice of hearing was issued on July 10, 1985, and was served on the respondent on July 15, 1985. In view of certain outstanding discovery matters, and at the specific request of the parties, the hearing was continued to October 3, 1985, and the hearing site was changed to Big Stone Gap, Virginia. I subsequently determined that Duffield, Virginia, would be a convenient hearing site for the parties, and an amended notice of hearing was issued on September 24, 1985, and was served on respondent's counsel on September 28, 1985.

By letter dated September 3, 1985, mine operator Jerry C. Deel requested that I consider "a settlement of $150 on the matter." He also advised that "it would be further damaging financially for me to have to miss work and come to court on Thursday, September 12, 1985." Copies of the letter was forwarded by me to counsel for the parties on September 10, 1985, and respondent's counsel received it on September 14, 1985. Counsel were advised to inform me of any settlement proposal as required by my original notice of hearing issued

on July 10, 1985. Since no further information was forthcoming from the parties regarding any firm settlement proposal, the matter proceeded to hearing as scheduled.

On the morning of the hearing, Thursday, October 3, 1985, petitioner's counsel advised me that respondent's counsel McAfee informed him that morning that Mr. Deel, the mine operator, could not afford the time to be away from the mine and that he would not appear at the hearing. Petitioner's counsel also advised me that counsel McAfee stated that the respondent was willing to pay the full amount of the civil penalty assessed in this case, but that since Mr. Deel would not appear, he (McAfee) saw no reason for his appearance on behalf of his client. According to petitioner's counsel, Mr. McAfee requested him to inform me that the respondent was willing to pay the assessed penalty. Petitioner's counsel informed me that Inspector Coeburn advised him that mine operator Deel usually works outside the mine and the inspector knew of no reason why Mr. Deel could not be present at the hearing (Tr. 5).

At approximately 9:40 a.m., on Thursday, October 3, 1985, I placed a telephone call to counsel McAfee's office in Norton, Virginia. The person who answered the phone informed me that Mr. McAfee was out of the office and when I inquired as to his whereabouts, she informed me that his schedule indicated that he "had a hearing scheduled for 9:30 a.m." I then requested to speak to Mr. McAfee's secretary. I informed her that I was awaiting Mr. McAfee's appearance at the hearing, and she informed me that he was not in the office and that she would try to locate him at his home. She asked me to hold, and apparently placed a call to his residence. She then informed me that Mr. McAfee was not at home and asked for a telephone number where I could be reached. I advised her that I was at the Ramada Inn in Duffield, Virginia, and informed her that I would convene the hearing and proceed without Mr. McAfee. I also requested her to inform Mr. McAfee of this fact and to also inform him that I intended to default the respondent and would hold Mr. McAfee personally accountable for failing to appear at the hearing or to notify me that he would not appear. His secretary indicated that she would give him the message.

On October 4, 1985 I issued an Order to Show Cause to the respondent's counsel requiring him to show cause as to why the respondent should not be defaulted for its failure to appear at the scheduled hearing, and why counsel for the

respondent should not be referred to the Commission for possible disciplinary action pursuant to Commission Rule 29 C.F.R. § 2700.80, because of counsel's failure to appear pursuant to notice and for counsel's failure to advise me that he would not appear.

By letter and enclosure filed with me on October 17, 1985, counsel McAfee filed a response to my show-cause order. In a separate letter dated October 11, 1985, and received by me on October 17, 1985, counsel McAfee requested that I inform him of "what disciplinary rule I have violated in your opinion so that I might further respond to your allegation in the Order to Show Cause."

By letter dated October 17, 1985, I advised counsel McAfee of the basis for my possible disciplinary referral, furnished him with a copy of the Commission's decision in Disciplinary Proceeding Docket D-84-1, a case involving a similar referral by me, 7 FMSHRC 623, and afforded him an additional 10 days within which to respond further if he so desired.

In his initial response filed October 17, 1985, counsel McAfee states as follows at paragraph 3:

> On October 3, 1985, at approximately 7:30 a.m., counsel for Respondent received a telephone call from the Respondent advising him that they would accept the proposed penalties in lieu of lengthy litigation. At that time, counsel for Respondent did not have the file which reflected who the administrative law judge was and only knew that counsel for Petitioner was staying at the Ramada Inn in Duffield, Virginia. Counsel for Respondent attempted to contact counsel for Petitioner and after several attempts, he was located in the dining room of the Ramada Inn. At that time, counsel for Respondent advised counsel for Petitioner of the Respondent's decision to accept the proposed penalties and requested counsel for Petitioner to notify the administrative law judge of that fact. (Emphasis added).

For the reasons which follow, I find counsel McAfee's statement that on October 3, 1985, the very morning of the hearing, he did not know who the presiding judge was to be rather astounding:

1. A second amended notice of hearing issued by me on September 24, 1985, advising the parties of the time and place of the hearing was served on counsel McAfee by certified mail on September 28, 1985 (certified postal return receipt in file).

2. A letter from me dated September 10, 1985, addressed to the parties and enclosing a copy of a letter received from the respondent was served on counsel McAfee by certified mail and it was received on September 14, 1985. (Certified postal return receipt in file).

3. An amended notice of hearing and notice of continuance issued by me to the parties on September 3, 1985, was served on counsel McAfee on September 5, 1985. (Certified postal return receipt in file). That notice made reference to a previous telephone conference with counsel for the parties which took place on August 30, 1985.

4. Counsel McAfee was a party to the telephone conference referred to in paragraph 3 above, and the purpose of that conference was to accomodate counsel. Although the amended hearing notice cited Big Stone Gap, Virginia, as the hearing location, the second amended notice specifically advised counsel that Duffield, Virginia, would be the location of the hearing, and counsel McAfee does not suggest that he was confused.

In paragraph 1 of his response, counsel McAfee makes reference to the telephone conference in question, and he states that it was "with an administrative law judge." At the time of the conference, I assumed that counsel McAfee knew that I was on the other end of the telephone and that he and petitioner's counsel were jointly speaking with me.

5. By letter and enclosure filed with me on August 14, 1985, counsel McAfee filed copies of his responses to the petitioner's request for admissions. Since the letter was addressed to me, I assume that counsel McAfee

knew that this case was assigned to me for adjudication.

Counsel McAfee has failed to respond to my letter of October 17, 1985, affording him an additional 10 days to file a response to my Show Cause Order of October 4, 1985. The postal service return certified mailing receipt reflects that the letter was received on October 19, 1985. I assume that counsel McAfee has opted not to respond further.

In the original notice of hearing served on the parties on July 10, 1985, I specifically advised the parties that any proposed settlement should be filed with me no later than 10 days in advance of the commencement of the hearing. The notice of hearing advised the parties that any settlement proposals filed later than 10 days prior to the hearing would be rejected and that the parties would be expected to appear at the scheduled hearing. Although counsel McAfee's appearance in the case occurred on August 12, 1985, when he filed a response to the petitioner's request for admissions, I assume that the respondent mine operator Jerry Deel furnished counsel McAfee with a copy of the hearing notice. In any event, by letter to counsel for the parties dated September 10, 1985, and served on counsel McAfee on September 14, 1985, he was specifically advised that any settlement proposals were to be filed with me in accordance with the July 10, 1985, hearing notice.

In view of the foregoing, I conclude and find that counsel McAfee has failed to advance any acceptable excuse for his failure to appear at the scheduled hearing. I further conclude and find that counsel McAfee's unilateral decision not to appear amounts to a flagrant disregard of a Commission judge's authority and orders and that such conduct by a member of the bar practicing before the Commission should not be condoned. Accordingly, the matter will be referred to the Commission for consideration of appropriate action pursuant to 29 C.F.R. § 2700.80.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and considering the statutory criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of $600 is reasonable and appropriate for the violation which has been affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $600 for a violation of mandatory safety standard 30 C.F.R. § 75.200, as noted in the section 104(d)(1) Citation No. 2153645, served on the respondent on December 6, 1984. Payment is to be made to the petitioner within thirty (30) days of the date of this decision and order.

IT IS FURTHER ORDERED THAT:

In view of counsel Timothy W. McAfee's failure to appear at the scheduled hearing pursuant to notice duly served on him, the matter is referred to the Commission pursuant to Rule 80, 29 C.F.R. § 2700.80. See: Secretary of Labor v. Co-op Mining Company, 1 FMSHRC 971 (July 1979) (Disciplinary Proceeding No. D-79-2); Commission Disciplinary Proceeding No. D-84-1, 7 FMSHRC 623 (May 1985).

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

DEC 4 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 83-104-M A.C. No. 48-00155-05511
v.	:	Alchem Trona Mine
ALLIED CHEMICAL CORPORATION, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., and Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; John A. Snow, Esq., VanCott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Allied Chemical Corporation (Allied) with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties, a hearing on the merits was held on March 5, 1985 in Salt Lake City, Utah.

Issues

The issues are whether the evidence establishes that an accident occurred within the meaning of the MSHA regulations. If such an accident occurred, then the operator was obliged to immediately report the event to MSHA.

Citation 2082864

This citation alleges respondent violated 30 C.F.R. § 50.10, which provides as follows:

> Subpart B - Notification, Investigation, Preservation of Evidence
>
> § 50.10 Immediate Notification. If an accident occurs, an operator shall immediately contact the MSHA District

> or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, toll free at (202) 783-5582.

The Secretary's regulations further defines the term "accident" as being "an injury to an individual at a mine which has a reasonable potential to cause death", § 50.2(h)(2).

Stipulation

At the hearing the parties stipulated that Allied, a large operator, is subject to the Act. Further, the proposed penalty will not affect the company. Finally, the operator established its good faith in abating the citation (Tr. 44, 45).

Summary of the Evidence

William W. Potter, an MSHA mine inspector, received an anonymous telephone call advising him that a worker had been electrocuted at Allied. The inspector confirmed this information the following day (Tr. 10-12). At that time he learned that a mechanic, William H. Carter, had been shocked while getting on the top of a miner to do some welding (Tr. 13). When this occurred Carter's clothes, boots and gloves were wet from having washed down the miner. His Lincoln arc welder had an amperage setting on 300. In the inspector's opinion Carter was shocked by 70 volts of electricity. This occurred when Carter, laying on his right side over the miner, grabbed the energized portion of the electrode (Tr. 15-17). Carter could not let go of the electrode once he had contacted it. A fellow worker took it out of his hand (Tr. 17).

Carter was hospitalized and observed for approximately 12 hours. While hospitalized his heart beat was monitored and he received an IV (Tr. 17, 18). Dr. Collins, the treating physician, advised the inspector that the patient was monitored for 12 to 18 hours because there was still a potential for death (Tr. 18).

Eight days before the Carter incident a miner at a different company had been shocked by an arc welder. In the performance of his duties Inspector Potter advised Allied, as well as other companies, that such an accident was immediately reportable to MSHA (Tr. 19-20).

Terrance D. Dinkel, an electrical engineer for MSHA at the Technology Center in Denver, was familiar with the effects of electricity on a body (Tr. 22-24).

Death can be caused by fibrillation of the heart which is induced by a low current of electricity. In such a case death might not be instantaneous but the heart can last as long as six

hours. Generally, industry considers that .05 amps can cause fibrillation of the heart (Tr. 25, 26). Above four amps the heart can be stopped by the muscles seizing (Tr. 26, 27). If there is an exposure below five amps (50 milliamps) a fatality will not result unless the exposure is over a period of time (Tr. 28, 29). A worker can be shocked by momentarily touching 50 milliamps of electricity (Tr. 28, 29). Exposure to ten milliamps can result in a fatality (Tr. 30, 34). An average person's heart will fibrillate if exposed to 100 to 200 milliamps. Fibrillation may also result from a shock as low as 50 milliamps (Tr. 120).

A second cause of death can be a high current of electrical shock which burns the flesh and body tissues (Tr. 25).

In the situation at Allied the flow of the current through Carter's body would depend on the voltage of the arc welder and his body's resistance. The amperage on the arc welder was 300. Industry generally accepts a wet body's resistance at 1000 ohms (Tr. 31).

The fact that Carter could not let go of the arc welder indicates he received a shock of 10 milliamps (.01 amps). For such a low electric current to cause death it must pass through the heart (Tr. 32). Whether this particular electric shock would kill Carter depended on the path of the electricity through his body (Tr. 32, 34, 38-39). If Carter had been in a different position on the miner the current could have gone through his heart. But the electricity was most likely grounded by the miner because he was laying across it (Tr. 35). If Carter's fellow worker had not released him from the electrode, death could also have resulted (Tr. 36). Ten milliamps of electricity can cause death as well as a locking of the victim's muscles (Tr. 36).

After his contact with the electrode was broken the circumstances still exposed Carter to a reasonable potential for death. Fibrillation might manifest itself after a number of hours (Tr. 36, 37).

Inspector Dinkel was aware of five fatalities related to situations where workers with wet clothes had been shocked by 70 to 80 volts of electricity (Tr. 37, 38). In these cases fibrillation caused death by cardiac arrest (Tr. 38).

Respondent's witnesses were William Carter, John Doake, Randall Dutton and Dr. Gordon Balka.

Carter generally described and confirmed the events of the day he was shocked (Tr. 47-65). The only discomfort after being shocked was a cramped feeling, like a charley horse in his leg (Tr. 54). He also had a chill. He was removed by ambulance to the hospital and released the following day (Tr. 58). In the hospital he only received an IV. In addition, his heartbeat was monitored for 18 to 20 Hours (Tr. 59, 65).

John Doake, an electrical engineer, testified the arc welder had 70 volts. Witness Doake testified how electrical current affects the body. He further testified as to an accepted formula to calculate the amount of electricity entering a body (Tr. 110-113; Exhibit R4). In his opinion approximately 40 some odd milliamps of electricity passed through Carter's body (Tr. 110, 111).

Randall O. Dutton, Allied's superintendent of safety and loss prevention, didn't believe the injury to Carter had a reasonable potential to cause death (Tr. 68). The emergency medical technician advised Dutton that Carter had been shocked but otherwise appeared to be "Okey" (Tr. 69). Carter was admitted to the hospital for observations and was released the following morning (Tr. 69, 70). Allied's procedure is to transport any workers to the hospital by ambulance (Tr. 70).

Gordon Lee Balka, M.D., experienced in the hazards of electrical shock, indicated that death from shock can be caused by cardiac arrest due to fibrillation or cardiac standstill; or by respiratory arrest due to muscle contraction; or by electrical burns and soft tissue injuries (Tr. 76-79). Kidney failure is also a potential result of electrical shock (Tr. 79, 84). Symptoms of arrhythmia or fibrillation would manifest themselves. Cardiac arrest, due to electrical shock, cannot occur as a primary event after elecrical shock. As a secondary event it would be a condition of arrhythmia (Tr. 82). If the condition of respiratory paralysis occurs it is immediately observable in 99 percent of all shock victims (Tr. 84).

An electrical shock can cause a burn on the skin. An untrained person could see such a burn (Tr. 84, 85).

The hospital records, including the electrocardiogram, blood check and urinalysis do not indicate that Carter sustained any adverse health effects (Tr. 88-94; Exhibit R2). Based on the conditions found after the shock, as evidenced by the hospital reports, Dr. Balka expressed his opinion that Carter's condition would not have caused his death (Tr. 93).

In cross examination the witness agreed that there are rare occurrences of fibrillation or cardiac arrest occurring after the shock itself (Tr. 92). However, he disagreed with MSHA's witness Dinkel that fibrillation could occur as late as 6 to 10 hours after the shock (Tr. 98).

Dr. Balka indicated that Carter's shock was serious. The treatment that followed, including hospitalization, conforms to standard medical procedures (Tr. 99).

Discussion

The regulation, § 50.10, requires that the respondent immediately notify MSHA if an accident occurs. Such an accident is defined as an injury which has a reasonable potential to cause

death § 50.2(h)(2). The issue thus presented is whether the electric shock to Carter had a reasonable potential to cause his death.

The evidence relating to the accident itself is uncontroverted. Carter's clothes, gloves and boots were wet from when he washed down the miner. While lying on the miner he was shocked by 10 to 40 some odd milliamps from his arc welder. Had this low current passed through his heart it would have killed him (Tr. 32). However, the shock went to ground without passing through his heart.

These facts establish that Carter was injured and that the injury had a reasonable potential to cause his death. It was merely fortuitous that the electrical shock went to ground without passing through his heart.

Allied correctly recites that the evidence shows that Carter received an electrical shock which caused chills and that he had a cramp in his right leg. Further, there was no evidence of burns or other adverse effects other than temporary muscle soreness resulting from the shock.

Allied argues from these facts that MSHA's view of the regulations would bring within its ambit every accident at the mine because any accident could have caused death if the circumstances were different. Basically Allied states that it is the injury which must have the potential to cause death, not the incident causing the injury. Therefore, the operator asserts that, since there was no medical opinion that Carter's life was in danger, the regulation was not violated.

Allied's initial position lacks merit. Every accident would not come within the ambit of the regulation because the reguation requires that the potential to cause death must be a "reasonable" one. § 50.2(h)(2).

Further, I am not persuaded by Dr. Balka's opinion. It is not directed to the pivotal issue of whether the 10 to 40 milliamps coursing through Carter's body would have killed him if it passed through his heart. On the contrary, the doctor's opinion focuses on Carter's condition in the hospital. At this point Carter had already, fortunately, survived the shock.

In short, the evidence of MSHA's witness Dinkel that 10 milliamps passing through Carter's heart would have killed him is uncontroverted. This evidence clearly establishes the potential for death.

In evaluating the circumstances here I consider that the shock to Carter had more than a reasonable potential to cause death. In my view, there was a reasonable likelihood that his death would result. Simply put, he was lucky.

This decision does not turn on Exhibit R4 which outlines the effect of electrical shock on the average human. The exhibit supports the theories of both of the parties to this litigation. The exhibit, as witness Dinkel testified, is a chart of a general average, which can vary either way (Tr. 118-121).

In support of its position Allied relies on Climax Molybdenum Company, 2 FMSHRC 1967 (ALJ Morris) and Hecla Mining Company, 1 FMSHRC 1872 (ALJ Koutras).

The initial case, decided by the undersigned, is not controlling. The Secretary's case failed in Climax because he did not offer any credible evidence that the severe occupational injury sustained by the employee had a reasonable potential to cause his death.

In Hecla Commission Judge George Koutras ruled to the same effect. Namely, MSHA must establish that the injuries sustained by an accident victim have a reasonable potential to cause death, 1 FMSHRC at 1888. The rulings in the cited cases coincide and the cases do not support Allied's position.

As noted in this case, the uncontroverted evidence clearly establishes that Allied violated the regulation in failing to immediately report the accident when there was a reasonable potential to cause Carter's death.

In short, Allied claims that it did not violate the regulation because Carter survived without serious injury. This is a correct analysis of the evidence but I find the following evidence to be credible: if the electrical current had passed through Carter's heart he would have died; further, Carter could have died if a fellow worker had not released him from his contact with the energized electrode (Tr. 33, 39).

The citation should be affirmed.

Civil Penalty

The statutory criteria to assess civil penalties is contained in Section 110(i) of the Act, now codified at 30 U.S.C. § 820(i).

In considering the criteria, I find that the evidence fails to establish any adverse history of previous violations. Respondent is a large operator and the minimal proposed penalty will not affect the company. Further, I find the company was negligent. Since this violation is a reporting requirement the gravity is minimal; however, the gravity of the actual incident giving rise to the reporting requirement was high. The operator's statutory good faith is apparent in abating the violation.

Based on the above criteria, I am unwilling to disturb the proposed minimal penalty of $20.

Briefs

Counsel for both parties have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R. § 50.10.

3. Citation No. 2082864 and the proposed penalty therefor should be affirmed.

ORDER

Based on the foregoing findings of fact and conclusions of law I enter the following order:

1. Citation 2082864 and the proposed penalty of $20 are affirmed.

2. Respondent is ordered to pay the sum of $20 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

DEC 4 1985

ALLIED CHEMICAL CORPORATION, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 84-114-RM
	:	Citation No. 2083069; 6/13/84
v.	:	Docket No. WEST 84-115-RM
	:	Citation No. 2083070; 6/13/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 84-116-RM
	:	Citation No. 2083071; 6/21/84
	:	Alchem Trona Mine

DECISION

Appearances: John A. Snow, Esq., VanCott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Contestant;
James H. Barkley, Esq. and Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Morris

These are consolidated contest proceedings initiated by contestant against the Secretary of Labor in accordance with the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq (the Act).

A hearing on these cases and a case involving the same parties commenced on March 5, 1985, in Salt Lake City, Utah. At that time the parties filed a written settlement agreement and a motion seeking approval therefor.

The agreement recites that the contestant did not know of the defects in the equipment which is the subject of citations numbered 2083069, 2083070 and 2083071. It is further stipulated that the contestant should not have known of the defects in view of the original MSHA certification and approval of the cited equipment.

Contestant further agrees to perform and certify continuity of the groundings system on a weekly basis, if in use, as requested by MSHA, until an approved ground fault interrupter system is available as required by 30 C.F.R. § 18.47(d)(2).

Based on the proposed settlement the Secretary of Labor moves to vacate his citations and contestant moves to withdraw its applications for review.

I have reviewed the proposed settlement agreement. I find it is reasonable and it should be approved.

Accordingly, I enter the following:

ORDER

1. The settlement agreement is approved.

2. In WEST 84-114-RM citation 2083069 is vacated and the contest proceeding is dismissed.

3. In WEST 84-115-RM citation 2083070 is vacated and the contest proceeding is dismissed.

4. In WEST 84-116-RM citation 2083071 is vacated and the contest proceeding is dismissed.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 5 1985

LEE ROY FIELDS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 86-19-D
	:	MSHA Case No. BARB CD 85-60
CHANEY CREEK COAL CORPORATION,	:	
Respondent	:	No. 5 Mine

DECISION APPROVING SETTLEMENT
AND
ORDER OF DISMISSAL

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed on November 12, 1985, by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complainant was employed by the respondent as a section foreman, and he alleged that he was discharged by the respondent for making safety complaints and for his refusal to ride a conveyor belt which he believed was unsafe.

On November 29, 1985, counsel for the parties filed a joint motion to dismiss the complaint on the ground that the parties have settled the dispute. The parties state that the complainant wishes to withdraw his complaint and that he waives his claims to any attorney's fees. Included with the motion is a settlement agreement executed by counsel on behalf of the complainant and the respondent.

Discussion

The settlement agreement states in pertinent part as follows:

> In return for Fields withdrawal of said complaint and waiver of said claim, Chaney Creek Coal Corp. hereby agrees to reinstate Fields to a position at either its White Oak (Dollar Branch) mine

or its Oneida (No. 2) mine, beginning on Monday, December 2, 1985, at the pay rate of $10.00 per hour. If a foreman's job is not available on said date at the mine at which Fields is reinstated, Chaney Creek further agrees to assign Fields the next foreman's position to come open at either said mine after his reinstatement.

In addition, Chaney Creek shall pay Fields the sum of $4,800, said sum to be paid in three equal installments of $1,600. The first payment shall be made on or before December 2, 1985; the second payment shall be made on or before December 31, 1985; and the third payment shall be made on or before January 31, 1986.

Conclusion

After careful consideration of the motion and supporting settlement agreement, I conclude and find that the settlement disposition is reasonable and in the public interest. Accordingly, the settlement disposition is APPROVED, and the motion to dismiss IS GRANTED.

ORDER

In view of the mutually agreeable settlement disposition of this case, the complaint IS DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 6, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF PAUL Z. SWIGER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 85-18-D
	:	MORG CD-84-5
v.	:	O'Donnell No. 20 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL
DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a detailed motion explaining that pursuant to agreement between the parties, the complainant now has received all the relief sought in this case.

The Solicitor further has moved for approval of a civil penalty in the amount of $900 for the violation of section 105(c) of the Act. The Solicitor further has discussed the proposed settlement in light of the six statutory criteria set forth in section 110 of the Act. Based upon my review of the Solicitor's motion I am satisfied that the proposed settlement is consistent with the purposes and spirit of the statute.

In light of the foregoing the proposed settlement is APPROVED and the operator is ORDERED TO PAY $900 within 30 days from the date of this decision. This matter is hereby DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 9, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 84-1 A.C. No. 15-13881-03510
v.	:	Docket No. KENT 84-174 A.C. No. 15-13881-03525
PYRO MINING COMPANY, Respondent	:	Pyro No. 9 Slope William Station

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Petitioner;
William Craft, Manager of Safety, Pyro Mining Company, Sturgis, Kentucky, for Respondent

Before: Judge Fauver

The Secretary of Labor brought these actions for civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 891, et seq. Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent owned and operated Pyro No. 9 Slope William Station, an underground coal mine that produced coal for sales or use in or substantially affecting interstate commerce.

2. Pyro No. 9 mine has an annual production of about 900,000 tons. Respondent is a relatively large operator. Payment of the penalties assessed herein will not adversely affect Respondent's ability to continue in business.

3. With respect to each of the citations involved, all issued at Pyro No. 9 mine, Respondent made a good faith effort to achieve rapid abatement of the cited condition after receiving the citation.

Citation 2225770

4. At the hearing the parties proposed settlement of Citation 2225770 based on full payment of the proposed penalty of $91. This settlement is APPROVED.

Citation 2225768

5. This citation was issued by Federal Mine Inspector George W. Siria on July 19, 1983, alleging a violation of 30 C.F.R. § 75.200.

6. On July 19, 1983, Inspector Siria observed that mining timbers had not been installed in eight cross-cuts adjacent to the supply entry on the No. 5 unit and more than 240 feet outby the tail piece of the belt line.

7. Pyro's roof control plan, in effect at that time, required that timbers or cribs be placed in all cross-cuts adjacent to supply entries to within 240 feet of the belt tail piece.

8. The condition cited constituted a hazard of roof falls.

9. Ten to twelve coal miners were working in the No. 5 Unit. At least three of the miners would be endangered, at any one time, by the condition which the inspector observed and cited.

10. From the placement of the tail piece and the nature of this violation, it is apparent that the section foreman or some other member of Pyro's management knew or should have known of this hazard.

11. In a two-year period immediately preceding this citation, Respondent had 33 violations of § 75.200, with nine prior violations occurring at Pyro #9 Slope William Station.

Citation No. 2074898

12. This citation was issued by Federal Mine Inspector Robert G. Smith on July 28, 1983, alleging a violation of 30 C.F.R. § 70.100(a).

13. Inspector Smith was unable to attend and testify at the hearing because he was on an extended period of sick leave. Mr. Charles Dukes, Mr. Smith's immediate supervisor and the Supervisory Safety and Health Specialist for District 10 of MSHA, testified concerning the issuance of this citation.

14. Inspector Smith issued Citation No. 2074898 because he found that the average concentration of respirable dust from samples he took on the No. 3 Unit mechanized mining unit was 3.7 milligrams per cubic meter of air (mg/m3).

15. These samples were taken by Inspector Smith using approved sampling devices and yielded results upon which Inspector Smith based his determination to issue the citation.

16. An average concentration of respirable dust above the prescribed standard of 2.0 mg/m3 represents a serious threat to the health of underground coal miners. It should also be noted that the 3.7 mg/m3 measured by the inspector was an average. Secretary's Exhibit G-9 shows that the measured concentrations for two of the individual miners working on the mechanized mining unit were higher: the cutter operator's reading was 5.3 and the loader operator's reading was 8.4.

17. In the two-year period before this citation, Respondent had 11 prior violations of § 70.100(a) with one of those prior violations occurring at Pyro #9 Slope William Station.

Citation No. 2225777

18. This citation was issued by Federal Mine Inspector George W. Siria on August 4, 1983, alleging a violation of 30 C.F.R. § 75.1304.

19. Inspector Siria testified that he observed a shot firer, Louis Allen, carrying explosives to the face of the Number 5 entry on the Number 1 Unit in a cardboard box which did not have a top on it.

20. Inspector Siria testified that although a cardboard box would ordinarily be non-conductive, it would become conductive if it became wet. He further testified that he observed the shot firer dragging the box across the mine floor which was frequently wet. Mr. Siria also expressed concern that without a top on the box sticks of the explosives could fall out of the box and be overlooked by the shot firer and then be run over or scooped up with the coal and rock during normal mining operations. In either case, Mr. Siria felt that there was a danger of detonation. He acknowledged that he was more concerned with the insubstantial construction of the container and the missing top on the box than the question of conductive material, but did not specify either of those conditions in the citation.

21. In the two-year period before this citation, Respondent, had one violation of § 75.1304 and 10 violations of § 75.1303, § 75.1305, and § 75.1306, which are all standards dealing with the handling, transportation or storage of explosives.

Citation 2337386

22. This citation was issued by Federal Mine Inspector George W. Siria on August 11, 1983, alleging a violation of 30 C.F.R. § 75.400.

23. Inspector Siria observed loose coal and coal dust which had been allowed to accumulate along the ribs and floor of two haulage roads inby the three way feeder used by Pyro to facilitate the transportation of coal out of the mine. The loose coal and coal dust extended for a about 60 feet along two haulage roads and was three to twelve inches in depth.

24. The accumulations presented a serious hazard of a mine fire or propagation of a fire or explosion.

25. About 12 miners were endangered by this condition.

26. In the two-year period before this citation, Respondent had a 102 violations of § 75.400 with 15 of these violations occurring at Pyro #9 Slope William Station Mine.

Citation 2225774

27. Inspector George W. Siria issued this citation on August 2, 1983, alleging a violation of 30 C.F.R. § 70.501.

28. Inspector Siria, using MSHA approved procedures and instruments, obtained an eight hour supplemental noise survey for the loading machine operator. The results showed a noise level of 1.41, which substantially exceeded the permissible level of exposure prescribed by Table 1 referenced in 30 C.F.R. § 70.501.

29. As prescribed by the formula found in § 70.502, the maximum permissible exposure level is expressed as the number one. Any number above one represents an exposure in excess of the permissible levels expressed in Table 1.

30. Inspector Siria testified that it is MSHA's policy to allow an instrument error factor of .32 so that no citation is issued until the measured noise exposure exceeds 1.32.

31. Inspector Siria testified that the loader operator was not wearing any hearing protection.

32. In the two-year period before this citation Respondent had no violations of § 70.501.

DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS

Citation 2225768

Respondent was negligent in failing to follow its approved roof control plan. This was a serious violation, subjecting three to twelve miners to a hazard of roof fall.

Considering the criteria for civil penalties in section 110(i) of the Act, I find that an appropriate penalty for this violation is $500.

Citation 2074898

Respondent does not dispute this violation, but contends that it is not a serious violation. This contention is rejected. Dr. Hodous' statements in Exhibit G-10 support a finding that the diseases associated with the inhalation of respirable coal dust present a serious hazard to the health of coal miners.

Respondent was negligent in exposing the listed employees to excessive amounts of respirable dust.

Considering the criteria for civil penalties in section 110(i) of the Act, I find that an appropriate penalty for this violation is $250.

Citation 2225777

The Secretary failed to prove a violation as alleged in this citation. The condition cited is use of a conductive container for exposives. However, the plastic bags and carboard box used were not conductive materials, and the Secretary did not prove that they were wet or otherwise conductive at the time of this citation. The Secretary's additional evidence of dangers due to an open carton and one of insubstantial material are not fairly and reasonably indicated by the specification of the charge in the citation. Moreover, the Secretary did not notify the Respondent of these contentions in the prehearing exchanges and did not move to amend the citation before the hearing.

The charge in this citation will be dismissed.

Citation 2337386

Respondent does not dispute the accumulations observed by the inspector, but contends that it was following its clean-up program. This argument is rejected. Inspector Siria testified that the accumulations were extraordinary and dangerous, whether or not they occurred on one shift or more. A violative accumulation under § 75.400 is not made acceptable simply because it will be cleaned up later under the operator's clean-up plan.

The violation was serious and due to negligence.

Considering the negligence, gravity, and compliance history involved, and the other criteria of section 110(i) of the Act, I find that an appropriate penalty for this violation is $1,500.

Citation 2225774

A violation of the noise standard was proved.

Considering Respondent's good compliance history concerning this standard, and the other criteria of section 110(i) of the Act, I find that an appropriate penalty for this violation is $75.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in these consolidated proceedings.

2. Respondent violated the safety standards as alleged in Citations 2225768, 2074898, 2337386, and 2225774.

3. The Secretary failed to prove a violation as alleged in Citation 2225777.

ORDER

1. Respondent shall pay the above civil penalties in the total amount of $2,416 within 30 days of this Decision.

2. The Secretary's charge as to Citation 2225777 is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 12, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINITRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 85-4
	:	A.C. No. 29-00096-0350
v.	:	
	:	McKinley Mine
THE PITTSBURG & MIDWAY COAL MINING COMPANY, Respondent	:	

DECISION

Appearances: Richard L. Collier, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
John A. Bachmann, Esq., The Gulf Companies, Law Department, Denver, Colorado, for Respondent.

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 $470 for one alleged violation of mandatory safety standard 30 C.F.R. § 77.202. The violation is in the form of a section 104(a) citation, with special "S & S" findings, issued by MSHA Inspector Harold Shaffer on March 6, 1984.

The respondent filed a timely answer contesting the proposed civil penalty assessment, and a hearing was held in Gallup, New Mexico, on June 4, 1985. The respondent filed a posthearing brief, and the arguments presented therein have been fully considered by me in the course of this decision. Petitioner did not file a brief, but I have considered the Solicitor's arguments made during the course of the hearing.

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.

Issues

The principal issue presented in this proceeding is (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of where appropriate in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the gravity of the violation, and (5) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Stipulations

The parties agreed that the respondent's mining operations affect interstate commerce, that the inspection was performed and the citation issued as alleged in the complaint. They also agreed that the respondent produces 15,000,000 tons of coal a year, and that the payment of the civil penalty assessment will not affect the respondent's ability to continue in business (Tr. 4).

Discussion

Section 104(a), "S & S" Citation No. 2070578, issued on March 6, 1984, cites a violation of 30 C.F.R. § 77.202, and the condition or practice cited is described as follows:

> Coal dust was not prevented from accumulating in dangerous amounts inside the motor control center at the north coal preparation facility transfer building operator room.

Coal dust was spread throughout the inside of the electrical control center. This condition was one of the factors that contributed to the issuance of Imminent Danger Order No. 2070575 dated 3/6/84; therefore, no abatement time was set.

30 C.F.R. § 77.702 provides as follows: "Coal dust in the air of, or in, or on the surface of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts."

Petitioner's Testimony and Evidence

MSHA Inspector Harold Shaffer, testified as to his mining experience and background, and he confirmed that he has been employed as an electrical specialist since September, 1982. Prior to that he served as an electrical inspector with MSHA since 1977. He identified the subject mine as a bituminous coal strip mine located at Window Rock, New Mexico, and he confirmed that he conducted the mine inspection on March 6, 1984. After completing an electrical spot "classification inspection" at the mine south facility, he proceeded to the north facility (Tr. 8-14).

Mr. Shaffer explained that the metal coal transfer building used to transfer the coal from one belt to another belt housed the motor control room and operator's compartment. The motor control room is located at the top of the building, and the room is approximately 11 feet by 22 feet. The operator sits at a table where his motor controls are located. The controls operate all of the motor and conductor circuits in the building, as well as those located outside the building (Tr. 40-42). He explained that the transfer building operator's compartment is classified as a Class 2, Division 2 hazardous area under the National Electrical Code, Article 500, and that in order to make the area non-hazardous, it has to be purged of coal dust (Tr. 39). All electrical components used in such an area must have UL or FM approval, and all motors have to be totally enclosed. The motor control compartment was classified as Class 2, Division 2, because there were openings into the area (Tr. 44).

Mr. Shaffer stated that the purpose of the electrical component compartment which he cited was to prevent or eliminate coal dust from entering the inside of the compartment which contained electrical components such as line starters, and 3-phase circuit breakers. He identified the compartment in question as a NEMA (National Electrical Manufacturer's

Association) type 12 enclosure, and in his opinion, it was not effectively maintained to keep coal dust out because the bottom was open (Tr. 14-16).

Mr. Shaffer stated that the opening at the bottom of the compartment cabinet was created when the compartment was fitted over the concrete floor to facilitate the entrance of electrical conduits servicing some 30 to 40 circuits inside the compartment enclosure. The coal dust migrated continuously up and through these conduit openings into the compartment.

Mr. Shaffer stated that when he first entered the compartment control room he observed two electricians and three other individuals cleaning up coal dust. One person was removing coal dust from inside the compartment with a non-approved vacuuming device. He observed that the energized main breaker was exposed, and the other individuals were removing the coal dust from the cabinets and pipes with rags. He estimated that there was coal dust approximately 1/8 to 3/16 of an inch inside the compartment where the conduit entered through the floor, and the dust was present on the conductors as well as the metal bottom portion of the cabinet enclosure. He did not measure the coal dust depths because he could not make accurate measurements due to the fact that the lighting was off and "everything was de-energized" (Tr. 19). In addition, it would be difficult for him to insert his wooden ruler into the bottom recesses of the cabinet and to read the measurement with his glasses on (Tr. 21).

Mr. Shaffer stated that one full time operator is usually working at the cited location, and he had no way of determining how long the cited coal dust condition had existed prior to his inspection. However, he did not believe that the accumulation could have existed for less than 1 day.

Mr. Shaffer believed that the presence of combustible coal dust in the motor control center with starters and breakers which are not dust proof would be hazardous under an abnormal operating condition such as a phase-to-phase fault in the electrical equipment. He identified a photograph of the result of an electrical phase-to-phase fault in a breaker at a coal facility, and he explained that it was an example of what could occur should such a fault take place, but conceded that no coal dust was present when this event occurred (exhibit G-6, Tr. 23). He confirmed that should such an event occur in the presence of coal dust an explosion hazard would be presented because coal dust will explode (Tr. 24).

Mr. Shaffer stated that the circuit breakers and breaker arc traps would be a potential source of ignition. He identified a Westinghouse circuit breaker produced at the hearing for demonstration purposes, confirmed that it was similar to the breakers in the compartment which he cited on March 6, 1984, and he believed it was a source of ignition since it could produce a spark (Tr. 26). Respondent's counsel stipulated that the circuit breaker used for demonstration purposes, as well as others, is the type used at the cited control center (Tr. 26).

Mr. Shaffer agreed that in order for the circuit breaker or other electrical component inside the compartment to constitute a hazardous ignition source, there must be arcing, sparking, or some other breakdown in the electrical components (Tr. 27). He also agreed that "some type of an explosion" would have to occur to put the coal dust in suspension or produce a "dust cloud," but that any static electricity would not be a problem at all (Tr. 28-29).

Mr. Shaffer stated that he has conducted experiments with regard to the combustibility of bituminous coal dust, and he identified exhibits P-2, P-3, and P-4 as representative samples of the coloration of explosive coal dust in a cubic foot white area. Exhibit P-2 represents 5/100 of an ounce of coal dust; P-3 1/10 of an ounce; and P-4 6/10 of an ounce. He identified exhibit P-4, as the most dangerous in terms of combustibility, and indicated that with the greater amount of coal dust present, the greater the possibility of placing the coal dust in suspension. The coal dust he observed during his inspection was in excess of the amount shown in exhibit P-4 (Tr. 32).

Mr. Shaffer stated that in his experiment with combustible coal dust, he used coal dust similar to the kind which he observed on the day of the inspection, and that he induced an "explosion." He repeated the experiment in the courtroom for demonstration purposes. He explained that he weighed out 7/100 of an ounce of coal dust, placed it in the demonstration chamber, put the coal in suspension by a tube-type device, and then induced an electrical spark with a coil. This resulted in an explosion of the coal dust (Tr. 34-35).

Mr. Shaffer confirmed that the cited conditions were abated when the coal dust was cleaned up and removed from inside the electrical center and operator control room, thereby removing the existing hazard (Tr. 38).

On cross-examination, Mr. Shaffer identified exhibit R-1 as a copy of a citation he issued at the south mine facility prior to his inspection at the north mine. He confirmed that he issued the citation after finding accumulations of coal dust inside three different electrical compartments which were approximately the same devices as those cited at the north facility. He estimated that the coal dust present at the south facility citation locations might have been 5/100 of an ounce per square foot, or similar to the color of exhibit P-2, the lightest colored coal dust sample. The second location cited was also light in color, and at the third location the accumulations had already been cleaned out. Under these circumstances, and since he did not consider that the coal dust accumulations were enough to present a hazard, he subsequently vacated the citation (Tr. 45-48). He confirmed that he took no coal samples, and that it was possible that the areas may not have been completely all coal dust (Tr. 49).

Mr. Shaffer stated that the coal dust present in connection with the citation at the north facility was black and "paper-thin," and at the bottom of the compartment it was heavier where it entered the compartment through the openings (Tr. 50). He confirmed that the coal dust was inside the component compartment or control center as shown in photographic exhibit R-2. The motor control center consists of the group of electrical cabinets positioned back-to-back, and the photograph represents the face, and there is a similar face on the other side. All of the electrical control for the tipple facility, i.e., the crusher, load-outs, and belts is inside the motor control center (Tr. 52-54). Everything in the building is classified as Class 2, Division 2, and Mr. Shaffer confirmed that it was so classified by MSHA by letter dated May 25, 1977 (exhibit R-3; Tr. 55-56).

Mr. Shaffer stated that the electrical code for a Class 2, Division 2 area does not prohibit accumulations of coal dust, but it does require that the equipment which is in such a location be approved for that location (Tr. 56). He explained further as follows (Tr. 57-59):

> Q. But doesn't the National Electric Code in Class 2, Division 2 say that dust accumulations, or the gist of it, I should say, because I paraphrased it, that the dust accumulations are all right so long as they don't interfere with the normal operations?

A. As long as the equipment is approved for location, there's nothing wrong.

Q. So you can have dust accumulations in this area?

A. Right, Yeah, there's nothing says you can't.

Q. But didn't you earlier testify that PNM didn't prohibit -- or prevent dust from accumulating in there?

A. That's correct, because the equipment isn't approved for the location.

Q. We seem to be chasing our tail here, Mr. Shaffer, the building's classified for dust and all the devices that are in it have been approved for a Class 2, Division 2 area.

A. Well, whoever approved them, that I don't know. I mean, I was -- it ain't my problem that they done it, but the National Electric Code specifically states they got to be approved for the location. You got receptacles in there. You had a heater, I think it was a heater with an air conditioner on it. Neither one of them was UL or FM approved for the location, for a Class 2, Division 2 area.

Q. Are they inside the motor control center?

A. No. But the breakers aren't either.

Q. Are the breakers required to be dust-tight?

A. They can't be dust-tight. That's why you had the cabinet, to keep the dust out.

Q. They're only required to be dust-ignition proof, aren't they?

A. They're not even required to be dust-ignition proof, because they got to be ventilated, because of your RPM temperature build-up, and your conductors and your terminals.

Q. All those devices though are approved for that area.

A. No, the -- inside that compartment is not approved, no, sir, not the -- not the electrical components.

When asked what led him to believe that there was a dangerous accumulation of coal dust present when he issued the citation in issue in this case, Inspector Shaffer replied as follows (Tr. 64-65):

A. Just by the color of it and the depth of it.

Q. And why does the color and depth of the coal dust accumulation make it dangerous?

A. Because you have more chance when you have a large amount of coal dust, you get that five-hundredths of an ounce into suspension into a dust cloud, also under abnormal operating conditions, you have a breaker that blows, it's going to put that in suspension and it's going to blow the whole compartment up.

Q. Is coal dust -- let me rephrase the question. Was the coal dust that was lying in these cabinets dangerous as it laid there?

A. No, it was not dangerous as it lays, not just laying.

Q. Now, what do you -- how would that -- let me rephrase the question again. What do you know about the suspendability of coal dust? Have you had any training in that?

A. All I know is what I read, and I read a lot of articles on it.

Q. Now, how would you propose that this coal dust get into suspension?

A. You'd have an -- all you'd have to have is a breaker explode.

Q. And how long does a breaker explosion last?

A. Well, -- well, once the dust is in suspension, then it don't take that much energy to ignite the dust cloud.

Q. Well, the question I asked you, how long does the breaker explosion last?

A. Well, it would last long enough to put it into suspension, if you had enough coal dust in there, you'd get that much in suspension.

Q. And how violent would a coal -- or excuse me, a breaker explosion be?

A. All right. Once the initial would take place, then you would have the promulgation of the rest of the dust going into suspension explosion.

Q. Well, I'm -- I'm asking you how violent the explosion would be. You need some kind of energy output to raise the dust, don't you?

A. Yeah, you -- once the explosion takes place, it's going to raise everything.

Q. But how violent is the explosion does the breaker? Does it go off like a firecracker? Does it go off like a paper bag being popped? Does it go off like a balloon being broken.

A. Well, it could go almost any way under the conditions, you know, under the fault.

Mr. Shaffer stated that in his 30 years experience with electrical systems, he has seen no multi-case type circuit breakers blow up. He has heard of five or six exploding since he has been with MSHA, and he confirmed that while such an explosion would place coal dust in suspension, the presence of a spark would be required to ignite it. The spark would be present because the conductor and insulation would be on fire if the breaker blew up (Tr. 67).

Mr. Shaffer believed that the coal dust in the cited control center cabinets would be dangerous because an abnormal fault could put the dust in suspension. He indicated that the distance of the breakers to the coal dust ranged from 8 to 15 inches at different locations (Tr. 68). Absent an abnormal condition, the possibility of a "smoldering fire" existed (Tr. 68).

Mr. Shaffer stated that his prior citation at the south mine was vacated because there was not enough coal accumulations for the areas cited, whereas in the north facility there were enough accumulations for the areas cited (Tr. 71).

Mr. Shaffer confirmed that enough coal dust must be present to put it in suspension, something has to be close enough to put it in suspension, and an ignition source must be present. During normal operating conditions, there would be no existing ignition sources inside the motor control center. Although a hot conductor could ignite the coal, an explosion would not result because the coal dust has to be in suspension before it will explode (Tr. 69-70). He also testified as follows (Tr. 70; 72-73):

> Q. So, this quiescent coal dust, this coal dust laying in this cabinet, is only dangerous when it becomes suspended and ignited?
>
> A. That's correct.
>
> Q. And it could only become suspended in these cabinets under a fault or abnormal condition?
>
> A. That's correct.
>
> Q. During normal operation, there is no ignition source?
>
> A. Well, there is an ignition source, the electrical wire and stuff is there, you know. The potential is there. I mean, it's always there. You can't take it away.
>
> Q. This coal dust that was in these cabinets did not interfere with the normal operation of the cabinet -- of the electrical devices at the time, did it?
>
> A. No.

Q. So it wasn't dangerous to the operation itself?

A. No, sir, it wouldn't be dangerous to the operation itself, no.

* * * * * * *

Q. Now, just for clarification of the record, would you tell us again how the coal dust could be placed in suspension in that facility?

A. The only way I see possible, the way it can be put in suspension, under an abnormal condition, with something exploding in there, to put it -- to make it get a dust cloud up, then that's the only way.

Q. Are you talking a spark from some of the electrical equipment?

A. We're talking about something exploding in that compartment. You would have to have an explosion to put that dust into suspension and that spark being there at the time then.

Q. So what you're really talking about is two explosions?

A. Yeah, yeah, the first explosion won't make the coal dust, it would only make a dust cloud. Once the dust cloud gets in suspension, you'd get five-hundredths of an ounce, and then you'd have a spark, then you would have ignition.

Q. So you're talking about a little explosion placing it into suspension. Then you're talking about a big explosion after that?

A. Yes, sir

Q. It could --

A. Excuse me, sir. The last one would be according to how much coal dust was there.

And, at Tr. 83-84:

Q. Now, when you saw the coal dust in here, was it in these areas in this whole motor control center, was it generally in flat uniform layers or was it bumpy and ridgey?

A. It's more of the smooth.

Q. Nice and layered?

A. Yeah, it's float. It's stuff that settles.

Q. Even around the -- the conduit openings where it was coming in, it wasn't ridged up or anything, it was just laying there flat?

A. No, in there, it's more irregular, plus it was on the conductors themself. It was laying heavily on the conductors, of all conductors.

Q. And are they ignition sources as they lay there?

A. Oh, they definitely are, yes.

Q. Why is that?

A. Well, they -- one of them, you could have a fault in one of the circuits, or else one of your motor controls, breakers, could be -- it won't trip, it's faulty, and that conductor could be shorted on the other end, it could get red hot.

Q. I see. And that will cause a coal dust explosion?

A. It'll catch on fire.

Q. But it won't cause it to explode?

A. Well, we're only talking about dangerous accumulations now. A fire is also going to give off CO, and if a man's in that room up there, it's possible that he'd be overcome.

Q. How far would that fire spread across this coal dust that was accumulated in the bottom?

A. I -- I personally, I couldn't tell you.

In response to bench question concerning exhibits P-2, P-3, and P-4, Mr. Shaffer stated as follows (Tr. 89-90):

JUDGE KOUTRAS: Now, let's assume that you had observed coal dust or float coal dust the color of P-2, which is the lighter of -- would that still be dangerous, in your opinion?

THE WITNESS: Could I see which one is P-2?

JUDGE KOUTRAS: Yeah, it's the first one there. Mr. Collier, I believe, is the lighter one. I believe it's that one. isn't it?

MR. COLLIER: Yes, sir.

THE WITNESS: No, that one I wouldn't.

JUDGE KOUTRAS: If you'd of seen the coal dust -- if you'd seen the accumulations of that color, coloration, you wouldn't have issued a citation?

THE WITNESS: No.

JUDGE KOUTRAS: Because you wouldn't consider that to be dangerous?

THE WITNESS: No.

JUDGE KOUTRAS: How about the next one down, the P-3?

THE WITNESS: The next one, I would hesitate now about even writing it as a dangerous accumulation.

JUDGE KOUTRAS: And why is that?

THE WITNESS: That's one-tenth of an ounce. Due to the fact it would be hard to get

five-hundredths of an ounce of that into suspension.

JUDGE KOUTRAS: Okay. Now, you claim that the color that you saw was what's -- which is on the last exhibit, P-4 there, and you were of the opinion that was dangerous?

THE WITNESS: Yes, sir.

Respondent's Testimony and Evidence

Ernest Yazzie testified that he is employed by the respondent as the supervisor of safety and training at the McKinley Mine, and has served in that position for 3 years. Prior to this, he served as a company safety inspector and mine foreman, and his total experience with the respondent is approximately 9 years. His duties include supervision of all mine safety activities, keeping compliance records, and accompanying mine inspectors during their inspections.

Mr. Yazzi stated that he was familiar with the mandatory standards found in Part 77, Title 30, Code of Federal Regulations, and he confirmed that he accompanied Inspector Shaffer during his inspection on March 6, 1984, and that the citation was served on him.

Mr. Yazzi stated that Mr. Shaffer began his inspection at the south mine surface facility where he issued a ladder guarding citation, a citation for using a non-approved vacuum cleaner, and a citation for coal dust accumulations on certain electrical compartments (exhibit R-1). However, the citation for dangerous coal dust accumulations charging a violation of section 77.202, was subsequently vacated by Mr. Shaffer. Upon completion of the inspection at the south mine location, he and Mr. Shaffer proceeded to the north coal preparation facility transfer building where the citation in issue in this case was issued at approximately 2:00 p.m.

Mr. Yazzi stated that Mr. Shaffer issued the citation in question after finding coal dust accumulations in the operator's control room at the top loadout and sampler building. The coal dust was found on the operator's motor control panels, and he identified four photographs as the equipment where the accumulations were found to exist (exhibits R-2-a through R-2-d). He stated that when they arrived at the control room, two electricians and the tipple operator were in the process of cleaning the coal dust with rags. Although a vacuum cleaner was present, Mr. Yazzi denied that it was

being used, but he admitted that it was probably intended to be used to clean up the accumulations, but since it was not approved by MSHA, it was not in fact used.

Referring to photographic exhibit R-2-c, Mr. Yazzi stated that he observed coal dust accumulated inside the opened circuit breaker shown in the photograph and that it was "greyish" in color. He indicated that the coal accumulations he previously observed at the south surface facility cited earlier by Mr. Shaffer were no different than those cited at the north facility location. However, he conceded that the coal dust accumulations which were present at the bottom of the equipment cabinets where a number of cables and conduits entered the enclosures were darker in color, and that this was true at both the south and north facilities. He identified photographic exhibit R-2-a, as the control panel in question, and he indicated that at the time of the inspection at the north facility, the bottom panels had been removed and the openings permitted the coal dust to enter the inside of the entire enclosure.

Mr. Yazzie stated that upon arrival at the cited control room north facility some of the panel doors were open and that the electricians were in the process of opening the other cabinet panel doors to facilitate the cleaning of the coal dust. He confirmed that Mr. Shaffer issued a closure order taking the equipment out of service, and that he did so because the equipment was energized. He explained that the power was on "the main feed lines," but that the electricians turned off each of the individual circuit breakers as the cabinet doors were opened, and that this de-energized all circuits below the breakers. However, Mr. Shaffer insisted that the main power breaker be shut down before the clean up was allowed to continue, and this was done.

Mr. Yazzi confirmed that he discussed the cited conditions with Mr. Shaffer, and that when he asked him why the coal dust accumulations were dangerous or hazardous, Mr. Shaffer replied "if they are black, its dangerous." Mr. Yazzi was of the opinion that the cited coal dust accumulations were not dangerous. He stated that the accumulations were the result of normal operating conditions, and it was his opinion that the accumulations were a "normal four-week" accumulation. He also indicated that such coal dust accumulations are cleaned up on a monthly cycle, but that since the citations were issued, they are cleaned up every 2 weeks (Tr. 123-132).

On cross-examination, Mr. Yazzi stated that when he arrived at the motor control center some of the cabinet doors were open and the electricians were still opening others. He saw no one using the vacuum cleaner. With regard to the prior citation issued at the south mine, Mr. Yazzi stated that the only difference in the coal accumulations at the north mine was with respect to the color of the coal at the bottom of the control center. It was darker in color (Tr. 137).

Mr. Yazzi believed that the clean-up which was in progress at the time Mr. Shaffer arrived on the scene was simply a coincidence, and the clean-up had just started. Other cabinets in other areas of the building had been cleaned up before Mr. Shaffer arrived at the control room (Tr. 140).

Frank Scott, testified that he has been employed at the mine as an electrician foreman for approximately 7-1/2 years. He has 25 years of experience as an electrician, including work as an electrical contractor. He attended the University of Texas for 3 years taking electrical engineering courses, but he did not receive a degree.

Mr. Scott stated that he was familiar with the electrical equipment which was cited in this case, but confirmed that he was not present during the inspection and did not observe the cited coal dust accumulations. Mr. Scott confirmed that the type of electrical equipment which was cited is subject to routine break-downs and failures, and that while circuit breakers have been known to fail and needed to be repaired or replaced, he has never known any to "blow up." He stated that under normal operating conditions, all of the electrical component parts in question, such as the wiring, breakers, overloads, and fuses are sized so as to preclude the overheating of any wires or cables. They are also designed to prevent arcing across the phases.

Mr. Scott stated that in his experience, he has known circuit breakers to crack or burn internally when they did not "re-set" after tripping due to an overloaded circuit, but he has never known any to physically "blow up" or disintegrate (Tr. 140-146).

On cross-examination, Mr. Scott stated that under normal operating conditions, there is no ready ignition source within the cabinet components of the electrical equipment in question. He stated that while he has observed transformers with fuses which had blown or which had shorted out, he has never known of any which had "blown up." He stated further

that he could think of nothing which would place the coal dust accumulations into suspension within the electrical component cabinets in question (Tr. 147-152).

Dr. Robert V. Dolah testified that he is a self-employed consultant in the field of all types of fires, gas, dust, and paper explosions, and spontaneous combustion. He was employed with the U.S. Bureau of Mines from 1954 to 1978, when he retired, and he served as head of the group at Pittsburgh and Bruceton, Pennsylvania, which was concerned with fires and explosions. He served as the research director of the Pittsburgh Mining and Safety Research Center. He holds a B.A. in chemistry from the Whitmann College, Walla Wala, Washington, and a PH.D. in Organic Chemistry from the Ohio State University (Tr. 153-155). By agreement of the parties, Dr. Dolah's credentials and background were admitted as part of the record in this case (Tr. 155, exhibit R-5).

With regard to the photograph depicting the results of an electrical fire as testified to by Inspector Shaffer, Dr. Dolah stated that had there been coal dust present in that instance in the amount testified to by the inspector, its contribution to the fire would have been miniscule in contributing to the full load compared to the wire insulation which was present (Tr. 157).

Dr. Dolah stated that Mr. Shaffer's estimate of the amount of coal dust one can calculate to provide the minimum explosive concentrations in any electrical compartment is incorrect. He indicated that recent studies conducted by his group indicates that .135 ounces of coal per cubic foot is the minimum explosive concentration. For any reasonable ignition sources that may be present, he estimated that it requires three times that amount to constitute an explosive concentration. Although the blackest coal dust sample as depicted by exhibit P-4 contains 10 times the minimum required explosive concentration, by simply lying inert on a surface area it does not constitute a hazard or a dangerous accumulation. Simply being in the presence of combustible insulation, with nothing burning, the coal dust will not explode. In order to be dangerous, the accumulated coal dust must be capable of being suspended to provide an explosion. Otherwise, the coal dust, at best, will only smolder very slowly, and a thin layer of dust on a metal plate will not smolder (Tr. 158-159).

Dr. Dolah stated that in underground coal mines, methane provides the initial explosion, and the initial dynamic wind from that explosion picks up the coal dust and fire, and this

results in a propagating coal dust explosion. While there have been instances of explosions in the absence of methane, these were the result of the improper use of non-permissible explosives which dispersed large quantities of coal dust which was present in the working place (Tr. 159-160).

Dr. Dolah could not cite anything that would create a coal dust cloud inside a closed electrical cabinet. Even if a breaker or a starter motor were to fail, an explosion would not be associated with these events. In the photograph of the electrical fire, he did observe evidence of a fire but not an explosion (Tr. 161).

In addition to the creation and presence of a coal dust cloud, Dr. Dolah indicated that sufficient wind must be present to suspend the coal dust. In a series of several investigative research reports completed under his supervision, a large amount of coal dust required winds at 100 miles an hour to place it in suspension. Very fine coal dust requires winds of hurricane force to place it in suspension. Dust which is simply lying on tiles in artifically ridged piles in a "wind tunnel" apparatus required winds of 20 to 30 miles an hour simply to move it (Tr. 161). He could perceive of nothing which would create a wind of this magnitude inside a closed cabinet, and he finds it difficult to understand how any reasonable accumulation of coal dust inside such a cabinet presents a dangerous accumulation (Tr. 162). He further explained as follows at (Tr. 168-170):

> Q. Now, in other words, the coal dust wants to stay where it is, is what it amounts to?
>
> A. Yeah, there's no reason for it -- it -- all dust explosions, except under conditions where we've had -- that there was an ample concentration of dust in suspension at the time there was an ignition source, all other dust explosions occur when there is a violent aerodynamic force that picks up the dust and disperses it.
>
> Q. And what you said earlier, you can't conceive of any, having looked at these cabinets, you can't conceive of any event that would supply the necessary energy to suspend the coal in any instance?
>
> A. The only one would be explosion in the whole building.

Q. We wouldn't have to worry about the coal dust then?

A. That's right -- well, the coal dust inside these compartments, no.

Q. Now, what about the thermal effects. What if, as Mr. Shaffer testified, there was -- there's coal laying on the conductors and the wire can get hot because of a loose connection and start burning and it's -- your breaker where it comes through the bottom of the box, you got this sixteenth of an inch or three-sixteenths of an inch of coal dust, and you could have a fire down there that would smolder and get it in suspension somehow?

A. Well, the coal dust could smolder, that coal dust in the immediate proximity to the wire that's -- that's hot could smolder, but even in a sixteenth of an inch or even an eighth of an inch layer, that smoldering propagation is not going to propagate away from the fire. And in no way is that smoldering combustion going to lift other dust and create a dust cloud.

Q. What about an electrical fire just on the insulation and a fire for whatever, a fault starts in the cabinet and you get an electrical fire going, vis-a-vis that picture for instance --

A. Yeah.

Q. -- will that cause coal dust to go into suspension?

A. No. The conductive forces associated with a fire even like a pretty intense fire that we have here, won't really lift up the dust that's lying on the plate down here at the bottom.

Q. So, you can't get enough thermal wind to disturb it?

A. Well, it's -- you see, the winds are going up, and they're not going up all that fast, you know, even in a fireplace in a chimney, and so forth, the actual draft is -- it's not going up there miles an hour, let alone the air that's coming in at the bottom, into the -- into the fire. That, you know, that's almost immeasurable. You -- it's going in, but there's no winds associated with that, even in -- in a fireplace.

Q. What then is your conclusion with respect to -- and Mr. Shaffer testified that the cabinets had as much dust on as that middle sample, what is your conclusion with respect to the danger -- dangerousness, to make up a word, I guess, of that accumulation?

A. Well, I don't -- I don't think that it represents a danger, because I cannot see that it contributes a significant additional fuel load in the case of a fire, nor does it -- do I conceive -- do I -- I'm not able to come up with a credible mechanism whereby I can go from this dust layer to a dust cloud. And I must have a dust cloud before I can have a dust explosion.

Q. It must be suspended?

A. Yes.

On cross-examination, Dr. Dolah stated that he finds section 77.202 of MSHA's regulations impossible to apply in all cases. He also stated as follows at (Tr. 171-172):

Q. Let me ask you, do you think it's -- it's possible to have an accumulation of -- of coal on the floor of a compartment like we talked about today in an amount that would be dangerous?

A. I would think that there was a -- there was an increased fire hazard when one has an accumulation in there such that the dust could undergo spontaneous heating. That if there was sufficient dust in there that it significantly increased the fuel load within that -- within that compartment. Regardless

of the amount of dust that you have inside the closed compartment, I still have to have some mechanism of getting that dust into suspension before I can conceive of a dust explosion. And if I have a closed compartment, I have to conceive of some external mechanical force that disrupts this compartment, or I have to conceive of an aerodynamic force within the compartment and short of an explosion outside or short of an explosion inside that has to be of an energy that is great compared to what I'm interested in, I can't get this -- these aerodynamic forces or these mechanical forces. I can't find a credible mechanism for suspending that coal dust.

Q. Have you considered in all respects, Doctor, the -- any extraordinary acts that could occur that could cause an explosion?

A. Well, I mentioned one. That was an explosion outside.

Q. Could cause an explosion inside?

A. Yeah.

Q. You have or haven't considered extraordinary events that might not cause this?

A. Well, I consider that to be most extraordinary.

And, at Tr. 173-174; 175-177:

Q. Doctor, could coal dust in the amount of .05, five hundredths of an ounce per cubic feet cause an explosion if put in suspension?

A. That amount, that concentration of coal dust is not in itself ignitible.

Q. Have you personally ever experimented with that amount of coal dust in suspension?

A. No. I have -- I have seen the kind of demonstrations that Mr. Shaffer put on, and I've seen those several times. I have seen the Hartman bomb operated on a variety of

dust many times, and I have -- I have seen the most recent work that has been published by the Bureau of Mines, and which -- which shows that the original numbers are incorrect. And I say there's a great problem of making these measurements. If you look in the literature on this minimum concentration for coal dust, of a dust comparable to Pittsburg coal dust, you'll find numbers running all the way from one-hundredth of an ounce per cubic foot to .23, nearly a quarter of an ounce of -- per cubic foot, and all of these numbers have their -- have their proponents, but I believe that the most recent work of -- beginning in the late 70's and still continuing, done by the Bureau of Mines, I sort of doubt these problems quite reasonably.

* * * * * * *

JUDGE KOUTRAS: You indicated that, in your opinion, that the specific regulation that we're dealing with, 77.202, is impossible to apply in all cases.

THE WITNESS: In all cases, because it depends on the circumstances, the possibility and what credible mechanisms exist for the suspension of this coal dust.

JUDGE KOUTRAS: Okay, Now, given the facts in this case, given the conditions or practices that the inspector observed, that Mr. Shaffer saw --

THE WITNESS: Yes.

JUDGE KOUTRAS: -- with respect to these compartments, can you envision any situations connected with that equipment where this particular regulation would come into play?

THE WITNESS: No, I cannot.

JUDGE KOUTRAS: Now, counsel -- Mr. Collier asked you some questions about the -- the explosion factor here and Mr. Bachmann asked you some questions on direct with respect to the -- the arcing and the propagation and

getting the dust into suspension, and your answers were specifically addressed to an explosion situation.

THE WITNESS: Yes.

JUDGE KOUTRAS: Can you envision these same types of questions applying to a fire situation? In other words, what -- what, if any, amount of coal accumulations, let's say just laying on a metal trap or lying in a cabinet, would -- would any of that be prone to fire? What would it take to start a fire, let's say in this cabinet, given a given amount of float coal dust?

THE WITNESS: It would really be quite a thick layer, you know, inch or two inches or something like that, because for this coal to fire, you would -- I don't even know that two inches is enough, because you have a problem -- it's going to oxidize, and in oxidizing, it heats up. So you end up with a balance between the heat that is lost in the environment and the heat that is retained within the sample. It's the heat -- some amount of heat is kept in the sample, so that it builds up, it will actually go into glowing conditions, and this we have in the -- in spontaneous heating. But if you've got a -- a thin layer, you know, something a half inch, or -- I'm sure that a half inch would never do it, even with a reactive coal like this, the heat loss to the atmosphere just through -- through convective forces and by conduction to the metal plate underneath there, is such that it will never get to a glowing condition. What -- what quantity is required in there for a fire to occur within the compartment, would have to be determined for a specific coal, because those coals have different self-heating proclivities, but it's -- it's a very substantial amount, it's not this thin layer that we're talking about here.

Inspector Shaffer was called in rebuttal, and he testified that the abatement took approximately 4 hours. He confirmed that during the process of cleaning up the coal dust

with rags, it could not be placed in suspension (Tr. 179-180).

When asked why he believed the cited accumulations constituted a significant and substantial violation, Mr. Shaffer replied "I have been always told if it's black in color, that it was a dangerous accumulation." Since this was the case, he automatically concluded that the violation was significant and substantial (Tr. 182).

Findings and Conclusions

Fact of Violation

The alleged violation in this case is virtually identical to the facts which led to a prior violation at the same mine site in July, 1983. That case was heard and decided by Judge Broderick on May 17, 1984, Secretary v. The Pittsburgh & Midway Coal Company, 6 FMSHRC 1347, and it is now pending before the Commission on appeal by Pittsburgh & Midway. In that case, Judge Broderick made the following findings (7 FMSHRC 1348-1349):

> On June 9, 1983, there was an accumulation of coal dust in the main crusher panel and the heat trace panel. The dust on the base of each panel measured approximately one-eighth of an inch. It was black in color. There was dust on the equipment within each box although most of it had settled to the base. The dust was not in suspension.
>
> The dust had come up through the floor of the room and around the conduits under the panels.
>
> In the normal operation of the main crusher panel and the heat transfer panel, no ignition source, arc or spark is created.
>
> In the event of a phase to phase or phase to ground fault within one of the panels, an ignition could be created. If an ignition occurred, it could put the dust accumulation in suspension and an explosion could result.

Judge Broderick then made the following conclusions and affirmed the violation (7 FMSHRC 1349):

> The critical issue in this case is whether the coal dust accumulations existed "in dangerous amounts." There are few cases interpreting this phrase. But see Consolidation Coal Company, 3 FMSHRC 318 (1981) (ALJ); Secretary v. Co-op Mining Company, 5 FMSHRC 1041 (1983) (ALJ). Whether an accumulation is dangerous depends upon the amount of the accumulation and the existence and location of sources of ignition. The greater the concentration, the more likely it is to be put into suspension and propagate an explosion. I accept the inspector's testimony as to the amount of the accumulation and conclude that it was significant. It is true that there were no bare wires or any equipment that would cause arcing or sparking without some equipment failure or defect. But there was energized electrical facilities present and faults or failures in such facilities are common occurrences. I conclude that if the extent of the accumulation is such that it is black in color, and if potential ignition sources are present, the accumulation exists in a dangerous amount.

The Consolidation Coal Company case concerned an accumulation of float coal dust ranging from 1 to 5 inches in a room which housed a coal transfer belt head roller, drive belt, motor and electrical equipment for the belt. The evidence in that case established that the float coal dust covered the entire area of the room, including several ignition sources such an energized unprotected light bulb in a hooper beneath the belt, a high voltage disconnect switch covered with float coal dust, and the belt rollers. Former Commission Judge Laurenson affirmed an imminent danger order issued by the inspector for these conditions, and in the companion civil penalty case, he affirmed a violation of section 77.202. Judge Laurenson found that the 1 to 5 inches of float coal dust throughout the entire room in question constituted an accumulation within the meaning of section 77.202. He then concluded that by permitting accumulations of dangerous amounts of coal dust in the room, the mine operator violated section 77.202.

The Co-op Mining Company case concerned a decision by former Commission Judge Moore in which he affirmed a violation of section 77.202. Although Judge Moore rejected an inspector's opinion that a mixture of unsuspended coal fines

and float coal dust could be ignited with a match and could burn as rapidly as gunpowder (black powder), he nonetheless found that the accumulations were combustible and that a source of ignition in the form of a fire in a bucket was in the area where the accumulations were found. He concluded that the accumulations existed in "dangerous amounts."

In his posthearing brief in defense of the violation in question in this case, respondent's counsel cites the Consolidation Coal Company case, as well as the case of Western Slope Carbon, Inc., 5 FMSHRC 795 (April 1983), 2 MSHC 2218 (1983). The Western Slope Carbon, Inc., case concerned an imminent danger order issued by an inspector for an accumulation of float coal dust in excess of an eighth of an inch deep for a distance of 500 feet along several underground mine entries. Judge Carlson found that these accumulations constituted a violation of section 75.400. He noted that the Commission has held that a violation of this coal accumulations standard occurs whenever an accumulation of combustible materials exists. Judge Carlson found that while there was an improper accumulation of float coal dust, it did not constitute an imminent danger. He concluded that the possibility that the dust would be raised into suspension and then ignited was too remote to create the likelihood of a fire or explosion "at any moment". Although Judge Carlson vacated the order, he found that the cited accumulations constituted a violation of section 75.400, and assessed a civil penalty accordingly.

Respondent argues that in order to establish a violation of section 77.202, MSHA must establish that a coal dust accumulation must exist in a location such that under normal operating conditions the dust is susceptible to being put into suspension, that the concentrations of coal dust are such that the suspension would be ignitable, and that during normal operations an ignition source is present, proximate and capable of igniting the suspended dust.

Respondent asserts that the inspector's testimony is full of inconsistencies and misconceptions as to the standard imposed by section 77.202. As an example, the respondent cited the inconsistent testimony of the inspector with respect to the extent of the accumulations he observed, and in particular, his inconsistent estimates as to the depths of the accumulations. Further, respondent cites the inspector's testimony that under normal operating conditions no ignition source existed in the motor control room in question, and his failure to provide a creditable explanation as to how during normal operating conditions, the coal dust in the cabinets

could get into suspension. With regard to the inspector's reliance on a "catastrophic failure" of an electrical component of sufficient magnitude to put the dust in suspension, the respondent points out that the inspector did not recognize that the failure would also have to be of such duration and such proximity to the suspended dust so as to provide an ignition source. Respondent concludes that section 77.202 does not require an operator to prevent the accumulation of coal dust which is ignitable only during a catastrophic failure of the facility where the dust collects.

The respondent points to the fact that Inspector Shaffer conceded that coal dust at rest by itself does not constitute a dangerous accumulation, and that he agreed that the coal dust must be put in suspension, that the ignition source must be proximate, and that during normal operating conditions no ignition sources exist inside the motor control center. The respondent maintains that Inspector Shaffer issued the citation solely on the basis of what he perceived to be the black color of the coal dust accumulations regardless of whether or not the other elements of a dangerous accumulation were present.

Citing the testimony of its witnesses, the respondent asserts that it has clearly demonstrated that a dangerous accumulation of coal dust did not exist inside the cited electrical control center. Respondent cites the testimony of its safety supervisor Yazzie that the accumulations were "grayish black" in appearance, no thicker than a newspaper, and that he could see the compartment paint through the coal dust. Respondent also cites the testimony of its electrical supervisor Scott that the amount of coal dust described by Inspector Shaffer did not constitute a dangerous accumulation, and that the dust could not be placed in suspension inside the cited cabinets. Mr. Scott also testified that he did not believe that the electrical components could "blow up" as testified to by Inspector Shaffer, and he confirmed that on numerous occasions he has observed coal dust accumulations exactly as described by Mr. Shaffer, and as an electrician he was not concerned about the existence of that dust in the electrical components.

Respondent cites an earlier citation issued by Inspector Shaffer for another violation of section 77.202 at the respondent's south mine on the same day he issued the citation in question in this case. Respondent points out that the citation was subsequently vacated and withdrawn because MSHA could not prove that a dangerous accumulation of coal dust

existed. Respondent asserts that even when the evidence concerning the dust accumulation is viewed in the light most favorable to the petitioner it appears that there could have been no more than 1/8 inch of difference in the amount of coal dust found in the south mine electrical control cabinets and the north mine electrical control cabinets. Respondent asserts that Inspector Shaffer did not adequately or satisfactorily explain why 1/8 inch to 3/16 of an inch of coal dust constituted a dangerous accumulation at the north mine while slightly less than that amount did not constitute a dangerous condition at the south mine.

Finally, the respondent maintains that the unrebutted testimony of its expert witness Dr. Van Dolah, clearly and unequivocally demonstrates that the conditions observed by Inspector Shaffer did not constitute a dangerous accumulation of coal dust in violation of section 77.202. Respondent asserts that Dr. Van Dolah's testimony refuted the inspector's belief that coal dust might propagate a fire, and that Dr. Van Dolah could conceive of no credible situation where the coal dust accumulation in the electrical cabinets in question could be put into suspension and ignited in such a manner to create a dangerous situation. Further, respondent concludes that in order for such a situation to occur, the act which precipitated the suspension of coal dust would have to be so violent that the additional danger presented by any coal dust present would be insignificant when compared to the danger proposed by the catastrophic failure itself.

In this case, Inspector Shaffer issued his citation on the afternoon of March 6, 1984. Earlier that day, he inspected the respondent's south mine surface facility and issued a citation for a violation of section 77.202, after observing "dangerous amounts" of coal dust accumulations in the crusher motor control room and in two electrical component and panel compartments. The violation was abated after the "dangerous amounts" of coal dust accumulations were removed from the three cited areas (exhibit R-1).

I take note of the fact that the prior citation, as well as the one in issue in this case, are both framed in identical language. In both instances, Inspector Shaffer stated that dangerous amounts of coal dust were permitted to accumulate inside electrical compartments. Mr. Shaffer confirmed that in connection with the earlier citation, he determined that the float coal dust he observed constituted a dangerous accumulation because of its color and depth (Tr. 64). However, I note that in both instances Inspector Shaffer did not

use the phrase "float coal dust" on the face of the citations, nor did he indicate the extent or amounts of the accumulations he purportedly observed. He simply concluded that coal dust was permitted to accumulate in dangerous amounts.

The respondent established that the earlier citation issued by Inspector Shaffer was subsequently vacated and that MSHA's Dallas Regional Solicitor's Office filed a motion to withdraw the citation during the course of a civil penalty proceeding filed against the resondent in Secretary v. Pittsburgh & Midway Coal Co., Docket No. CENT 84-77 (exhibit R-4). The citation was withdrawn because MSHA believed that it did not have sufficient evidence to prove that the amount of coal dust cited by Inspector Shaffer constituted a dangerous amount, and that it was not possible to measure the dust. MSHA Counsel Collier confirmed that he was unaware of the prior citation (Tr. 61).

Inspector Shaffer confirmed that the coal accumulations he cited in this case were float coal dust, and he determined this simply by visual observation (Tr. 88). He explained that the accumulations were black in color and similar to the example shown in exhibit P-4. Had the accumulations been the colors depicted in exhibits P-2 and P-3, he would not have issued any citations because the colors were less than "black," which indicated to him something less than dangerous accumulations (Tr. 89-90). He described the float coal dust he observed as "smooth," "nice and layered stuff that settles," rather than "bumpy and ridgey" (Tr. 83).

Mr. Shaffer stated that he observed some coal dust three-sixteenths of an inch at the bottom of one of the cabinets, but that it was dark and that he could not see too well without his glasses. He indicated that he could see the dust "silhouette above the height of the conductor when I brushed it off," and that he estimated the amount "by feel", but that he did not measure it with a ruler (Tr. 119-120). He confirmed that while it was possible to sample this dust, he had nothing with him to put the samples in. He conceded that without sampling, he would have no way of knowing the combustible content of the dust (Tr. 120).

Inspector Shaffer confirmed that clean-up was accomplished by wiping up the coal dust with rags, and he indicated that this was the only method that could be used (Tr. 180). He stated that the clean-up took about 4 hours, and when asked why he believed the violation was "significant and substantial," he replied "I have been always told if it's black in color, that it was a dangerous accumulation," and

that in such a situation, he "automatically" makes a finding that the violation is "S&S" (Tr. 182).

Respondent's safety supervisor Yazzie, who accompanied Inspector Shaffer during his inspection, testified that the cited coal dust accumulations were "grayish black" in color, were "newspaper thin," and that he could see the cabinet compartment paint through the dust. Although the coal dust at the very bottom of one of the cabinets in the north mine was darker in color than the dust inside the cabinets, there was no significant difference in the coal dust coloration at the south or north mine areas. Mr. Yazzie also stated that while the miners cleaning up the cited accumulations intended to use a vacuum cleaner to clean up the coal dust, they did not do so and the dust was cleaned up by wiping it up with rags. He described the dust as "light dust" and confirmed that it was similar to "dusting a table at home" (Tr. 131). He estimated that it took about 2 hours to abate the conditions (Tr. 136).

Inspector Shaffer conceded that coal dust simply laying in the cabinets is not dangerous, and that it would not interfere with the normal operation of the cabinets or the electrical componets inside the cabinets. In these circumstances, he would not consider the presence of such dust to be dangerous to the operation of these components. He further conceded that under normal operating conditions, there are no ignition sources present inside the motor control center in question. However, he believed that the electrical wiring would be a potential source of ignition, but conceded that such an ignition source must be close enough to the coal dust to put it in suspension, and that the only way it could be placed in suspension is by a fault or an abnormal condition (Tr. 69-70). Should such a fault or abnormal condition exist, an explosion would have to occur inside the cabinet in order to place the coal dust in suspension. Once the coal was in suspension, an arc or ignition would have to occur before the coal was ignited, and the extent of any such explosion would depend on the amount of coal dust present (Tr. 74-76).

Electrical supervisor Scott testified that under normal operating conditions no potential source of ignition existed inside the electrical cabinets in question, and that the coal dust could not be placed in suspension. He discounted Inspector Shaffer's testimony that a breaker could "blow up." Mr. Scott has 25 years of experience as an electrician, including work as an electrical contractor, and he indicated that the electrical components inside the cabinets are fused

and sized in such a manner as to preclude the overheating of any wires or cables, and that they are designed to prevent arcing. Although Mr. Scott alluded to instances of fuses blowing out or shorting, and cracking or burning internally when they did not reset, he knew of no instances of any which had "blown up" with such force as to suspend coal dust. He knew of nothing which could place the dust in suspension inside the cabinets.

Dr. Van Dolah testified that on the basis of the testimony of Inspector Shaffer, he could not support any conclusion that section 77.202 was violated. Dr. Van Dolah testified that the amount of coal dust testified to by Inspector Shaffer did not present a danger because "I am not able to come up with a credible mechanism whereby I can go from this dust layer to a dust cloud, and I must have a dust cloud before I can have a dust explosion." Conceding that an accumulation of coal dust may pose a possible fire hazard, Dr. Van Dolah emphasized the fact that before one can conclude that the coal dust posed a fire hazard, the specific combustible properties of the coal must be established, and there must be an amount of coal dust present to significantly increase the potential fuel load. He believed that the amount of float coal dust which must be present inside the cabinets to present a possible fuel load for a fire would be "quite a thick layer, you know, inch or two inches or something like that, . . . I don't even know that two inches is enough . . ." (Tr. 176). Dr. Van Dolah stated that coal dust in the amount of .05, of five hundredths of an ounce per cubic feet is not itself ignitable (Tr. 173-174).

Dr. Van Dolah confirmed that he examined the electrical cabinets cited by Inspector Shaffer, and he testified that except for an explosion of the entire building where these cabinets were located, he could not conceive of any event that would supply the necessary energy to place the coal dust described by Inspector Shaffer in suspension (Tr. 168). Conceding that coal dust in proximity of a hot wire could smolder, even in a one-sixteenth or one-eighth of an inch of coal dust, such a smoldering condition would not propagate away from that location, and in no way will any smoldering combustion lift other coal dust and create a dust cloud (Tr. 169). Dr. Van Dolah found it quite difficult to imagine any explosion of an electrical circuit breaker that would blow up a multi-case breaker with such violence that the winds associated with that explosion would place the coal dust in suspension (Tr. 166).

Dr. Van Dolah alluded to past coal dust explosion experiments conducted at the Bruceton experimental mine, and he emphasized the fact that there must be an initial explosion, either by the introduction of methane or a massive amount of explosives, a dispersion of the dust cloud in the air, and the resulting propagation of the explosion. He could conceive of no dust cloud being created inside a closed electrical cabinet (Tr. 160).

Dr. Van Dolah took issue with Inspector Shaffer's testimony concerning the coal dust experiments he conducted. He stated that the amount of coal dust one can calculate to provide the minimum explosive concentration in any compartment was incorrectly stated by Inspector Shaffer, and that more recent studies by his own group has shown the incorrectness of the data relied on by Mr. Shaffer. Dr. Van Dolah stated that the fact that the coal dust in question was lying in the cabinet says nothing about the hazard associated with it. In his opinion, for coal dust to be dangerous, it has to be capable of being suspended by some mechanism in order to provide an explosion. Otherwise, coal dust, at most will only smolder very slowly, and a thin layer of coal dust on a metal plate, in fact, will not smolder (Tr. 158). Referring to the darkest sample of coal dust introduced at the hearing Dr. Van Dolah stated that the coal dust simply lying on a surface or on an insulator does not constitute a hazard or a dangerous accumulation because its simply there. As long as the insulation is there, the coal dust is not burning and it is not going to explode (Tr. 159).

I find the testimony of Mr. Scott, Mr. Yazzie, and Dr. Van Dolah to be credible, and that it effectively refutes the testimony offered by Inspector Shaffer to support his theory of a possible explosion within the electrical cabinets. I cannot conclude that MSHA has established that in the normal course of operation, an electrical component inside the cabinets could cause the dust to be placed in suspension, thereby propagating an explosion or a fire. As for the inspector's theory of a "catastrophic" explosion of a circuit breaker or other electrical component inside the cabinet, I simply find no credible support for the inspector's belief that this could occur. I accept the testimony by Mr. Scott and Dr. Van Dolah as a credible refutation of any such unlikely event.

With regard to inspector's observations concerning the extent of the coal dust accumulations in question, I cannot conclude that MSHA has established that the amounts present were sufficient to pose a hazard of a fire or an explosion.

Nor can I conclude that they were dangerous. Inspector Shaffer's testimony concerning the extent of the accumulations is rather equivocal. On direct examination, he testified that the coal dust was approximately 1/8 to 3/16 of an inch thick. He also indicated that the lights were out inside the cabinet and that he had difficulty in seeing, and that he could not measure the depths with a ruler. On cross-examination, he testified that the coal dust was "paper thin" or 1/16 of an inch (Tr. 50).

Dr. Van Dolah's unrebutted testimony is that a dangerous accumulation of coal dust for purposes of a fire hazard are such coal dust accumulations which are at least an inch or two in depth, and that in order to present an explosion hazard, the coal dust must be capable of being placed in suspension. The unrebutted testimony is that the cited accumulations were cleaned up with rags, and I find Mr. Yazzie's testimony that the accumulations were "grayish black," "paper thin," and consisted of a "light dust" similar to ordinary household dust to be credible.

On the basis of all of the evidence and testimony adduced in this case, I conclude and find that MSHA has failed to establish that the float coal dust accumulations cited by Inspector Shaffer were dangerous within the meaning of section 77.202. I am convinced that Inspector Shaffer's conclusion that the accumulations were dangerous were based on a rather cursory evaluation of the circumstances presented to him at the time of his inspection. He simply observed float coal accumulated in and around the electrical compartments and concluded that they were dangerous. He candidly admitted that he is of the opinion that accumulations of coal dust which are black in color are ipso facto dangerous accumulations.

Unlike underground mandatory standard section 75.400, which prohibits accumulations of coal dust in active workings or on electrical equipment, section 77.202 prohibits the accumulation of coal dust only in dangerous amounts. Accumulations which are not dangerous are not prohibited. On the facts of this case, the respondent does not dispute the existence of the cited float coal dust accumulations. Its dispute lies with the finding by the inspector that the accumulations were dangerous. I agree with the respondent's contention that in order to establish that such accumulations are in fact dangerous, MSHA must establish that they present a realistic fire hazard, or that they are susceptible of being placed in suspension in close proximity to a readily available ignition source capable of placing them in suspension, thereby fueling or propagating an explosion. On the facts of this case, I conclude

and find that MSHA has failed to establish either of these hazards or dangers by a preponderance of any credible evidence. Accordingly, the citation IS VACATED.

ORDER

In view of the foregoing findings and conclusions, the section 104(a) Citation No. 2070578, issued on March 6, 1984, IS VACATED, and this proceeding IS DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 12, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 85-39-M
	:	A.C. No. 08-00871-05505
v.	:	
	:	Big Four Mine
AMAX CHEMICAL CORPORATION, Respondent	:	

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
William B. deMeza, Jr., Esq., Holland and Knight, Tampa, Florida, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty 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 of $5,000, for an alleged violation of mandatory safety standard, 30 C.F.R. § 55.11-1.

The respondent filed a timely answer and contest, and a hearing was conducted in Tampa, Florida, on July 30, 1985. The parties filed posthearing proposed findings and conclusions, and the arguments presented therein have been considered by me in the course of this decision.

Issue

The issue in this case is whether the respondent violated the cited mandatory safety standard, and if so, the appropriate civil penalty which should be assessed for the violation. Additional issues raised by the parties are identified and discussed in the course of this decision.

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, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 4-6):

1. Respondent operated the Big Four Mine, a surface phosphate mine producing products affecting commerce within the meaning of the Act.

2. The mine has been closed since October, 1984, and prior to that time worked 131,095 man-hours annually.

3. Payment of the proposed penalty assessment by the respondent will not affect its ability to continue in business.

4. The Big Four Mine is a subsidiary of the respondent Amax Chemical Corporation.

5. Petitioner's exhibit P-1, a computer print-out, reflects the respondent's prior history of paid civil penalty assessments for the period November 19, 1982 through November 18, 1984.

Discussion

This case concerns a fatal accident which occurred at the respondent's mine on August 28, 1984. The accident victim, John F. May, an electrician/line worker, was fatally injured at approximately 7:30 a.m., when he came in contact with an energized connector on top of an electrical substation. The substation was a portable, skid-mounted unit approximately 9 feet high, with an additional 10 feet of superstructure extending above the top of the station where high-voltage insulated connectors were mounted for power taps which supplied power to certain field slurry pumps.

The victim was electrocuted when he came in contact with an energized 4,160 volt energized power connector on top of the substation. The connector was approximately 12 inches from a deenergized connector where the victim was standing at

the time of the accident. Although a truck equipped with a hydraulically-operated insulated bucket on an extendable boom was used to transport the victim and a fellow-worker, James Dickey, to the work site, and was parked in front of the sub-station, the victim did not use the bucket, and instead climbed the structure without the use of a ladder or other device.

MSHA Inspector Russell Morris conducted an accident investigation and prepared a report (exhibit P-6). In the course of his investigation, he issued a section 104(a) Citation, No. 2382719, with special "significant and substantial" findings, citing a violation of mandatory safety standard, 30 C.F.R. § 55.11-1. The narrative description of the cited condition or practice is stated as follows in the citation (exhibit P-5):

> A fatal accident occurred at this operation on August 28, 1984, at about 7:30 a.m., when an employee contacted an energized 4160-volt bushing, while performing electrical maintenance. A safe means of access was available, but was not used to reach the top of the skid-mounted 13,200/4160 volt substation and superstructure which is approximately fifteen (15) feet above the ground.

Inspector Morris issued another section 104(a) Citation, No. 2382720, that same day, and it charged the respondent with a failure to guard or deenergize the live connector contacted by the victim. The respondent did not contest the violation and paid a $5,000 civil penalty assessment for this violation of 30 C.F.R. § 55.12-66 (Tr. 147-148). Section 55.12-66 provides as follows: "Where metallic tools or equipment can come in contact with trolley wires or bare power-lines, the lines shall be guarded or deenergized."

MSHA's Testimony and Evidence

James L. Dickey testified that in August, 1984, he was employed by the respondent at the Big Four Mine as a first class electrician. His duties included the service and maintenance of electrical equipment. He confirmed that John May, the accident victim, was also a first class electrician and that they worked together on the day shift. Mr. Dickey stated that on August 28, 1984, he and Mr. May were assigned by chief electrician Harold Jones to survey a job at the mobile sub-station used to supply power to the lift lines and

water pumps. A "hot" 4160 volt power line connector reportedly had a problem, and he and Mr. May went to the substation to find the problem and to decide what had to be done to repair the malfunction.

Mr. Dickey identified photographic exhibits P-2 through P-4, as the substation in question, and he stated that he and Mr. May arrived there between 7:00 and 7:30 a.m. They drove there in the "bucket" truck (exhibit R-2). Since the problem was in one of the connectors, the circuit providing power to that connector line was deenergized and locked out, but the other circuits were not. Mr. Dickey stated that he suggested to Mr. May that he use the boom bucket on the truck to go up and look at the problem connector, but Mr. May declined, and instead climbed up onto the structure to visually observe the problem. Mr. Dickey believed that the first connector to the extreme left of exhibit P-3, was the defective connector, but he was not sure.

Mr. Dickey stated that when Mr. May climbed the structure, he had no tools with him and that he was simply to observe the defective connector to determine the necessary repairs. Mr. Dickey stated that when he last observed Mr. May he had climbed further up the structure and was standing on an I-beam below the connectors with his hands on the I-beam above him where the connectors were located (exhibit P-3). Mr. May had his back to him, and Mr. Dickey did not observe him performing any work.

Mr. Dickey stated that after observing Mr. May standing on the I-beam, acting chief electrician Harold Jones and electrician Rex Tadlock arrived at the scene, and they all discussed the proposed maintenance work to be performed. While this discussion was going on, electrial superintendent Raeburn Foster arrived and joined in the discussion. At that time, Mr. Dickey heard a "crackling" sound, and he turned and saw that Mr. May was "on the hot circuit" with his feet on the I-beam and his hands on top of the connectors. He then observed Mr. May fall backwards and land on top of the structure circuit breakers. In his opinion, Mr. May could not have fallen to the ground because the I-beam would have prevented him from falling to the rear of the structure to the ground.

Mr. Dickey estimated that the distance between the connectors was 2 feet, and he also estimated the other distances and dimensions of the structure. There was 4160 volts leaving the energized connector lines at the top of the structure, and he confirmed that while Mr. May was on the structure

they were discussing the work which had to be done to repair the defective connector.

Mr. Dickey stated that Mr. May gave no reasons for not using the truck bucket. Mr. Dickey also indicated that the accident occurred within 5 minutes of Mr. Foster's arrival (Tr. 15-39).

On cross-examination, Mr. Dickey reiterated that Mr. May had no tools with him and did not plan to stay long on the structure. No supervisor's were present when he first climbed up the structure, and he believed that Mr. May must have known that the other circuit was "hot" because they only deenergized the one that he was observing.

Mr. Dickey stated that when Mr. Foster arrived, he asked whether or not the power was turned off, and that he (Dickey) told him that it was. Mr. Dickey could not recall whether Mr. Tadlock asked about the power.

In response to further questions, Mr. Dickey stated that the day of the accident was a maintenance day, and that the entire power-station could have been deenergized without disrupting work. Mr. Dickey stated that he and the other electrician's reported directly to Mr. Foster, and he considered Mr. Foster to be a very responsible individual who conducted regular safety meetings.

Mr. Dickey stated that he and Mr. May knew that the defective connector was loose because the condition had been reported to the third night shift foreman on the last working shift, and that he and Mr. May intended to visually observe what was necessary to repair the connector.

Mr. Dickey stated that there were no ladders on the bucket truck or at the substation. He was of the opinion that had he climbed the structure, he could have observed the connectors from on top of the circuit breakers. He also confirmed that there was no safety belts on the structure (Tr. 40-64).

Mr. Dickey was recalled as the court's witness, and he stated that the usual procedure was to disconnect or deenergize only the circuit which was going to be repaired. In the instant case, he explained that since he and Mr. May knew where the defective connector was located, they only deenergized that circuit. Since Mr. Dickey believed that Mr. May

climbed the structure merely to visually observe the defective connector, they did not believe it was necessary to deenergize the other circuits.

Mr. Dickey conceded that when he and Mr. May advised Mr. Foster that the power was shut down, it was reasonable for him to assume that they had deenergized all of the circuits (Tr. 186-192).

MSHA Inspector Russell Morris testified as to his background and experience, and confirmed that he is an electrical inspector and that he conducted an investigation into the fatal electrocution of Mr. John May on August 28, 1984 (exhibit P-6, MSHA accident investigation report). Mr. Morris stated that he arrived at the accident site between 11:30 a.m. and 12:30 p.m., and he identified photographic exhibits P-2 through P-4 as the photographs of the substation which he took during his investigation.

Mr. Morris stated he used a ladder to climb to the top of the circuit breaker structure, but that he did not climb up onto the I-beam. He determined that the third connector from the left of photographic exhibits P-3 and R-3, was the defective connector. He also stated that the connector clamp and bushing had been removed, it appeared that the connector threads were stripped, and this indicated that Mr. May was having difficulty removing it. Mr. Morris estimated that the spacing between the connectors was 12 inches, and he confirmed that he took no measurements. He also confirmed that Mr. Dickey's other estimates concerning relevant distances and locations were fairly accurate. Mr. Morris also believed that the I-beam Mr. May was standing on was attached to the back of the structure up-right supports while the I-beam containing the connectors was attached to the front of the structure. Under these circumstances, he believed that Mr. May had to lean his body or hold onto the connector I-beam in order to reach the connectors with his free hand.

Mr. Morris identified exhibit P-6 as a copy of the citation which he issued, and he confirmed that he marked the citation as a "significant and substantial" violation because a fatality had occurred, and that it was the result of the violation (Tr. 64-74).

On cross-examination, Mr. Morris stated that he did not know for a fact that Mr. May had performed work on the connector or had removed the bushing. He assumed that this was the case, and he included this assumption in his accident report.

He conceded that MSHA's "special assessment" narrative findings which state that Mr. May climbed the structure "to remove a defective electrical connection" and that he performed work on the connectors, were conclusions taken from his accident report.

Mr. Morris confirmed that he also issued a citation for failure to completely deenergize the entire substation, and it is his understanding that the penalty assessment was paid (Tr. 74-95).

Respondent's Testimony and Evidence

Raeburn Foster, testified that he was employed at the Big Four Mine in August, 1984, as the electrical superintendent. He stated that the mine processed raw phosphate but that it has been closed since October, 1984. When it was operating, he had 14 electrician's under his supervision. He identified Harold Jones as a union leadman, and while Mr. Jones was substituting for the regular leadman who was on vacation, Mr. Jones was not a "management" employee.

Mr. Foster stated that he conducted regular safety meetings with his men, and he confirmed that he has in the past issued verbal and written warnings for employee safety infractions.

Mr. Foster identified exhibit R-1 as a photograph of the substation in question, and he testified as to the dimensional heights of the structure and equipment shown in the photograph. He confirmed that he went to the site on August 28, 1984, as part of his routine site visits. He arrived at approximately 7:30 a.m., but was not sure whether he arrived before or after Mr. Jones and Mr. Tadlock. He also confirmed that the bucket truck and ladders are available to the electricians for their use in their maintenance and repair work.

Mr. Foster stated that when he arrived at the site, Mr. Dickey was "half-sitting" in and out of the truck and that Mr. May was standing on the I-beam below the connectors with one arm over the I-beam where the connectors were located. Mr. Foster stated that he asked Mr. Dickey and Mr. May whether the power was turned off, and that they both replied simultaneously "yes sir." Mr. Foster had no reason to believe that the power was not off.

Mr. Foster stated that shortly after he arrived at the site, and shortly after being advised that the power was off, he observed Mr. May "slide" or move along the I-beam on which

he was standing. Mr. May had his back to him, and Mr. Foster observed him with his arms between the fourth and fifth connectors, heard him "grunt," and observed him fall backward off the I-beam.

Mr. Foster stated that he had never observed any of his men climb the substation structure without a ladder, and had he observed this, he would issue a verbal warning. He confirmed that Mr. May was an experienced electrician, and that he had never been issued any warnings for safety infractions.

Mr. Foster identified exhibit R-5 as a page from the employee safety handbook dealing with the proper procedures for line crews to follow while performing their work. He confirmed that when Mr. May and Mr. Dickey stated to him that the power was off, he assumed that all five of the substation cabinets had been deenergized. Mr. Foster confirmed that he was not present when Mr. May first climbed up the structure to the I-beam, and that when he arrived Mr. May was already on the I-beam. Mr. Foster stated that he was not concerned about Mr. May falling because he did not believe that he was "that far up." Mr. Foster believed that Mr. May had received safety training, and that this training included the use of the bucket truck.

Mr. Foster stated that when he first arrived at the site there was some conversation among those present, including Mr. May, but he could not recall what was said. He conceded that he was aware of the fact that Mr. May was not using the bucket, and that he observed no ladder. Mr. Foster indicated that he did not want to yell at Mr. May at that time because he did not want to distract him from his position on the I-beam, but that he intended to reprimand him when he came down (Tr. 131).

On cross-examination, Mr. Foster stated that the spacing between the connectors was approximately 12 to 15 inches, and he believed that when he oberved Mr. May on the I-beam, his left arm was between the No. 2 and No. 3 connectors. He confirmed that he did not observe Mr. May take the connector off, nor did he observe any tools in his possession (Tr. 136).

Mr. Foster stated that while he did not observe Mr. May perform any work while on the structure, he conceded that had he used the bucket he would have had more freedom to maneuver about.

Robert Phillips testified that he is employed by the respondent as the Director of Human Resources, and he

explained the company's training procedures. He stated that Mr. Harold Jones was employed as a bargaining unit leadman electrician and was not considered part of mine management. At the time of the accident in August, 1984, Mr. Jones was substituting for the regular shift leadman who was on vacation.

Mr. Phillips stated that the bucket truck was purchased at a cost of $150,000, and that it was purchased after the publication of the company's safety procedures handbook (exhibit R-5). He confirmed that Mr. May received safety training and that it included training in safe access. He also confirmed that the truck bucket was available for use by all electricians (Tr. 159-165).

Rex Tadlock testified that in August, 1984, he was employed at the respondent's Big Four Mine as an electrician. He stated that he reported "a hot spot" on the substation connector in question, and that this was done at the end of his shift on Sunday evening, August 26, 1984. He discussed the condition with Mr. Foster, and since Monday and Tuesday were maintenance days, Mr. Tadlock was asked to stay at work to repair the condition. Mr. Tadlock stated that Mr. Foster instructed him to open the primary circuit switch at the substation where the work was to be done, and that by cutting off the primary switch, the power to the top connectors would be cut off.

Mr. Tadlock stated that when he arrived at the substation with Mr. Jones, Mr. May was standing on the I-beam and was looking at the terminator and power wire. Mr. Tadlock could not remember seeing any tools in Mr. May's possession. Mr. Tadlock estimated that 2 to 3 minutes elapsed from the time Mr. Foster arrived and when the accident happened. He confirmed that Mr. Foster asked whether the power had been shut off, and that he was told that it was. He also confirmed that Mr. Foster conducted regular safety meetings with the men, and that he always informed the men to contact him or the chief electrician in the event they encountered any problems in their work (Tr. 166-172).

On cross-examination, Mr. Tadlock stated that he reported the connector condition by making a notation on his time card at the end of his Sunday shift, and that this was normal procedure. He stated that when he first observed Mr. May on the I-beam, he was standing in front of the third connector.

Mr. Tadlock stated that he had never climbed the structure to perform any work, and that in the event he had to go to the top to perform work he would deenergize all of the circuit breakers, or the entire substation (Tr. 173-184).

MSHA's Arguments in Support of the Violation

MSHA argues that the workplace to which the respondent's electrician John May needed access was the faulty third connector at the electrical substation. Since the term "working place" is defined in section 55.2 as "any place in or about a mine where work is being performed," MSHA concludes that it is clear that on the day of the fatality in question, the faulty third connector was a "working place" within the meaning of the cited standard. MSHA points out that no one, including the respondent, argues that climbing the framework of the electrical substation is a safe means of access to the connectors. In addition to the potential electrical hazard, MSHA asserts that there is also the danger of falling as much as 15 feet to the ground or 5 feet to the top of the substation, and it points out that the respondent's own electrical superintendent agreed that the bucket truck or ladder should have been used.

Recognizing the fact that the "safe access" standard is broad in application, MSHA states that it has been found constitutional and not overbroad or ambiguous, citing former Commission Judge Vail's decision in UNC Mining & Milling, 5 FMSHRC 1164 (June 28, 1983). MSHA asserts that the requirement of "safe means of access" must be considered to be a basic requirement for the protection of an employee's health and safety, and it cites several cases as examples of the various circumstances, locations and different situations where "safe access" has been applied, e.g. Texas Architectural Aggregates, Inc., 2 MSHC 1169 (October 1980) - access to cutoff value on diesel storage tank; Homestake Mining Company, 2 FMSHRC 2295 (August 1980) - low clearance in passage way; Ideal Basic Industries, Cement Division, 2 FMSHRC 1352 (June 1980) - an employee straddling a moving raw feed belt conveyor; and, The Hanna Mining Company, 3 FMSHRC 2045 (Rev. Comm. September 1981) - travel underneath an overhead belt.

MSHA argues that on the facts of this case, "safe means of access" must be viewed in light of the danger that existed in gaining access to a faulty electrical connector 15 feet above the ground, and that "safe access" is meant to include protection from any potential hazard to an employee in getting to his work place. MSHA concludes that the hazards

associated with gaining access to the faulty connector clearly involved the possibility of falls and electrocution.

MSHA agrees that the bucket truck was the safest means of access to the connectors atop the electrical substation, and concedes that the truck was used by the electricians to get to the substation. However, since the truck bucket was not used to gain access to the faulty connector, MSHA asserts that the "safe access" required by section 55.11-1, was not provided or maintained, and that the respondent had a duty to assure the use of the bucket truck. MSHA maintains that the respondent's electrical superintendent, upon arrival at the site, was fully aware that the bucket truck was not being used by the electricians, and that he remained silent even though he knew that the accident victim was violating a company work rule requiring the use of a ladder or staging when working above ground.

Citing a September 22, 1981, Commission decision in Secretary v. Hanna Mining Company, 3 FMSHRC 2045, where the Commission held that an operator is required to make each means of access to a working place safe, MSHA argues that the respondent was aware that the accident victim was climbing the framework of the substation to gain access to the faulty connector. Therefore, MSHA maintains that the respondent cannot claim that there is a reasonable possibility that a miner would not use the framework as a means of access, and that the respondent had an obligation to assure that ladders or other safe means of access were used at the site.

In response to the respondent's argument that it has already paid a $5,000 civil penalty assessment for failing to deenergize the substation as required by mandatory safety standard 30 C.F.R. § 55.12-66, MSHA points out that the accident resulted in the issuance of two separate violations, and that the respondent may not shield itself from liability for a violation of a mandatory safety standard simply because it violated a different, but related standard. El Paso Rock Quarries, Inc., 3 FMSHRC 35 (January 1981); Southern Ohio Coal Company, 4 FMSHRC 1459 (August 1982).

MSHA concludes that the violation in this case was "significant and substantial" within the test enunciated by the Commission in Cement Division, National Gypsum Company, 3 FMSHRC 822 (April 1981). In support of this conclusion, MSHA argues that from the facts established at hearing, there was a reasonable likelihood that the electrician climbing the substation to repair the faulty connector could have received injuries from a fall or electrocution of a "reasonably

serious nature." In fact, he was electrocuted after moving from in front of connector No. 3 which had been deenergized to connector No. 5 which had not been deenergized. Additionally, MSHA asserts that the victim was subject to a fall of as much as 15 feet to the ground or 5 feet to the top of the substation which also could be considered of a "reasonably serious nature." The effort exerted by the electrician in climbing the substation and his total reliance on his strength and sense of balance also made a fall reasonably likely.

MSHA asserts that its $5,000 proposed civil penalty assessment is reasonable. Relying on Inspector Morris' testimony that the violation of section 55.11-1, may have contributed to the death of the electrician in question, MSHA concludes that the failure to deenergize the connector was the principal reason for his death. MSHA asserts that regardless of whether the substation had been deenergized, if the electrician had used the insulated bucket truck to gain access to the faulty connector, he would not have been placed in such a precarious position. His hands, which he had to use to remain on the I-beam, would have been free, and his shoulder would not be in close proximity to the energized connector. Thus, MSHA concludes that the gravity of the violation should be considered serious.

With regard to the question of negligence, MSHA asserts that the respondent's electrical superintendent was aware of the violative condition immediately prior to the accident but remained silent. Since management did nothing to insure that the violation was corrected, and since its failure to provide and maintain safe access may have contributed to the electrician's death, MSHA concludes that the violation resulted from the respondent's negligence.

Respondent's Arguments

The respondent maintains that the evidence adduced in this case demonstrates that it provided safe access to the job site within the meaning of section 55.5-11.1, and that the actions of the deceased electrician were unforeseeable violations of his training, the respondent's work rules, and common sense.

The respondent asserts that MSHA has admitted that safe access was furnished in this case, and it relies on the statement made by Inspector Morris on the face of his citation that "a safe means of access was available, but was not used" in support of its assertion. Respondent concludes that MSHA

has conceded that safe access was provided at the time of the accident.

Respondent asserts that it has implemented every reasonable precautionary measure to ensure employees safe access to its electrical substations. First, it has required a comprehensive safety training program for its mine employees for a number of years. The program includes training and periodic retraining in safe access practices, particularly for employees in the electrical maintenance department, and the training encompasses operation of the bucket truck. Although the deceased electrician received that training, he ignored its precepts on the day of the accident.

Second, respondent maintains that it has enacted and enforced appropriate work rules requiring employees to utilize safe access procedures in their daily tasks. It routinely disciplines employees for violations of safety work rules and repeated violations of those rules have contributed to employee discharges. The deceased electrician received a copy of those work rules but ignored them on the day of the accident.

Third, respondent points out that it spent in excess of $150,000 for an electrial maintenance "bucket" truck that employees were required to use to obtain safe access to elevated electrical maintenance work. The truck was driven to the substation on the day in question, but, contrary to respondent's work rules, his safety training and retraining, and common sense, the deceased consciously and knowingly refused to use the truck to reach the top of the substation.

In response to MSHA's assertion that respondent's superintendent Foster was present on the scene at the time of the accident, and should have assessed the situation immediately and ordered the deceased down from the substation superstructure and into the bucket truck, respondent points out that while Mr. Foster did arrive at the accident scene several minutes prior to the electrocution, it was after Mr. May climbed onto the superstructure. Since Mr. Foster was present only a few minutes prior to the electrocution, he could not have realized nor conducted a thorough investigation to determine that, contrary to the reports he had received, the substation's secondary circuit breakers were <u>not</u> totally deenergized.

Respondent asserts that Mr. Foster gave two logical reasons for not ordering Mr. May down from his position. First, the superintendent had observed that his rigid insistence

upon safe procedures had previously caused his employees to become nervous in his presence. Rather than risk Mr. May's over-reaction to immediate criticism, Mr. Foster decided that he would wait until Mr. May completed his brief initial survey and returned to the ground before reprimanding him for failure to use the bucket truck. Second, Mr. Foster did not perceive any significant danger to Mr. May. Further, he had been assured that the substation electrical circuits had been deenergized and he could observe that Mr. May was only 4-1/2 feet above a solid surface, without any possibility of falling to the ground.

Citing Judge Carlson's decision in Secretary of Labor v. Climax Molybdenum Co., 2 MSHC 1752, 1753 (1982), vacating an alleged violation of mandatory standard section 55.11-1, respondent suggests that a "precautionary steps" test, as applied by Judge Carlson in Climax is applicable to the facts of the instant case. In Climax, Judge Carlson stated that "since some standards are necessarily broad and therefore vague, as here, the courts have devised a test for standards so that the question becomes what precautionary steps a conscientious safety expert would take to avoid the occurrence of the hazard." Citing the circumstances which existed on the day of the accident, the respondent argues that they clearly demonstrate that it could not have taken any additional precautions to provide safe access. Respondent provided equipment, training, work rules, and enforcement of work rules to ensure that its miners had the ability to implement safe access procedures. Respondent points out that there was testimony from all electrician witnesses that use of the bucket truck would not have prevented the accident, and Mr. May would have been electrocuted -- even while standing in the bucket -- if he had contacted a "hot" circuit.

In response to MSHA's assertion that the respondent failed to provide safe access because Mr. May encountered an energized high-voltage circuit while at his work station in the substation superstructure, respondent argues that since it has established that it provided safe access from the ground to the superstructure, the citation can only be sustained if respondent was required but failed to provide safe access in the superstructure. Respondent suggests that logic and the law both indicate that MSHA's position is untenable.

The respondent asserts that the term "access" is commonly defined as "a way or means of access" and "the action of going to or reaching." Webster's New Collegiate Dictionary. Respondent argues that the commonly-used definition, applied in light of the regulatory requirement that access be maintained

"to" the working place, implies that the regulation addresses specific jobsite locations rather than specific jobsite hazards. Respondent concludes that the plain language of the regulation does not suggest that it covers hazards at the working place.

Citing Secretary of Labor v. Hanna Mining Co., 1 MSHC 2488 (1980) (Broderick, J.); Secretary of Labor v. Erie Blacktop, Inc., 2 MSHC 1251 (1981) (Koutras, J.) (Applying 30 C.F.R. § 56.11-1); Secretary of Labor v. Standard Slag Co., 2 MSHC 1145 (1980) (Koutras, J.) (same), as representative cases interpreting the "safe access" safety standards, respondent points out that in each case the standards have been applied to prohibit hazards encountered by miners on their way to the work station rather than hazards at the work station. Respondent maintains that these decisions are consistent with the regulatory scheme, for if an operator could be cited for failure to provide safe access every time a miner encountered a hazard at his working place, every hazard would generate two citations--one citation for failure to provide safe access and one citation for the "substantive" violation (e.g., failure to guard pinch points). Respondent concludes that neither the statute nor the regulations support that practice.

In response to MSHA's suggestion that the respondent was required to deenergize the substation pursuant to the safe access requirement of section 55.11-1, respondent argues that any such interpretation is an impermissible ex post facto amendment of that regulation. To the extent that MSHA seeks to impose a greater duty upon respondent than that required by the language of section 55.11-1, respondent maintains that MSHA must do so by amending the regulation. Respondent maintains that even a broad standard cannot be applied in a manner that fails to inform a reasonably prudent person that the condition or conduct at issue was prohibited by the standard.

With regard to the question of negligence, respondent cites the cases of Secretary of Labor v. Marshfield Sand & Gravel, Inc., 1 MSHC 2475, 2476 (1980); Secretary of Labor v. Warner Co., 1 MSHC 2446, 2447 (1980), and Secretary of Labor v. Peabody Coal Co., 1 MSHC 1676 (1978), in support of its argument that miner misconduct will mitigate or eliminate any negligence chargeable to the mine operator.

Respondent asserts that Mr. May's actions on the day of the accident clearly fall within the rule set forth in Warner and Marshfield. Respondent points out that Mr. Mays' failure

to use the bucket truck, his failure to deenergize all circuit breakers on the substation, and his knowing venture into the area of the energized circuits all constitute aberrational, inexplicable, and almost suicidal conduct which is not chargeable to the respondent. Respondent concludes that since there is no evidence indicating that it could have taken additional precautions to prevent the occurrence of Mr. May's actions, or the tragic consequences, respondent and its superintendent simply were not negligent. Respondent concludes further that since it has established that it did provide and maintain safe access to the electrical substation, access that was reasonable under all the circumstances existing on the day in question, and since it was not negligent, no violation has been established and the citation should be vacated.

Findings and Conclusions

Fact of Violation

In this case the respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 55.11-1, which provides as follows: "Safe means of access shall be provided and maintained to all working places."

The term "working place" is defined by section 55.2 as "any place in or about a mine where work is being performed.

On the facts of this case, I conclude and find that the location where Mr. May was standing at the time of the accident was a "working place" within the meaning of section 55.11-1. Although the testimony is not clear that any actual work was being performed by Mr. May when he was electrocuted, the fact is that he and other members of his work crew were at the scene to repair a defective connector, and that when Mr. May climbed the electrical substation structure he did so in order to evaluate the work which had to be performed to complete the necessary repairs. Accordingly, I conclude that he was performing work while he was on the structure in question.

In this case, the accident victim May climbed the structure and failed to use a truck bucket which was readily available for his use. He also failed to deenergize all of the connectors before climbing the structure. Mr. May was an experienced electrician, was trained in the use of a bucket, and had used such a bucket in the past. Although a safety belt or ladder were not available to Mr. May, since he

decided on his own to climb the structure, one can only speculate as to whether he would have used a ladder or belt even if they were available or provided.

Respondent's view of section 55.11-1, is that its application is limited to situations where an employee has to have access to his work location. Once he arrives at that work location, respondent believes that what transpires after his arrival is not covered or encompassed within the parameters of section 55.11-1. On the facts of this case, respondent's counsel takes the position that the respondent believed that the hazard addressed by MSHA was the fact that Mr. May placed himself in danger of falling when he climbed the structure, rather than a danger of electrocution. Respondent's counsel argued that since electrical superintendent Foster was told that the power was off, it was unreasonable for the respondent to believe that at the point in time, when Mr. May climbed the structure and placed himself in close proximity to a live connector which had not been deenergized, that there was any possibility of his being exposed to an electrical hazard (Tr. 127). Conceding that section 55.11-1, was enacted for the protection of an individual employee, on the facts of this case, respondent's counsel takes the position that the hazard against which Mr. May is protected is one of falling rather than electrocution (Tr. 121).

Respondent's counsel suggests that in issuing his citation, Inspector Morris perceived an electrical hazard rather than a falling hazard, but counsel conceded that had Mr. May fallen from the structure before contacting the live connector, the citation would have been proper (Tr. 121). Since the inspector issued a separate citation for the respondent's failure to completely deenergize the live connector which resulted in Mr. May's electrocution, and since the respondent has paid a $5,000 civil penalty assessment for this violation, counsel suggests that the respondent has already been penalized for any "safe access" violative condition connected with the accident.

MSHA's view is that section 55.11-1, has a broad application which encompasses any hazards to which an employee may be exposed once he is at his work location, and that the standard is not limited to falling or tripping hazards (Tr. 123). Had all of the connectors been deenergized, and had Mr. May used a bucket, safety belt, or ladder to gain access to the connector which he contacted, MSHA's counsel conceded that no violation would have been issued (Tr. 126). Counsel believes that on the facts of this case, safe access to Mr. May's work location was not provided and maintained because he was

exposed to both a fall and electrocution hazard, and that section 55.11-1, is intended to preclude exposure to both of these hazardous conditions (Tr. 127).

While it is true that the respondent has paid a civil penalty for a violation of mandatory safety standard section 55.12-66, for failure to guard or deenergize the connector located adjacent to the troubled connector which prompted Mr. May to climb the structure in the first place, and which resulted in his electrocution when he contacted the live connector, I take note of the fact that section 55.12-66, requires guarding or deenergization only in instances where metallic tools or equipment can contact a bare powerline. On the facts of this case, the testimony is unclear as to whether or not Mr. May had any tools with him at the time he contacted the live connector, and the witnesses were unclear as to whether Mr. May was actually performing any work on the faulty connector when he came in contact with the adjacent live connector. What is clear is that he used no safety belt, ladder, or bucket to observe or evaluate the work which had to be done. What is also clear is that by standing on the I-beam he had to maintain his balance by holding onto the beam to which all of the connectors were affixed with his hands and arms and could not maneuver along the beam with both hands free. Had he used the bucket, I believe it is reasonable to assume that he could have observed the defective connector from a safe distance without the necessity of placing his hands or body in close proximity to the adjacent connectors which were not deenergized.

Although section 55.11-1, is found under a general regulatory section dealing with travelways, and has been applied in instances dealing with the means made available to a miner to reach his work station or location, and is not among the regulatory sections found in section 55.15 which cover such personal protection requirements such as safety belts and lines, the intent of section 55.11-1 is that an individual be protected not only from hazards which may be encountered while he is on his way to perform some work, but also to protect him from hazards which may be encountered while he is about to perform this work. The use of the phrase "maintained" in section 55.11-1, suggests that a miner be kept or preserved from exposure to dangerous or hazardous situations while he is performing his work duties. Since Mr. May's access to the faulty connector in question was a necessary and integral part of the work which he was required to perform, I conclude that the standard is broad enough to require that safe access to the connector be provided to him, and continued, until such time as his work is completed.

I recognize the respondent's fears that any interpretation or application of section 55.11-1, prohibiting hazards encountered by a miner at his work station, rather than on his way to his work station will leave an operator vulnerable to two citations -- one for failure to provide safe access and one for the "substantive" violation, e.g. failure to guard pinch points. Theoretically, one could probably argue that the failure to guard a piece of equipment could result in two citations -- one for the failure to provide a guard to preclude anyone from contacting a pinch point, and one for failure to provide "safe access" on the theory that failure to provide such a guard does not ensure safe access to the unguarded equipment. However, I believe that such determinations should be made on a case-by-case basis and on the basis of the specific facts and circumstances presented in any given case. Further, practically all of the promulgated mandatory standards address specific hazardous situations covered by substantive regulatory standards. On the facts of this case, while it may have been more appropriate for the inspector to cite the safety belt requirements of section 55.15-5, if he believed that Mr. May was in danger of falling, the fact that MSHA seeks to rely on a broad and general standard such as section 55.11-1, in support of the citation is not inappropriate.

The respondent's argument that MSHA's suggestion that it was required to deenergize the substation pursuant to the safe access requirements of section 55.11-1, is an impermissible ex post facto amendment of the regulation because such an interpretation was not communicated to the respondent and fails to inform a reasonably prudent person that such conduct was prohibited is rejected. I agree with the respondent that the test to be applied in interpreting a broad and general standard is the test enuncitated by Judge Carlson in Secretary of Labor v. Climax Molybdenum, 2 MSHC 1752, 1753 (1982), that "since some standards are necessarily broad and therefore vague, * * * the courts have devised a test for standards so that the question becomes what precautionary steps a conscientious safety expert would take to avoid the occurrence of the hazard." The Commission followed this approach in Alabama By-Products Corp., 4 FMSHRC 2128 (December 1982); U.S. Steel Corp., 5 FMSHRC 3 (January 1983); and Great Western Electric Company, 5 FMSHRC 840 (May 1983).

Relying on the inspector's statement on the face of the citation that "a safe means of access was available, but was not used," respondent takes the position that since it provided Mr. May with safe access to his workplace on top of the

substation structure, it was not obligated under the law to do more than that. Although I agree that the conduct of Mr. May in climbing the substation structure and failing to deenergize all of the connectors were contributing factors which led to his own demise may be considered in assessing the question of negligence, I cannot conclude that these factors absolve the respondent from liability in this case. The Commission has held that an operator is liable for a violation of a mandatory standard without regard to fault, and that when an employee fails to comply with the standard the operator's efforts towards enforcement or compliance are irrelevant with respect to the issue of liability.

Mr. Tadlock testified that he discovered the defective "hot spot" on one of the connectors at the end of his shift prior to the accident and that he discussed this with Mr. Foster. Since the following days were maintenance days, Mr. Foster asked him to work the day of the accident in order to repair the defective connector. Thus, it seems clear to me that Mr. Foster was aware of the fact that work was to be done at the substation in question, and in fact, he instructed Mr. Tadlock to deenergize the substation primary circuit switch feeding power to the top connectors.

James Dickey, Mr. May's fellow worker, testified that Mr. May decided to climb the substation structure in order to survey the work which had to be accomplished, and at that point in time no supervisory employees were at the scene. Mr. May climbed to the top of the transformer and was standing on the circuit breakers when chief electrician Harold Jones and electrician Rex Tadlock arrived on the scene. While Mr. May was on the structure, Mr. Dickey, Mr. Jones, and Mr. Tadlock were discussing the work to be performed. While these discussions were taking place, electrical superintendent Foster drove up in his truck and joined in on the discussion. At that point in time, Mr. Dickey was unaware of what Mr. May was doing, but when he heard a "crackling sound," everyone turned and observed Mr. May "on the hot circuit." Mr. Dickey assumed that Mr. May had climbed up further to the top of the grid cage itself and had positioned himself on the angle iron beneath the connectors. Mr. Dickey estimated that the accident occurred within 5 minutes, and possibly less, of Mr. Foster's arrival (Tr. 44). Mr. Dickey and Mr. Foster confirmed that Mr. Jones and Mr. Tadlock were not company supervisors.

Mr. Tadlock testified that on the morning of the accident Mr. Foster was aware of the fact that he, Mr. May,

Mr. Dickey, and Mr. Jones were going to work at the substation. Rather than knocking out all of the mine power, Mr. Foster suggested that they cut the power only from the primary substation switch where they would be working (Tr. 168-169). Mr. Tadlock did not actually determine whether all the circuits had been in fact deenergized by Mr. May and Mr. Dickey before he arrived at the scene, and he simply asked them whether the power was off (Tr. 183). When Mr. Foster arrived, he simply asked whether the power was off, and Mr. Tadlock believed that it was reasonable for Mr. Foster to assume that the power to all circuits had been shut down (Tr. 171-172). Mr. Dickey confirmed that Mr. Foster did not specifically ask whether the power to all of the circuits had been shut off, but simply asked whether the power was off (Tr. 183). Mr. Dickey admitted that he and Mr. May cut the power from only the first circuit because they suspected that it was the source of the problem. Since Mr. Dickey believed that Mr. May was simply going to observe the suspected trouble area, the live connectors adjacent to the suspected defective one were not deenergized, and Mr. Dickey stated that in hindsight, Mr. May apparently forgot that only one circuit had been deenergized (Tr. 187).

While it is true that Mr. May had already climbed the structure when Mr. Foster arrived on the scene, and that the accident occurred within minutes of his arrival, the respondent's suggestion that Mr. Foster had no time to react or to conduct a thorough investigation is rejected.

Mr. Foster admitted that when he arrived at the substation he observed Mr. May on the structure, and that at the time he (Foster) was aware of the fact that Mr. May was in violation of the proper safety procedures by not using the truck bucket (Tr. 131, 144). Mr. Foster saw no ladder present, and he confirmed that he engaged in a conversation with Mr. Dickey, Mr. Jones, and Mr. Tadlock concerning the work to be performed, and that he also spoke with Mr. May. Mr. Foster confirmed that from his position on top of the structure, Mr. May could hear the conversation taking place and in fact joined in on the conversation among the group who were on the ground (Tr. 143). Mr. Foster also stated that at one time he observed Mr. May moving along the I-beam in the direction of the connectors (Tr. 102-103), and that he also observed him with his arm over an overhead beam and leaning back, and that Mr. May was either engaged in conversation with the group of simply looking back (Tr. 153).

Mr. Foster conceded that had Mr. May used the truck bucket he would have had more freedom to maneuver about and

would not have had any need to place his hand over the contactor beam to support himself, and he would have had both hands free (Tr. 152). Although Mr. Foster stated that he was not concerned that Mr. May would be seriously injured if he fell from the structure, he did not rule out the possibility of a fall. As a matter of fact, he testified that the reason he did not order Mr. May down from the structure when he first observed him was that he did not want to upset him or make him nervous. Mr. Foster stated "if I'd said something, he might have fell; I might have contributed to him falling by jumping on him right there" (Tr. 131). Mr. Foster also believed that Mr. May would not have been seriously injured in a fall because he was not that far up the structure and that in the event of a fall Mr. May would probably have struck a part of the structure rather than falling straight to the ground (Tr. 132).

After careful review of the testimony and evidence adduced in this case, including a review of the photographic exhibits of the structure, I conclude and find that by climbing the structure and positioning himself on the I-beam, Mr. May placed himself in a dangerous position. By positioning himself on the structure without the use of a bucket or safety ladder, he placed himself in danger of falling. I also conclude and find that by failing to completely deenergize the entire substation and connector circuit breakers before climbing the structure, Mr. May placed himself in a hazardous position of being electrocuted in the event he contacted a live connector. While it may be true that the use of the bucket would not have prevented the electrocution which did occur, I believe it is reasonable to conclude that the use of the bucket would have substantially lessened the chances of Mr. May contacting the live connector. Had he been in the bucket, it would not have been necessary for him to hold on to the beam on which the connectors were located, nor would it have been necessary for him to place his hands and shoulders between the live connectors to keep his balance or to prevent his falling from the beam on which he was standing.

The respondent's suggestion that Mr. Foster did not have enough time to react to the situation when he first arrived at the scene of the accident and that Mr. Foster was afraid to chastise Mr. May for fear of upsetting him is rejected. On the facts here presented, I conclude and find that Mr. Foster had ample time to assess the situation and immediately order Mr. May down from the structure. Mr. Foster had prior knowledge that work was required at the substation. After his arrival, he joined in on the conversation with the

work crew, including Mr. May. He observed Mr. May moving about on the I-beam while the conversation was taking place, and he knew that Mr. May was in violation of at least one company safety rule. Under these circumstances, I believe that a reasonably responsible superivisor would have immediately ordered Mr. May off the structure.

I reject any suggestion that Mr. Foster's arrival and the accident took place simultaneously, or that Mr. Foster had no time to react. Given the conversations which took place, and Mr. May's movements while on the I-beam, in full view of Mr. Foster, I believe that Mr. Foster had a duty to order Mr. May down immediately. Since the normal conversational tone used by Mr. Foster during his discussion with the crew and Mr. May apparently did not upset Mr. May, I reject any suggestion that a directive by Mr. Foster in his normal tone of voice would have upset Mr. May to the point of causing him to fall. It is just as reasonable to conclude that had Mr. Foster ordered Mr. May down when he first arrived at the scene and before engaging in conversation with the crew, Mr. May would not have had the opportunity to maneuver down the beam on which he was standing, or to position himself dangerously close to the live connectors.

Respondent's suggestion that Mr. Foster could not have realized that only one circuit had been deenergized is also rejected. Mr. Foster had specifically instructed Mr. Tadlock to deenergize all of the circuits, and when he arrived at the scene he assumed that this was done, and he simply accepted the word of those at the scene that the power was off. However, Mr. Dickey knew that all of the circuits were not deenergized, and Mr. Tadlock did not specifically determine whether or not this had been done before Mr. Foster's arrival. Although Mr. Foster had previously instructed Mr. Tadlock to cut the power from all of the circuits, he did not specifically ask whether this had been done, nor did he personally verify that this had been done (Tr. 155-156). Although he could have determined that all circuits had been locked out by simply observing the positioning of the cabinet handles, he did not look at or observe the handles until after the accident occurred (Tr. 157). Under the circumstances, I believe that Mr. Foster acted less than reasonably when he accepted the word of those assembled at the scene that the power was off. To the contrary, I conclude that a reasonable and prudent person in Mr. Foster's position would have personally verified that all circuits were deenergized. On the facts here presented, I cannot conclude that Mr. Foster had to conduct any extensive or thorough investigation to ascertain that his instructions to Mr. Tadlock had been carried out. All

that was required was a specific inquiry by Mr. Foster, or a visual observation of the cabinet handles.

On the facts of this case, I conclude and find that section 55.11-1 was properly applied to Mr. May's situation. The failure by Mr. May to avail himself of the truck bucket placed him in a precarious position approximately 15 feet off the ground, and by positioning himself on the I-beam and maneuvering about without the use of the bucket or a safety line, in full view of a supervisor, Mr. May exposed himself to a danger of falling. The fact that he may not have fallen completely to the ground is irrelevant. Further, the fact that Mr. May had the bucket available for his use before he climbed the structure is no defense to the violation. Once Mr. May climbed the structure and exposed himself to a danger of falling, superintendent Foster had a duty to insure that he obtain a safety line or use the bucket. By failing to do this, I conclude that Mr. Foster acted less than a reasonably prudent superintendent would act under the circumstances.

On the facts of this case, I also conclude and find that it was not unreasonable for MSHA to rely on the fact that all of the circuits were not deenergized to support a violation of section 55.11-1. I conclude that the failure by the respondent to insure that all of the circuits were deenergized provided Mr. May with something less than a safe means of access to his work location, and that a safe means of access was not maintained while Mr. May was on the I-beam maneuvering himself in such a position as to enable him to evaluate the work which he had to perform to repair the defective connector. By failing to personally verify that all of the power was off, I believe that Mr. Foster acted less than a reasonably prudent superintendent would act under the circumstances.

In view of the foregoing findings and conclusions, the citation IS AFFIRMED.

History of Prior Violations

Exhibit P-4, is a computer print-out listing the respondent's mine civil penalty assessment record for the period November 19, 1982 through November 18, 1984. That record reflects that the respondent paid civil penalty assessments for 12 citations, none of which are for violations of section 55.11-1. For an operation of its size, I conclude that the respondent has a good compliance record, and I have taken this into account in assessing the civil penalty for the citation in question.

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

I conclude that the respondent's Big Four Mine was a moderately sized phosphate operation, and take note of the fact that the mine has been closed since October, 1984. Respondent has stipulated that the proposed civil penalty assessment will not adversely affect its ability to continue in business. Under the circumstances, I conclude that the civil penalty assessment I have imposed will not adversely affect the respondent's ability to continue in business.

Negligence

I conclude that the violation resulted from the respondent's failure to take reasonable care to insure compliance with the safe access requirements of section 55.11-1, and that this failure on its part constitutes ordinary negligence. As stated earlier in my findings and conclusions, superintendent Foster had a duty to insure safe access to Mr. May's work location, and Mr. Foster acted less than a reasonably prudent superintendent would act under the circumstances. In making this negligence finding, I have taken into consideration Mr. May's unexplained conduct in putting himself in such a hazardous position by failing to use the truck bucket which was readily available for his use. I have also taken into account the conduct of Mr. May, as well as his fellow-worker Dickey, in failing to completely deenergize the connector circuits before attempting to "troubleshoot" or perform work on the suspected defective connector. I have also considered these factors in mitigating the civil penalty assessment that I have made for the violation.

I have taken into account the respondent's arguments concerning its safety work rules, and the fact that Mr. May received safety training. Mr. Foster quoted from a portion of the respondent's Employee's Accident Prevention Manual, exhibit R-5, pg. 67, which reads as follows (Tr. 112): "One of the most hazardous parts of your job in working above ground; therefor, always use a good ladder or staging that is properly set up. Never use makeshift arrangements."

Mr. Foster stated that the quoted work rule addresses the situation presented in this case, but I take note of the fact that the work rules are silent as to the use of a truck bucket, and aside from the quoted reference by Mr. Foster, the shop work rules appearing on page 68 require the use of

non-conductive ladders for electrical work, and caution against an employee contacting ground wires or other attachments having ground potential.

Gravity

I conclude and find that the failure by the respondent to insure safe access to Mr. May's work location constituted a serious violation of the cited standard. Although Mr. May's conduct contributed to his own demise, I conclude and find that the failure to insure compliance with the standard was also a contributing factor to the accident.

Good Faith Compliance

The violation was abated after the respondent conducted safety meetings with all of its electrical personnel and discussed in detail safe work practices. I conclude that the violation was abated in good faith.

Significant and Substantial Violation

I agree with MSHA's posthearing proposed arguments that the violation in this case was significant and substantial (S&S). The violation resulted in a fatal accident, and I adopt as my finding and conclusion MSHA's arguments that the facts here establish that there was a reasonable likelihood that the electrician climbing the substation to repair the faulty connector could have received injuries from a fall or electrocution of a "reasonably serious nature." Although the facts establish that a fall did not result in the electrician's death, it has been established that he was electrocuted. Accordingly, the inspector's S&S finding IS AFFIRMED.

Penalty Assessment

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 a civil penalty assessment in the amount of $2,500 is appropriate and reasonable for the section 104(a) Citation No. 2382719, issued on August 28, 1984.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $2,500 for the violation in question, and payment

is to be made to MSHA 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

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DEC 12 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF F. FREDERICK PANTUSO, JR., Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 84-193-D
	:	MSHA Case No. HOPE CD-83-33
	:	No. 28 Mine
v.	:	
CEDAR COAL COMPANY, Respondent	:	

DECISION

Counsel: 1/ Covette Rooney, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Complainant;
Joseph M. Price, Esq., Robinson & McElwee, Charleston, West Virginia, for Respondent.

Before: Judge Steffey

Explanation of the Record

The complaint in this proceeding was filed on April 26, 1984, by counsel for the Secretary of Labor pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). A nearly identical complaint was filed on September 6, 1983, before the West Virginia Coal Mine Safety Board of Appeals. A 9-day hearing before the WV Board was held on October 11, 24, 26, 27, 29, November 16, 17, 21, and December 2, 1983, resulting in 1,116 pages of transcript and 36 exhibits, of which 17 were

1/ I have used the term "counsel" above, instead of the customary term "appearances", because I am deciding this case on the basis of a record which resulted from 9 days of hearing before the West Virginia Coal Mine Safety Board of Appeals. Ms. Rooney did not appear before that Board and no hearing has been held before me. An attorney named Roger D. Forman appeared before the WV Board on behalf of Mr. Pantuso. Mr. Price appeared before the WV Board on behalf of Cedar Coal Company and he also represents Cedar in this case. Mr. Forman is not involved in representing Mr. Pantuso in this proceeding.

marked as complainant's 2/ exhibits, 12 were marked as respondent's exhibits, and 7 were marked as the Board's exhibits. The Board also received in evidence a statement by Ed Ramsey, a senior pit foreman, but the Board did not give the statement a specific exhibit number (Tr. 436-437). The Board excluded Complainant's Exhibit 5 and it does not exist in the copy of the record which is before me (Tr. 280; 803). The Board reserved Board Exhibit No. 2 (Tr. 650) for the purpose of receiving in evidence a miner's manual which was to be supplied by witness Gary Browning, but that exhibit was never thereafter discussed and there is not a Board Exhibit No. 2 in the copy of the record supplied to me.

The person or persons who transcribed the record prepared neither an index of exhibits nor an index of witnesses. Moreover, the transcript was not bound in folders and consists of a 5-inch stack of transcript pages which must be handled like reams of paper which one is stacking in a duplicating machine. For the Commission's convenience, in the event a petition for discretionary review is granted, an index of the witnesses is given below:

Witnesses	Transcript Pages
Robert H. Bess, UMWA Field Representative ...	19 to 60
William Bolts Willis, UMWA Safety Representative	60 to 95
Patsy Pauley, Security Guard	95 to 99
Fortunato Frederick Pantuso, Drill Helper ...	108 to 236
Lester Kincaid, UMWA Inspector	243 to 269
Richard Brown, West Virginia Surface Mine Inspector	270 to 305
Billy J. Christian, Loader Operator	306 to 311
Robert DeWeese, Dozer Operator	311 to 327
Gary Browning, Drill Operator	328 to 354; 633 to 719
Ed Ramsey, Senior Pit Foreman	372 to 486; 490 to 494
Charles Gordan Wiseman, WV Surface Mine Inspector	495 to 557
William Lane, Mechanic and Mine Committeeman	558 to 579
Jerome Lee Workman, Jr., Core Drill Crew Foreman	602 to 629
Darlene Harmon, Secretary	721 to 726

2/ They are actually marked as "Petitioner's" exhibits, but I am referring to them as "Complainant's" exhibits in order to be consistent with the terminology used in our proceedings.

Harper C. Evans, Surface Mining Engineer	727 to 780
Emory Ray Neely, Security Officer	782 to 791
James Steven Mink, Safety Inspector for Cedar Coal	794 to 883
Burl Allan Holbrook, Senior Pit Foreman	884 to 948
Allan E. Tackett, Senior Pit Foreman	949 to 1002
Leonard Acree, Grader Operator	1003 to 1008
Jerry Wesley Deems, Personnel Manager	1009 to 1018
Meredith E. Kirk, Manager of Surface Mines ..	1020 to 1072
William Ray Frame, Maintenance Foreman	1073 to 1080

It should also be noted that Respondent's Exhibit 3 is a mine map which was the subject of testimony by many of the witnesses. The copy of R Exhibit 3 submitted with my copy of the record was not reproduced so as to show the colors of markings made by some witnesses. The original copy of R Exhibit 3 had an access road to a drill bench marked in yellow, whereas the copy of R Exhibit 3 submitted to me shows the access road in purple. A great deal of the testimony refers to the "left" bench or pit and to the "right" bench or pit. The Chairman of the WV Board aptly described the left bench or pit as resembling a snake and described the right bench or pit as resembling a rock (Tr. 733). Therefore, some of the transcript shows adoption of the Chairman's description of the left bench or pit and refers to it as the "snake pit". Nearly all of the testimony is related to events which occurred in the left pit.

A final word of explanation about the exhibits should be made. Inspector Wiseman and witness Bess made some photographs. Those photographs were reproduced for my copy of the record simply by using the duplicating machine for that purpose. Even the original photographs were described by the witnesses as being of poor quality (Tr. 277; 772; 1036). Therefore, it is not surprising that the copies of those photographs provided as a part of the record before me are absolutely worthless and the considerable amount of testimony related to them is likewise worthless. Some photographs were marked as Board Exhibit 1A, etc., some were marked as Exhibit 14A, etc., and others were marked as Exhibit 15. I have physically placed them in the manila folders marked "Board's Exhibits", and "Petitioner's Exhibits" but they were not marked with any exhibit numbers when I received the record and it is impossible to determine from the descriptions in the record which picture any witness is talking about on any occasion. Therefore, for the aforesaid reasons, I find that the photographs are useless for making any findings of fact in this proceeding.

Use of the Above-Described Record for Rendering the Decision in This Proceeding

After I had issued a prehearing order on July 3, 1984, I received a conference call on July 27, 1984, from counsel for the parties explaining that Pantuso had initiated four different kinds of proceedings against Cedar involving four different agencies or courts. At the time of the conference call, a decision had been rendered in only one of the four proceedings and that was an arbitration decision which was favorable to Cedar except that the arbitrator held that a 90-day suspension, rather than discharge, was a reasonable disciplinary action (C Exh. 2). At the time of the conference call, the hearing before the WV Board had been completed and had been recorded on 67 cassettes, but no transcript of that hearing had yet been made. Therefore, the parties requested that they be permitted to examine the transcript of the hearing held before the Board as soon as it could be obtained with the possibility that they would be able to enter into some stipulations which might avoid the holding of an additional hearing before me. I granted the parties an extension to January 15, 1985, within which to obtain and examine the transcript of the hearing held before the WV Board.

On January 18, 1985, counsel for the parties placed another call with me in which it was explained that the transcript of the hearing before the WV Board did not become available until the middle of January and that an additional 60-day extension of time was needed for the Secretary's counsel to examine the lengthy transcript which had just become available. I then granted a further extension of time to April 1, 1985.

Thereafter, I received a copy of a letter written on April 11, 1985, to the Secretary's counsel indicating that the parties had been unable to agree upon any stipulations and had decided to submit the case to me for decision based upon the entire record before the WV Board. Although counsel for Cedar had requested that a copy of the record be made for both me and the Secretary's counsel, only a copy for the Secretary's counsel was made and it was not until I wrote a letter to counsel for the parties on July 25, 1985, that they became aware of the fact that the Board had not yet provided me with a copy of the record, even though the Secretary's counsel had received a copy in early June 1985. A copy of the record was finally mailed to me on August 27, 1985.

On that same day, August 27, 1985, I issued an order outlining the matters to be discussed in the parties' briefs

and providing for simultaneous initial and reply briefs to be mailed on October 11, 1985, and October 31, 1985. Thereafter, I issued on October 4, 1985, an order granting a request for extension of initial and reply briefing dates to November 12, and 29, 1985.

The parties have agreed to have me decide the issues in this case entirely on the basis of the record resulting from the hearing held before the WV Board. In one of the conference calls, I suggested to counsel that it might be unwise for me to try to decide a complicated case based on a record before another agency because it would deprive me of the opportunity to observe the demeanor of the witnesses for determining credibility and would prevent me from being able to ask any clarifying questions. My reluctance to agree with their decision to use the WV Board's record was overcome when counsel pointed out to me that a hearing before me would be associated with about 5 weeks of hearing because each counsel would attempt to test the credibility of nearly all witnesses by use of their testimony previously given before the WV Board. Therefore, I have agreed to use the record before the WV Board to decide the issues in this proceeding. Much of my decision rests on a finding that Pantuso and his primary supporting witness, Browning, gave testimony which must be greatly discounted as being incredible. Since my credibility findings are not accompanied by an opportunity to observe the demeanor of the witnesses, I recognize that the Commission, if it is so inclined, could, upon review, disagree with my credibility findings, although I have been analyzing transcripts of hearings since 1956 and feel that I am relatively skilled in that endeavor.

Briefs

Counsel for Pantuso filed her initial and reply briefs on November 12 and November 29, 1985, respectively. Counsel for Cedar filed his initial and reply briefs on November 14 and November 29, 1985, respectively. Both counsel complied with my order of August 27, 1985, by discussing the criteria which the Commission uses in determining whether a violation of section 105(c)(1) of the Act has occurred. In Jack E. Gravely v. Ranger Fuel Corp., 6 FMSHRC 799, 802 (1984), the Commission restated those criteria as follows:

> Under the analytical guidelines we established in Secretary on behalf of Pasula v. Consolidation Coal Corp., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Corp. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981),

> a prima facie case of discrimination is established if a miner proves by a preponderance of the evidence (1) that he engaged in protected activity and (2) that some adverse action against him was motivated in any part by that protected activity. If a prima facie case is established, the operator may defend affirmatively by proving that the miner would have been subject to the adverse action in any event because of his unprotected conduct alone. The Supreme Court recently approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., ___ U.S. ___, 76 L.Ed 2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

Findings of Fact

On the basis of a detailed and extensive analysis of the testimony in this proceeding, I find that the credible evidence establishes the following essential facts. My reasons for rejecting Pantuso's and Browning's version of the statements which occurred on September 1, 1983, at the time Pantuso was suspended subject to discharge are explained in considerable detail in the portion of this decision which hereafter appears under the heading of "Consideration of the Parties' Arguments".

1. Fortunato Frederick Pantuso, the complainant in this proceeding, was a helper to the operator of a surface drill at the No. 28 Mine of Cedar Coal Company (Tr. 108). Cedar, at the time of Pantuso's discharge, was involved in the production of coal which entered or affected interstate commerce and was, therefore, subject to the Federal Coal Mine Health and Safety Act of 1977 and to the regulations promulgated thereunder. Jurisdiction is alleged in paragraphs 3 and 4 of Pantuso's complaint and admitted in Cedar's answer to the complaint.

2. Pantuso was a helper for Gary Browning who operated the drill in the left pit for the period from August 22 to September 1, 1983 (Tr. 111; 328-329). Pantuso had worked for Cedar for about 7 years and he had been a safety committeeman for Local 1766, UMWA, for about 2 or 3 years prior to his discharge and had been an alternate safety committeeman for several years prior to that (Tr. 108-109). Browning was

an alternate safety committeeman and both Pantuso and Browning were very active in reporting alleged safety violations to Cedar, UMWA, the West Virginia Department of Mines, and the Mine Safety and Health Administration (Tr. 122; 126-127; 152-158; 329; 338-339; 341-342).

3. Nearly all of the testimony in this proceeding deals with events which occurred in the left and right pits of Cut No. 28. Pantuso and Browning, however, worked only on the left drill bench during the 2 weeks preceding Pantuso's discharge. The work in Cut No. 28 was under the supervision of three senior pit foremen, Burl Holbrook, Ed Ramsey, and Allan Tackett. All three pit foremen were equal in rank and they shared responsibility for all operations in Cut No. 28, subject to the overall supervision of Meredith Kirk who was manager of surface mines. While the senior pit foremen were equal in rank, they had a loose division of work responsibility. Since Holbrook had been in charge of opening Cut No. 28, he worked on the topmost productive area in Cut No. 28 and assigned the work each day from a portal which was normally referred to as Burl's (or Holbrook's) portal (Tr. 372-374; 884; 891; 1040; 1050). Ramsey had been working for Cedar longer than Holbrook and Tackett and Kirk considered Ramsey to be his liaison man for directing the work in Cut No. 28 (Tr. 1049). Tackett had some blood clots in his legs and was off from work from August 9 to August 29 and reported back to work on August 30 (Tr. 950). Since Tackett had not worked in Cut No. 28, he performed various types of supervisory duties, depending upon the circumstances existing at any particular time. Ramsey had primary responsibility for the so-called mid-level producing area and shared with Holbrook responsibility for directing work in the utmost bottom pit of Cut No. 28 (Tr. 373-374).

4. All supervisory and union employees working in Cut No. 28 reported for work by passing through the Chelyan Gate where a guard wrote on a form the exact time when each employee's vehicle passed through the gate (Tr. 95-97). The supervisory personnel drove company vehicles which were numbered and union employees drove their own vehicles which had affixed to them an employee sticker number assigned by Cedar. The guard at the gate had a list of all the numbers assigned to Cedar's vehicles and a list of numbers assigned to union employees' vehicles (Tr. 782-785). It is possible to determine exactly when any person reported for work by ascertaining that person's vehicle number and noting his or her time of passing through the Chelyan Gate (Tr. 786; R Exh. 10). There is a sign at the gate which directs all vehicles to stop so that the vehicle numbers may be noted by the guard, but a complete stop is not required provided the driver of the vehicle slows down enough for the guard to

ascertain the number of the vehicle as it passes through the gate (Tr. 789). Pantuso refused to slow down sufficiently for the guard to obtain his vehicle number so that it was necessary for the guard to report Pantuso to the head security guard who in turn reported the matter to Cedar's personnel manager, Deems (Tr. 788). Deems reported the problem first to Kirk and then requested the assistance of UMWA's field representative, Bess, who succeeded in getting Pantuso to slow down sufficiently for the guard to obtain his vehicle number as he entered the Chelyan Gate (Tr. 1010).

5. After the employees working in Cut No. 28 enter the Chelyan Gate, they have to drive 9 miles to reach the portal where they are assigned to their specific jobs for the day (Tr. 1011). There is a parking lot at the portal where the employees may leave their personal vehicles and be transported in a vehicle belonging to Cedar to their specific working sites (Tr. 954). Employees are allowed to drive their personal vehicles to their working sites if the roads over which they travel are considered free enough from mud and rough places to permit them to reach their working sites without experiencing damage to their vehicles (Tr. 310-311; 395-396; 485; 895; 953; 1030). One miner's personal vehicle was damaged by a rock going through a cab window (Tr. 460). On another occasion, a dozer operator was traveling with his blade in a raised position up a ramp and failed to see an employee's vehicle which had been driven to his working site. The result was that the dozer did serious damage to the vehicle (Tr. 484). After that, Cedar adopted a policy of allowing employees to drive their personal vehicles to their working sites only if the supervisors approved it. Kirk took the position that the supervisor, by approving an employee's practice of driving to his working site, was responsible for any damage which that vehicle might incur (Tr. 1062-1063).

6. Although Pantuso liked to drive his Jeep to the left drilling bench where he was working (Tr. 134), he had not always driven it to the left bench (Tr. 120), and he had previously filed a grievance on behalf of himself and others in which he sought to be reimbursed for damage caused to his vehicle by driving it to work over rough roads (Tr. 154; 965; C Exh. 10F). His vehicle was inspected for damages by the security officer (Tr. 789) and Pantuso admitted that his Jeep was not damaged (Tr. 159). He also requested in his grievance that Cedar provide him with a rental car for the purpose of driving to work in the event his personal vehicle should be damaged and have to be taken to a garage for repair (Tr. 161). Since Cedar was required by article XXI(a) of the NBCWA to provide all employees with transportation from the portal to their working sites (Tr. 1012;

C Exh. 13), management was reluctant to allow Pantuso to drive his Jeep to the left bench when the roads were in a rough or muddy condition because of the grievance he had filed seeking damages if his vehicle should be damaged by driving it to his working site. Water came out of the mountain and ran in three places across the access road which Pantuso had to travel in driving his Jeep to the left drilling bench (Tr. 166; 333; 952). Pantuso constantly complained about the muddy condition of the road leading to the left bench. He admitted that even though the company often used a dozer or grader to scrape the road into a smooth condition, the road reverted to its previous muddy and rutted condition as soon as one or two vehicles passed over it (Tr. 196).

7. The significant events preceding Pantuso's discharge on September 1, 1983, occurred on the 2 days preceding his discharge, that is, August 30 and 31, 1983. Pantuso and Browning, the drill operator, rode to work together in Pantuso's Jeep (Tr. 351). On August 30 they were late for work as usual (Tr. 167), but Pantuso explained that "[T]he reason we do get to work about every day late is because the company doesn't require us to go to work until daylight, that's why we have always gotten there pretty late and nothing was ever said" (Tr. 133). While the lights on the drill to which Pantuso was assigned had plenty of illumination to enable him and Browning to see the drill itself and operate the drill, its lights did not shine high enough upon the embankment near the drilling bench to permit them to see the exact condition of the 15-foot highwall and embankment until about 6:45 or 7 a.m. when sufficient daylight became available to make the condition of the embankment readily observable (Tr. 133; 236; 335; 951).

8. On August 30 it was foggy early in the morning and Pantuso and Browning sat in the Jeep at the portal until about 6:45 a.m. before even attempting to drive to the left drilling bench (Tr. 127; 951). Their excuse was that it was too foggy to see to drive the short distance from the portal to the drilling bench despite the fact that they had just driven 9 miles in dark and foggy conditions from the Chelyan Gate to the portal (Tr. 167; 1011). They complained to both Tackett and Ramsey about the muddy and rough condition of the road which they had to travel to get to the drilling bench (Tr. 127; 410). Toward the end of the shift they observed a truck driver named Harold Hall who had returned from the hospital after getting an examination to determine whether he had suffered any ill effects from having been exposed to fumes in the cab of the R-50 Euclid which he had been operating (Tr. 128; 1042). Hall was sent to the hospital twice but the examinations at the hospital showed that he

had nothing discernibly wrong with him (Tr. 853). Pantuso asked to see the preshift report which Hall had made on his truck that day and Pantuso became involved in an argument with Holbrook and Tackett over Pantuso's claim that the senior pit foremen were required to pick up the preshift reports each morning before any of the equipment was put into service. Holbrook expressed doubt as to Pantuso's claims, but after he had read the applicable West Virginia regulations on the subject, he found that Pantuso was correct (Tr. 128; 251; 333-335; 338-339; 413-414; 635). On the evening of August 30 Pantuso called Bolts Willis, a UMWA safety representative, at home to advise him that he was coming by his office the next day to report some alleged safety violations so that Willis could request that the alleged violations be checked by a West Virginia inspector (Tr. 132).

9. It is customary for Kirk to have a meeting of all foremen on every other Tuesday and one of those meetings was held on Tuesday, August 30 (Tr. 415; 884; 953). Among the things discussed at the meeting was the fact that several employees, including Pantuso and Browning, were reporting late for work (Tr. 953). Kirk ordered the foremen to notify all employees that if they continued that practice, they would not be allowed to work on any day they were late (Tr. 133; 636; 953). Another matter discussed at the meeting was the fact that complaints had been received about the rough condition of the access road to the left bench in Cut No. 28 and Kirk recalled that Pantuso had filed a grievance on behalf of himself and others requesting payment for damages inflicted to vehicles as a result of driving them to their work sites (Tr. 154; 965; C Exh. 10F). Therefore, Kirk ordered the foremen to transport miners to their work sites if road conditions might damage their vehicles (Tr. 1023).

10. On Wednesday, August 31, Holbrook took some miners to their working places. Since Pantuso and Browning had not yet reported for work at the portal, he asked Tackett to wait for them at the portal and take them to their working place on the left bench in the truck which had been assigned to Tackett by Cedar. When Pantuso and Browning arrived, Tackett first advised them that if they were late again they would not be allowed to work (Tr. 954). He then asked them to get into his truck and he would take them to the left bench. Pantuso refused to get into Tackett's truck and stated that he would drive his Jeep to the left bench. Tackett then gave Pantuso a direct order to get into his truck, but Pantuso again refused. Tackett thereafter gave him a second direct order to get in his truck and Pantuso refused for a second time. A mine committeeman named William Lane happened to overhear the orders and refusals and asked Tackett

to let him talk to Pantuso privately. In a private conversation, Lane explained to Pantuso that it was advisable for him to obey the direct order and then file a grievance alleging discriminatory treatment because Cedar allowed some miners to drive their own vehicles to their working places. Pantuso agreed to follow Lane's advice and he and Browning got into the truck with Tackett, but Pantuso filed a grievance alleging discriminatory treatment by Cedar (Tr. 134; 559-560; 636).

11. On August 31, during the short ride with Tackett from the portal to the left bench, both Pantuso and Browning continued to make oral complaints. They noted that the access road was still rough and muddy. They requested that a light plant (generator) be provided on the bench to direct light on the embankment near the drill bench because they were being transported to the bench before it became daylight. They wanted to know if Tackett had preshifted his truck although it was one which Tackett drove back and forth to work and which was regularly inspected by the State of West Virginia. They objected to Cedar's failure to have berms even at places where drains were being installed. They also claimed that they had no way to communicate with the mine office in case of injury and contended that an ambulance would be unable to get to the bench in case of an emergency. They additionally wanted to know why Pantuso could not drive his Jeep to the left bench and Tackett explained that Cedar believed the rough and muddy road about which they were complaining might damage Pantuso's Jeep (Tr. 135-136; 171-173; 341-342; 636; 955-956).

12. When Pantuso and Browning preshifted their drill which had been brought to the left bench from another area, they enumerated a large number of items which needed routine maintenance and listed other items, some of which were already being repaired (Tr. 336-337; R Exh. 4). A mechanic named Frank Wright and his helper, Steve Donato, who was also a UMWA safety committeeman, came to the left bench and worked on the drill assigned to Pantuso and Browning for most of the day (Tr. 425; 636; 687; 957-958). Consequently, Pantuso and Browning had nothing to do but talk about alleged safety violations to their supervisors. One action taken by Browning was to wave for his foreman, Ramsey, to come to the bench. When Ramsey arrived, Browning asked him to transport him to a portable toilet which was located a short distance from the bench. Ramsey did so, but as soon as he had brought Browning back to the bench, Pantuso also asked to be taken to the toilet. Ramsey refused because he felt that they were deliberately harassing him. Even Pantuso admitted that the toilet was no more than a half mile

away, while Ramsey and Tackett said it was not more than 165 to 300 yards from the place where the drill was situated (Tr. 136; 168-169; 173; 425; 655-656; 963). In any event, Pantuso added to his list of complaints the failure of Cedar to provide a portable toilet on the left bench where he was working.

13. At various times during the day on August 31 Pantuso and Browning discussed alleged safety violations with Ramsey and Tackett. During one of the discussions, Pantuso stated that the material falling from the embankment and 15-foot highwall, along with the lack of a short-wave radio for communication, poor access road, failure to provide a light plant or generator on the bench, and lack of a portable toilet on the bench were grounds for a double withdrawal under article III(i) of the National Bituminous Coal Wage Agreement (NBCWA) 3/ (Tr. 136). A "double withdrawal", according to Pantuso, means that "as a safety committeeman, I have the power to danger that area off and withdraw all the people out of that working area" (Tr. 137). Pantuso admitted that Ramsey never did reply to his claim that he could withdraw and he stated that he was "pretty sure [Ramsey] understood it" (Tr. 137). Browning likewise agreed that if Ramsey heard the alleged threat of a double withdrawal, he gave no response to it (Tr. 342-343).

14. On Thursday, September 1, 1983, Pantuso and Browning arrived at the portal about 5:55 a.m. (Tr. 142; 351). There are six steps leading into the trailer which constitutes the portal (Tr. 959). Pantuso was at the top of the steps (Tr. 142) and Browning was just inside the door of the portal when Ramsey started up the steps (Tr. 441; 643). Ramsey stated that Pantuso was going to be working with another drill operator, Charles Wiseman (also known as "Sug"),

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3/ "(1) No Employee will be required to work under conditions he has reasonable grounds to believe to be abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. When an Employee in good faith believes that he is being required to work under such conditions he shall immediately notify his supervisor of such belief and the specific conditions he believes exist. Unless there is a dispute between the Employee and management as to the existence of such condition, steps shall be taken immediately to correct or prevent exposure to such condition utilizing all necessary Employees, including the involved Employee." [Paragraphs 2 through 5 of article III(i) provide detailed procedures to be followed when there is a disagreement as to whether an imminent danger exists.]

that morning (Tr. 143; 959). Pantuso wanted to know why he was being switched to work as Wiseman's helper instead of Browning's and Ramsey explained to Pantuso that he had previously acted as Wiseman's helper and they had performed well together and that he believed it was desirable to assign him again to work with Wiseman (Tr. 442). Ramsey also stated that Pantuso would be transported to his working site, but Pantuso refused that suggestion, saying that he would drive his own Jeep (Tr. 960). Holbrook was inside the portal and heard Pantuso say that he would take his own Jeep. Since Holbrook had heard about Pantuso's refusal to ride with Tackett on the previous morning and had been critical of Tackett's handling of that refusal, Holbrook stated in no uncertain terms that Pantuso would be given a direct order to ride in a Cedar-owned vehicle to his working place (Tr. 886). It was then about 5:58 a.m., so Browning reminded Holbrook that he couldn't give direct orders yet as it was not starting time (Tr. 143; 648). Holbrook agreed and said that he would give Pantuso a direct order after he had held a safety meeting which had been postponed from the first part of the week because the generator for the portal had not been working (Tr. 441; 886).

15. It was necessary for Holbrook to ask the miners to be quiet while he conducted a safety meeting pertaining to the use of hard hats (Tr. 892). Browning observed that Holbrook was one of the worst offenders in that respect and stated that he ought to wear a hard hat while conducting a meeting on that subject (Tr. 352). Only 6 minutes were required for Holbrook to read the materials which had been prepared concerning hard hats. When Holbrook had finished his safety talk, he asked if there were any questions. No one responded. Browning then asked if there were any safety problems to be raised and no one replied to his question (Tr. 352; 960). At that point, Holbrook said to Pantuso that he was giving him a direct order to get in the truck with a foreman and be transported to his working site. Pantuso refused the order and stated that he would take his own Jeep. Holbrook gave Pantuso a second direct order to get in the truck and Pantuso refused that order also. By that time, Holbrook was clearly agitated and walked over to the top of the stairs and stated that he was giving Pantuso one more direct order to get in the truck with Tackett and be transported to his working place. When Pantuso refused that order also, Holbrook told him he was suspended subject to discharge and that he would be expected to attend a meeting about the matter at 8 a.m. in Kirk's office (Tr. 144; 353; 443; 887; 960).

16. Pantuso said that if he was no longer working for Cedar, he did not have to attend any meeting and Holbrook told him that he should get off Cedar's property until time for the meeting. Holbrook considered calling a security guard so as to have Pantuso removed from mine property but failed to follow up on that threat when he realized that no guard would be available at 6:10 a.m. (Tr. 353; 887; 960). The senior pit foremen then went about their supervisory duties and refused to discuss the suspension with any of the miners prior to the meeting which had been scheduled for 8 a.m. (Tr. 144; 353; 445; 887; 961).

17. Pantuso, Browning, Lane, and some other miners gathered outside Kirk's office in time for the 8 a.m. meeting, but Lane had called Bess, their UMWA field representative, and had advised Bess that Pantuso had been suspended for trying to withdraw himself and others under article III(i) of the NBCWA (Tr. 26; 247; 563). Bess had other commitments which prevented his being able to attend the meeting. Therefore, Bess called Lester Kincaid, a UMWA inspector, and asked him to attend the meeting. It was about 7 a.m. when Kincaid received the call from Bess. The short notice period made it impossible for Kincaid and some of Cedar's personnel to be in Kirk's office by 8 a.m. Consequently, Kirk went out of his office and advised Pantuso and the other miners waiting outside his office that the meeting would be delayed about a half hour. Browning told Kirk that there were always delays when they were on union time and Pantuso said that the meeting would not have been necessary if Cedar had taken care of its safety obligations. Kirk had turned to go back into his office and did not hear what had been said and asked that it be repeated. Pantuso repeated his statement and Kirk told Pantuso that he would have him removed from the property if he heard any more outbursts from him. In making that statement, Kirk shook his finger at Pantuso who stated that he would knock Kirk's nose off if Kirk didn't get his finger out of his face (Tr. 178). Pantuso advanced toward Kirk with sufficient indication of striking him to result in Browning's testifying "[A]t that time Bill Lane, Frank McCartney, and a couple of other guys grabbed [Pantuso] and moved him back and I stepped between them" (Tr. 355; 565; 888; 919; 1022). Kirk added to the reasons for Pantuso's discharge the fact that he had threatened to strike a supervisor (Tr. 1023; C Exh. 1).

18. The meeting scheduled for 8 a.m. did not start until about 8:45 a.m. Tackett and Holbrook stated at the meeting that Pantuso had been suspended solely for refusing to obey Holbrook's orders directing Pantuso to get into a truck owned by Cedar and be transported to his working site,

whereas Pantuso and Browning, much to Tackett's and Holbrook's surprise, claimed that Pantuso had objected to being driven to his working site because he had told Ramsey he would withdraw himself and everyone from working on the left bench until such time as the alleged dangerous conditions discussed with Ramsey on August 31 had been corrected. Pantuso and Browning, therefore, took the position that Holbrook had suspended Pantuso for refusing to work in a dangerous area and that Pantuso's refusal to get into the truck had to be sustained under article III(i) of the NBCWA (Tr. 148; 179; 262; 355; 935-936; 961-962; 1022; 1059-1060).

19. Pantuso, as noted in finding No. 8 above, went to see the UMWA safety representative, Bolts Willis, after work on August 31 (Tr. 64). Pantuso's complaints to Willis about the alleged unsafe highwall, lack of communications, muddy and rough access road, Workman's failure to preshift, lack of a light plant, failure to provide a portable toilet on the left bench, and fumes getting into the cabs of some trucks, were made the subject of a request for an inspection by the West Virginia Department of Mines (Tr. 141; 348). A West Virginia inspector named Gordan Wiseman came to Cut No. 28 on September 6, 1983, to check on the condition of the highwall in the left pit, but found no violations because no miners were working on the left bench except two dozer operators who were pushing spoil off the bench in the area where the alleged unsafe conditions existed (Tr. 497-500). Kirk advised Wiseman that it was his intent to make a safety bench at the bottom of the highwall once the loose materials then on the bench had been removed (Tr. 975; 1039-1041). That procedure was acceptable to Wiseman (Tr. 528).

20. Wiseman and another WV inspector, Richard Brown, returned on September 12, 1983, to check on the condition of the left bench and found that the 15-foot highwall (Tr. 317) about which Pantuso had complained in August now had become a 40-foot highwall instead of the 15-foot highwall which existed on September 1 when Pantuso was discharged (Tr. 518). The increased height of the highwall resulted from the dozer operators' having removed the loose materials which they were pushing when Wiseman was there on September 6 and 7, 1983 (Tr. 536; 777). Wiseman issued a withdrawal order on September 12 because Cedar had failed to erect danger signs along the portion of the 40-foot highwall above which all loose spoil had not been completely removed by the dozer operators (Tr. 536-538; C Exh. 4). A drill on the bench was in a working position, but Cedar's foreman, Tackett, at the beginning of the shift, had instructed the drill operator to stay at least 30 feet from the portion of the highwall where the imminent danger was

subsequently cited by Wiseman (Tr. 969). Wiseman agreed that the drill could be safely operated at the place where it was located (Tr. 523; 547). Inspector Brown also signed the order and he agreed that the order had been issued because of Cedar's failure to erect danger signs along the 200-foot dangerous area of the highwall and not for Cedar's having drilling equipment situated outside the area of imminent danger (Tr. 279; 287).

21. The 40-foot highwall which existed on September 12 made the possible falling of rock or dirt from the highwall at that time much more hazardous than rock falling from the 15-foot highwall which existed on September 1 when Pantuso was discharged (Tr. 1057; 1066). Pantuso conceded that all his complaints about Cedar's failure to provide him with a smooth access road, a light plant, a portable toilet, and communication facilities would not constitute an imminent danger justifying withdrawal if the left bench had not been threatened by a dribbling of loose rocks and dirt from the embankment above the 15-foot highwall which existed on September 1 (Tr. 199). The only unsafe aspect of the embankment at the time of Pantuso's discharge, however, consisted of a crack in the loose material in the embankment which had been pointed out to Pantuso by a dozer operator named DeWeese when he was cleaning the left bench on August 20 for the purpose of making the bench smooth for future drilling operations (Tr. 109; 148; 317; 380; 384). When Pantuso was discharged on September 1, the condition of the highwall had not changed from the way it looked on August 20 when the crack was first pointed out to Pantuso by DeWeese (Tr. 401; 403; 957-958; 1051-1066). Moreover, Ramsey had entered in the preshift book on August 19 that the loose material in the embankment should be kept under observation and his entries in the onshift and preshift reports of September 1 show that Ramsey still did not consider the loose materials on the embankment to be unsafe (Tr. 405; C Exhs. 12 and 12A). Therefore, the preponderance of the evidence does not support Pantuso's allegations that the condition of the highwall on September 1 warranted his taking the position that he had withdrawn himself and all other miners from working on the left bench at the time he was discharged on September 1 for refusing to obey Holbrook's order directing him to get into Cedar's truck and be transported to his working site.

Consideration of Parties' Arguments

As indicated on pages 5 and 6 above, the Commission has held that a complainant establishes a prima facie case of discrimination if he shows that he engaged in a protected activity and that some adverse action against him was motivated in any part by that protected activity. If a miner

succeeds in establishing a prima facie case, the operator may defend affirmatively by proving that the miner would have been subject to the adverse action in any event because of his unprotected conduct alone. Cedar's initial brief (p. 12) assumes, arguendo, that Pantuso's discharge was motivated in part by his protected activities, but claims that his complaint should be denied because Cedar's affirmative defense showed that Pantuso would have been discharged in any event because of his unprotected conduct of refusing to obey Holbrook's direct order to get in the truck with Tackett and threatening to knock Kirk's nose off (Finding Nos. 15 and 17 above).

If Pantuso's complaint could be sustained at all, it would have to be upheld on his claim that he refused to be transported to his working site on the morning of September 1, 1983, not because he wanted to take his own Jeep to his working site, but because the conditions which existed on the left bench on the morning of September 1 constituted an imminent danger which required him to withdraw himself and all other miners under article III(i) of the NBCWA (Finding No. 13, n. 3 above). One of the Commission's most detailed discussions of the grounds which constitute a basis for withdrawal under the Act appears in Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982). In that case, the Commission held that the miner's refusal to work must be based on a good-faith belief that hazardous conditions exist and that the unsafe conditions must be communicated to the operator at the time the refusal to work is made, or must be communicated "reasonably soon" thereafter. If Pantuso's and Browning's testimony could be believed, their testimony satisfied all the prerequisites of the rationale enunciated by the Commission in the Northern case. The primary job of a Commission judge, however, is the making of a detailed analysis of the record to determine whether a complainant's presentation is credible. My analysis of the record will hereinafter show that Pantuso's and Browning's testimony constitutes a complete fabrication unworthy of acceptance.

Pantuso's Complete Lack of Credibility

About 30 miners were present at the portal when Holbrook gave Pantuso orders to get in the truck with Tackett and be transported to his working site (Tr. 319). Yet only Pantuso's buddy, Browning, was willing to corroborate Pantuso's claim that he raised the defense that he was refusing to go to the working site because conditions there constituted an imminent danger. Even Browning and Pantuso failed to agree on the exact time when Pantuso raised that defense.

Pantuso testified unequivocally that he did not raise the defense of withdrawal before the safety meeting started at 6 a.m. (Tr. 215), whereas Browning testified that Pantuso did raise the defense of withdrawal prior to the commencement of the safety meeting (Tr. 643; 696).

The only miners, Christian and DeWeese, who were actually present at the safety meeting and who testified on Pantuso's behalf, other than Browning, claimed that both Holbrook and Pantuso were shouting at each other and making so much noise, they could not understand what was being said (Tr. 307; 318). DeWeese admitted on cross-examination that he was within 35 feet of two people shouting at each other and yet could not discern who was speaking or determine what the discussion was about (Tr. 319). All three foremen, Holbrook, Tackett, and Ramsey, were present and all three testified unequivocally that no issue of safety was ever raised until, to their surprise, Pantuso and Browning belatedly raised that issue at the time a meeting was held at 8 a.m. in Kirk's office (Tr. 445; 447; 893; 898; 961). While I am aware that the three foremen would naturally be inclined by self interest to support management's position that Pantuso was discharged for refusing to obey a foreman's direct order to get in a truck for transportation to his working site, the fact that 30 miners heard the discussion between Holbrook and Pantuso and only Browning was willing to support Pantuso's version of the shouting match makes Pantuso's version unacceptable, particularly when one considers the many other incredible aspects of Pantuso's and Browning's testimony.

Perhaps the single aspect of Pantuso's and Browning's fabrication which is least credible is their claim that they went to the left bench on the morning of September 1 and made a preliminary examination of the conditions so that they would be in a position to withdraw when it came time for them to go to their working site. They contrived that story because they knew that a question would be raised as to how they could claim, before even going to the left bench, that conditions there constituted an imminent danger requiring them to withdraw themselves and all other miners from reporting to work at that site. For the aforesaid reason, they testified that they had come in early on September 1 so as to have time to drive to the left bench and examine the conditions there to determine whether Cedar's management had corrected the hazardous conditions which they had reported to Ramsey before quitting time on the previous day, August 31 (Tr. 141; 351).

The guard at the Chelyan Gate entered Pantuso's and Browning's arrival time as 5:22 a.m. (Tr. 97). They claimed

that it was a distance of 3 or 4 miles from the gate to the place where they turned off the main road onto the access road leading to the left bench and that the driving time to that point was 10 minutes. That means that they would have reached the access road at 5:32 a.m. (Tr. 203). Pantuso claimed that he drove to the left bench, inspected it in the dark with the lights of his Jeep and was back on the main road within a period of from 7 to 10 minutes (Tr. 205-206). Browning testified that it would take 4 minutes to drive to the portal from the place where the access road joins the main road (Tr. 645). Browning also testified that it would take 4 or 5 minutes to drive from the main road to the left bench, 3 or 4 minutes to inspect the bench conditions, 3 or 4 minutes to drive back to the main road, and 4 minutes to drive to the portal, or a total of 14 minutes to complete the inspection of the left bench and drive to the portal from the site where their Jeep was located at 5:32 a.m. Using the longest times given by Pantuso would have placed him and Browning at the portal at 5:46 a.m., whereas he claims that they arrived at the portal at 5:55 a.m. Using Browning's longest times would have placed them at the portal at 5:50 a.m.

The above testimony would not have been as devastating as it was if it had not been for the fact that they had failed to think through the driving times prior to cross-examination and therefore tried to minimize the driving time more than they would have had to minimize it if they had actually made a preinspection of the left bench prior to the time they arrived at the portal on September 1. The devastating part of their testimony on cross-examination is that they had claimed in their direct testimony that the access road was so muddy and rough that they could not get through the mud without shifting into four-wheel drive (Tr. 124; 196; 342; 635). When it came to explaining how they could have made such a fast trip to the left bench and back, however, Pantuso said that the road was "pretty smooth" (Tr. 206), that he was able to drive over it in two-wheel drive, that he could drive at a speed of from 25 to 30 miles per hour (Tr. 207), and that he "didn't have no problems" (Tr. 208).

Pantuso testified that nothing had been done to the access road between August 31 and September 1 (Tr. 207). Yet he found that the road was miraculously "pretty smooth" the next morning and could be traveled at a speed of from 25 to 30 miles per hour without having to resort to four-wheel drive at all. One of the reasons that he claims he wanted to drive his own Jeep to the left bench, instead of riding in a Cedar-owned truck, was that he would not have a means of transportation off the bench in case of an emergency. He claimed that an ambulance would be unable to get to the left

bench because the access road was impassable (Tr. 172). Yet if the road was in as fine a condition as Pantuso found it to be on September 1, an ambulance would have had no trouble whatsoever in traveling over the road to get him if he or any other miner had been injured while working on the left bench.

Moreover, Pantuso had claimed on August 31 that he needed a light plant or generator to reflect light on the highwall because the lights on the drill did not shine on the highwall itself (Tr. 135). If, as Pantuso claimed, the lights from a Jeep permitted him to see the highwall "real clear" on the morning of September 1, it is extremely doubtful that he really needed a light plant to enable him to inspect the highwall. Pantuso had succeeded in getting the foremen to admit that the drill had to be preshifted and that the preshift report had to be picked up by a foreman before any actual drilling could be started (Tr. 900; 953). By the time the drill had been preshifted and the preshift report had been picked up, there would have been plenty of natural light to enable Pantuso to inspect the highwall and determine whether it exposed the miners to any hazardous conditions.

There was other testimony which controverted Pantuso's and Browning's claim that they had made a preinspection of the left bench before arriving at the portal on September 1. Ramsey, a senior pit foreman, came in the Chelyan Gate at 5:16 a.m. on September 1 and was on the left bench to do a preshift inspection about 5:30 a.m. on September 1. He testified that he did not see the lights of any other vehicle while he was there (Tr. 466-467). Since it was still dark and since both Pantuso and Browning testified that they were on the left bench at the same time Ramsey was there, it would have been impossible for them to have been there using the lights on the Jeep to inspect the highwall without having been seen by Ramsey and without their having seen Ramsey. Neither Pantuso nor Browning, however, mentioned having seen the lights of any other vehicle while on the left bench.

Pantuso and Browning both stated that Pantuso had stopped the Jeep in the vicinity of the intersection of the access road and the main road so that Browning could tie his shoes (Tr. 207; 642). I have ridden in many Jeeps on all sorts of roads and I have never seen a road so rough that I could not have tied my shoes without having the driver stop the Jeep for that purpose. Therefore, I wondered why they would have concocted such a farfetched reason for stopping the Jeep until I read the testimony of Frame, the maintenance foreman, who testified that he saw Pantuso's Jeep

parked near that intersection at 5:50 a.m. on September 1 (Tr. 1075-1076). I then realized that Pantuso and Browning were aware of the fact that someone else had seen them parked near the access road to the left bench on September 1 and they had to contrive some excuse for having been stopped at that location.

Another aspect of Frame's testimony was absolutely devastating to Pantuso's and Browning's claim that they had made a preinspection of the left bench. Frame stated that he was impressed by the fact that Pantuso's Jeep was very clean when he saw it parked near the access road at 5:50 a.m. on September 1. Frame also testified that he saw no mud on Pantuso's Jeep when he saw it parked at the portal about 5:56 a.m. and saw no mud on the Jeep when he again saw it parked outside Kirk's office about 8:30 a.m. (Tr. 1079-1080). Frame said that there was no way that Pantuso could have driven his Jeep on a two-way trip through the mud on the access road without having mud on it from one end to the other (Tr. 1077). All witnesses, including Pantuso and Browning, uniformly agreed that the access road was muddy because water ran across it in three places (Tr. 166; 333; 952).

Another aspect of Pantuso's testimony which shows lack of credibility is his statement that he could drive from the Chelyan Gate to the portal in 10 minutes (Tr. 170). Deems, the personnel manager, testified that he had measured the distance from the Chelyan Gate to the portal with the odometer on his vehicle and had found it to be 9 miles (Tr. 1011). He said that if he drove the distance faster than normal, he could do it in 13 minutes which would be an average of 42.8 miles per hour. To travel the distance in 10 minutes, as claimed by Pantuso, would amount to an average speed of 54.5 miles per hour. Pantuso's claim that a road located entirely on Cedar's mine property can be safely traveled at an average speed of 54.5 miles per hour is just another reason to doubt his credibility.

There are many other reasons for doubting Pantuso's credibility. In an effort to maximize the danger inherent in drilling on the left bench, Pantuso stated that Ramsey ordered him and Browning to drill some "dummy" holes near the 15-foot highwall. He used the word "dummy" to designate holes which would be drilled but not filled with explosives. The idea was that other holes drilled farther from the highwall would be shot, but the dummy holes would create a place for the earth to break far enough from the highwall to form a safety bench, that is, a place which would catch any rocks and dirt that might fall from the highwall and prevent such material from falling into the area where

miners were working (Tr. 113-114). Pantuso testified that the shot foreman then came in and filled the so-called dummy holes with explosives and shot them along with the other holes and destroyed the safety bench which would otherwise have been created (Tr. 121).

Browning and Ramsey, on the other hand, both testified that the drilling of the dummy holes was authorized by Ramsey at Pantuso's and Browning's suggestion (Tr. 343; 384) and both Ramsey and Browning testified that they did not really think drilling dummy holes to form a safety bench at that time was a good idea because they were drilling in soft earth which would not form a solid area to serve as a safety bench (Tr. 359; 385; 407). Kirk testified that he authorized the dummy holes to be shot because they were in such soft earth that they would not be "worth a quarter" and that he had authorized the foremen to make a safety bench after they had sunk to a lower level where solid rock would be encountered (Tr. 975; 1040; 1054).

The preponderance of the evidence, therefore, fails to support Pantuso's claim that Cedar disregarded safety considerations and shot the dummy holes and thereby deprived him and Browning of a safety bench which they would otherwise have had.

Pantuso also tried to maximize the hazardous nature of drilling on the left bench by claiming that the highwall was 60 to 70 feet high prior to his discharge on September 1 (Tr. 184). Yet WV Inspector Wiseman checked the left bench on September 6 after Pantuso's discharge and testified that the highwall was 15 feet high at that time (Tr. 518; 523). Therefore, the highwall could not have been 60 or 70 feet high prior to Pantuso's discharge. When WV Inspector Brown examined the left bench on September 12 after the dozers had removed all materials drilled by Pantuso and Browning, the highwall was, in his opinion, about 60 feet high (Tr. 287). Cedar's engineering witness, Evans, using precise data, testified that the highwall was 15 feet high prior to Pantuso's discharge and 40 feet high on September 12 (Tr. 777).

As to Pantuso's claim that the left bench was an unsafe place to work because he had no means of communication in case of an emergency (Tr. 136), he admitted on cross-examination that all of the foremen had short wave radios in their trucks and that "you see foremen all the time around there" (Tr. 235). Moreover, Browning was able to use a hand signal on August 31 to get Ramsey to come to the left bench solely to transport him a short distance to the toilet (Tr. 423-425). Since Browning demonstrated that it was easy to

get a foreman's attention, Pantuso's claim that he was working at an isolated place where he could not obtain help in case of an emergency is another claim which is not supported by the preponderance of the evidence.

While Pantuso claimed that he consistently drove his Jeep from the portal to the left bench prior to August 31, he also testified that he was "pretty sure" he had his own transportation (Tr. 115) and he further testified that on August 26 he volunteered to drive his Jeep because Ramsey's Cedar-owned vehicle could not travel over a steep place in the access road (Tr. 120). If he had consistently been driving his own Jeep each day, there is no reason for him to have had to "volunteer" to use his Jeep on August 26 and it would have made no difference to him whether Ramsey's vehicle could travel the access road or not.

It is a fact that Complainant's Exhibit 1 is dated August 31, 1983, although it is Cedar's written notice of Pantuso's suspension subject to discharge which was actually given to Pantuso on September 1, 1983. Pantuso testified that the date of August 31 on the suspension notice showed that Cedar had planned on August 31 to discharge him when he came to work on September 1 and that there was no secretary at the mine on September 1 to type the notice of suspension (Tr. 217). Darlene Harmon, Kirk's secretary, testified that she actually typed the notice of suspension on September 1 but made a typographical error and typed the date of August 31 by mistake. She said that she distinctly recalled the date because the next day, September 2, was her birthday and that she remembered doing the typing on the day before her birthday (Tr. 722). Therefore, Pantuso fabricated a story to support his claim that the notice of suspension was prepared in advance of the actual discharge.

Pantuso also testified that he was just doing "dead" work on the left bench (Tr. 202) and that the drill broke down so often that he could not recall having worked there for a full 10-hour day (Tr. 187). The detailed time and attendance records submitted by Cedar, however, show that Pantuso worked four 10-hour days on the left bench on August 22 through August 25 (B Exh. 7).

Pantuso testified that he had successfully withdrawn because of hazardous conditions prior to September 1 pursuant to article III(i) of the NBCWA (Tr. 219). If he had withdrawn in the past, he undoubtedly knew what to say on September 1 to make Holbrook aware of his claim that he had withdrawn from working on the left bench and therefore could not accept transportation to the left bench where an imminent danger allegedly existed. Of course, he was actually going to be transported to the right bench.

Pantuso claimed that Ramsey's telling him on September 1 that he would be working with Wiseman, instead of Browning, did not mean to him that he would be drilling on the right bench where Wiseman's drill was located (Tr. 146). He based the aforesaid claim on a second unsupported assertion that Cedar "was in violation" on the right bench too and that Wiseman's drill would have had to be moved to the left bench because his and Browning's drill was still under repair and would not be available for use on September 1 in any event (Tr. 147). If Pantuso's and Browning's drill were still being repaired so that it could not have been used, there was no reason for Pantuso to claim that he had withdrawn on September 1 to keep from working under a hazardous highwall because no drilling would have been done in any event until another drill could have been moved to the left bench. That would have given Pantuso plenty of time within which to make certain that no miners were required to work on the left bench until the alleged imminent danger could have been eliminated.

Browning's Defiance of Cedar's Orders and Lack of Credibility

Pantuso and Browning rode back and forth to work each day in Pantuso's Jeep (Tr. 141; 351). Therefore, they had plenty of time to plot how they would interfere with Cedar's operations and do as much or as little work as they wished (Tr. 482; 613). Cedar's foremen testified that two drills had burned up when they accidentally caught on fire and that after that happened, Kirk put out a written order stating that drilling helpers should remain outside the cab so that they would be in a position to observe the drill at all times and advise the drilling operator of any hazards because a drilling operator was slightly injured by the fire which suddenly occurred on one of the drills (Tr. 398; 976; 1025; R Exh. 5).

Since Pantuso and Browning enjoyed each other's company, they did not like to be separated and Browning frankly testified that he instructed Pantuso to ignore Kirk's order and remain in the cab with him because it was too dark for Pantuso to see the wall in any event (Tr. 335). By the time they had preshifted the drill and the preshift reports had been picked up by a foreman, there was plenty of daylight for Pantuso to keep a watchful eye on the highwall (Tr. 900). The foremen stated that drilling helpers frequently did not have much to do and that they liked to remain inside the cab which was air conditioned in the summer and heated in the winter. One reason that the drill helpers liked to drive their own vehicles to the drilling bench was that it gave them a place to sit. The result was that the foremen found them asleep in their vehicles at times when they were supposed to be observing

conditions on the drilling bench and on the drill itself (Tr. 461-462; 478; 976).

If Cedar's management had set out to find a pretext for discharging Pantuso solely because of his safety activities, it could have made an excellent case for discharging both him and Browning because of their admitted refusal to follow Kirk's written order that Pantuso remain outside of the drill's cab.

One of the ways in which Pantuso tried to shed some credibility on his claim that he had withdrawn from the left bench on September 1 under article III(i) of the NBCWA was to have supporting witnesses testify that Holbrook was very unstable and was likely to fly into a rage at the least provocation and thereby refuse to listen to what any miner might be saying to him (Willis at Tr. 67; Lane at Tr. 566-568). Billy Christian, a loader operator, testified that Holbrook had shouted at him one day when he was complaining about some defects on his loading machine and that Holbrook's verbal assault caused him to remain silent about his safety problems (Tr. 306-307).

Holbrook's defense to Christian's allegations was an explanation to the effect that he was simply trying to stop Christian from a bad habit. That habit was described as follows: Christian would complain at a safety meeting that he had some defects in his loading machine. Holbrook would instruct a mechanic to repair the defects. In the meantime, Christian would start operating the loading machine despite its defects. Then when the mechanic came to make the necessary repairs, Christian would refuse to stop the loading machine long enough for the mechanic to repair it. Later, however, if Kirk or a safety committeeman happened to come near Christian's loader, he would stop it and complain about the defects in his loader and claim that the foreman would not correct the defects. Holbrook gave the name of one of the mechanics who reported such an encounter with Christian (Tr. 905-906) and described a similar incident, involving a safety committeeman, which had occurred just a week prior to the holding of the hearing before the WV Board (Tr. 942).

Pantuso's efforts to vilify Holbrook are largely, if not entirely, overcome by other uncontroverted testimony in the record. For example, just prior to Pantuso's discharge on the morning of September 1 Holbrook demonstrated an unusual amount of self control. Browning testified that when Holbrook first started to give Pantuso a direct order to get into Tackett's vehicle for transportation to his working site, Browning interrupted him to remind him that it was only 5:58 a.m. and that Holbrook could not give any direct orders before working time which did not start until 6:00 a.m. (Tr.

351). Holbrook admitted that Browning was right in making that observation and stated that he would give the direct order after he had held the safety meeting (Tr. 886).

Despite the fact that Holbrook was holding a safety meeting regarding the wearing of hard hats inside the portal building away from any hazards of falling rocks, Browning interrupted him again to note that he ought to put on a hard hat before conducting the safety meeting (Tr. 352). Holbrook again agreed that Browning was correct because he was one of the worst offenders in failing to wear a hard hat (Tr. 890). Browning further showed accommodating aspects of Holbrook's character by testifying that Holbrook had been "nicer" to him than any other foreman. On one occasion, Browning said that Holbrook had volunteered to guard his vehicle when he had had to leave it unattended at a time when it contained some sports equipment which could have been stolen through a broken window which then existed in the vehicle. Browning also testified that Holbrook had allowed him to drive his own vehicle to his working site when other foremen had refused to allow him to do so (Tr. 360).

It is clear from the record, therefore, that Holbrook was not so unstable in character that he would have discharged a miner who was trying to explain to him that the area where he was being sent to work was so hazardous that he was withdrawing himself and all other miners from that area under article III(i) of the NBCWA.

At all times in evaluating the credibility of Browning's and Pantuso's withdrawal claims, one has to bear in mind that Pantuso was initially suspended subject to discharge solely because he refused to get into the truck with Tackett for transportation to his working site. Once Pantuso had pushed Holbrook over the edge of forbearance and had been suspended, Pantuso and Browning were forced to fabricate retrospectively a safety-related justification for Pantuso's refusal to obey Holbrook's thrice-repeated direct order for Pantuso to get into the truck with Tackett for transportation to his working site (Tr. 887). It must be recalled that Browning was present when Pantuso allegedly told Ramsey on August 31 that he would have to withdraw himself and others from working on the left bench if Ramsey had not corrected all of the safety complaints which Pantuso had pointed out to Ramsey on August 31 (Tr. 136). Since Browning was an alternate safety committeeman who could withdraw under article III(i) just as well as Pantuso, Browning had to invent a reason for his not having withdrawn on September 1 after Pantuso was suspended. Browning was just as fully aware of the alleged hazardous conditions on the left bench as Pantuso was (Tr. 647). Yet, after Pantuso was discharged, Browning

announced to Ramsey that he was going on union time in order to assist Pantuso in defending himself at the meeting which Holbrook had stated would be held at 8 a.m. (Tr. 354; 672; 961).

In going on union time to assist Pantuso in holding his job, Browning abdicated his responsibilities as an alternate safety committeeman by failing to find out if the other miners who were scheduled to work on the left bench on September 1 were actually going to that allegedly hazardous place to work (Tr. 686; 718). If conditions on the left bench had really constituted an imminent danger, as Pantuso and Browning claimed, those dangers were not eliminated when Pantuso was suspended subject to discharge. The primary obligation on Browning at the moment of Pantuso's suspension was not in defending Pantuso from being discharged, but making sure that no other miner was forced to work in the extremely dangerous conditions which allegedly existed on the left bench. Of course, Pantuso did not actually raise a withdrawal defense, except as an afterthought, to justify his refusal to obey Holbrook's direct orders. Therefore, no thought was ever given to the matter of paramount importance which was assuring that other miners would not work in an area of imminent danger.

Browning realized that he had to contrive some excuse to explain why he had abdicated his duties as an alternate safety committeeman. Therefore, he introduced into his direct testimony a conversation which he and Pantuso had allegedly had on the morning of September 1 when they were making the claimed preinspection of conditions on the left bench prior to reporting for work at the portal. According to that conversation, Pantuso had told Browning that since Browning was only an alternate safety committeeman, Pantuso would have to be the spokesman for initiating withdrawal when the time came for them to go from the portal to their working area (Tr. 351). On cross-examination, Browning explained in detail the provisions of article III(i) of the NBCWA (Tr. 712-713) and he knew perfectly well that he had authority to invoke the provisions of that portion of the NBCWA. Therefore, the conversation in which Pantuso explained to Browning that only Pantuso could initiate a withdrawal, even if it had occurred, was no excuse for Browning's failure to perform the withdrawal which he and Pantuso had allegedly decided to implement on the morning of September 1. After all, Browning had never been backward or hesitant about exercising the functions of a safety committeeman on other occasions despite the fact that he was only an "alternate" safety committeeman (Tr. 329; 341; 343; 348).

Another excuse raised by Browning for his failure to withdraw all miners from the left bench after Pantuso's suspension was that he would have had to call for a safety committeeman to inspect the area and that would have necessitated his calling Pantuso who had already been disqualified from acting because of his suspension (Tr. 704). That was a lame excuse because there were other safety committeemen present at the time of Pantuso's suspension and one of them could have been called. Besides, at the time of Pantuso's suspension, about 30 miners were present at the portal (Tr. 319) and Cedar would have had to honor a bona fide withdrawal made under article III(i) of the NBCWA by going through all consultation steps required by that article.

Another difficulty which Pantuso and Browning had to overcome in fabricating their claim of withdrawal from the left bench is that they agree that Ramsey had advised Pantuso that he would be working with Wiseman, not Browning, that morning (Tr. 142; 353). They claim that they had just finished inspecting the left bench and they knew that the drill Wiseman would be operating was located on the right bench, not the left bench (Tr. 353). They had not made an alleged preinspection of the right bench and could not claim that conditions on the right bench also constituted an imminent danger, although Pantuso did say that Cedar was "in violation" on the right bench (Tr. 147). Therefore, they claimed that Wiseman's drill would have to be moved to the left bench in any event because the drill normally operated by Browning on the left bench was still undergoing repairs (Tr. 146). The net effect of their contentions was that Pantuso was still withdrawing from the left bench when he raised that as a defense because Pantuso knew that sooner or later he would be working with Wiseman on the left bench.

The credibility of Browning's testimony is eroded by some of the same infirmities which destroy Pantuso's credibility. Browning, for example, also emphasized the terrible condition of the access road on and before August 31, but found those conditions did not prevent Pantuso from driving over the road in two-wheel drive when they made their alleged preinspection of September 1 because Browning was forced to concede that the access road would have had to have been in relatively good shape in order for them to have traversed it as rapidly as they claimed in order to get to the left bench, inspect it, and return to the main road so as to arrive at the portal by 5:55 a.m. (Tr. 333; 342; 635; 645).

Browning also destroyed the credibility of his account of the events which occurred just prior to Pantuso's suspension on September 1 by recalling that Pantuso had withdrawn outside the portal before the safety meeting began even though Pantuso unequivocally stated that he did not withdraw until sometime during his conversation with Ramsey after the safety meeting started and perhaps in his alleged safety protests to Holbrook after the safety meeting had been concluded (Tr. 143; 215; 643). Browning also could not explain how he heard part of what Pantuso was saying to Ramsey and not hear all of that conversation in view of the vital interest he had in making sure that Ramsey was aware of the extreme importance of Pantuso's withdrawal from the imminent danger which allegedly existed on the left bench at that very moment. Browning and all witnesses agree that the safety meeting did not last for more than 5 or 6 minutes (Tr. 214; 961). During that time, Browning interrupted Holbrook on one occasion, talked to other miners despite Holbrook's telling all the miners to be quiet, and had time to ask if there were any safety problems to be discussed after the meeting. His conduct during and after the safety meeting supports a conclusion that he was not paying any attention to anything which Pantuso might have been saying to Ramsey because he was listening only to the prepared statement read by Holbrook and had nothing in particular on his mind about safety at the time Holbrook asked if there were any questions and and when he himself got up and asked if there were any safety matters to be raised (Tr. 352-354; 660; 699).

At one point in his direct testimony, Browning inadvertently told the truth by saying that he heard Ramsey tell Pantuso that he would not be going into "that" pit (Tr. 353). The context in which Browning used the word "that" meant the "left" pit and that statement, if it had been left undisturbed, would have destroyed both his and Pantuso's claim that Pantuso thought he would eventually be going to work in the left pit despite the fact that Ramsey had advised him that he would be working with Wiseman instead of Browning. Browning's attorney was alert, however, and succeeded in getting Browning to amend his testimony so as to say that Ramsey only told Pantuso that he would be working with Wiseman without specifically stating that Pantuso would be working in the right pit instead of the left pit.

Browning testified that no shots were set off on the left bench between August 26 and the time when the West Virginia inspector came to inspect the left pit on September 6 (Tr. 345), but the blasting log shows that a shot was set off on the left bench on September 2 (Tr. 768; R Exh. 9).

Pantuso's and Browning's Abuse of Their Positions as Safety Committeemen

Cedar's reply brief (p. 13) emphasizes the fact that Pantuso and Browning abused their positions as safety committeemen by reporting alleged violations which did not exist. There is considerable merit to the above contention. On one occasion, Pantuso requested that the Mine Safety and Health Administration (MSHA) of the U.S. Department of Labor conduct an investigation pursuant to section 103(g) of the Act with respect to 80 alleged violations of the mandatory health and safety standards (Tr. 181). Browning testified that he and three other safety committeemen spent 3 days with four MSHA inspectors checking Cedar's mine and equipment to determine whether the violations existed (Tr. 329; C Exh. 11). Respondent's Exhibit 2 consists of 69 statements written by MSHA's inspectors finding that 69 of the 80 alleged violations did not exist and the record is not clear as to whether the remaining 11 actually existed (Tr. 858).

Pantuso's attorney tried to defend Pantuso's having reported at least 69 violations which did not exist on the ground that Cedar had corrected them between the time he requested the section 103(g) inspection and the time when they were checked by the four inspectors (Tr. 823-827), but he merely confused matters by introducing Complainant's Exhibit 17 which dealt with a different section 103(g) inspection requested by Pantuso 10 days after he had been discharged (Tr. 865). The three alleged violations discussed in Exhibit 17 were not found to exist when they were checked by MSHA.

While it may be true that Cedar had corrected 69 of the 80 alleged violations prior to the time when the MSHA inspectors made their examination of the mine, the fact remains that the 80 alleged violations resulted from a quarterly inspection which the union made pursuant to the NBCWA and normal procedure was for Cedar to be given 5 days within which to correct an alleged violation before any other action was taken (Tr. 859). It is not clear from the record that Pantuso gave Cedar a period of 5 days to correct the alleged violations before requesting that an inspection under section 103(g) of the Act be conducted. If Pantuso did not eliminate violations corrected within 5 days before requesting the section 103(g) inspection, he certainly wasted a lot of time by four MSHA inspectors in checking nonexistent violations.

On another occasion, Pantuso and Browning decided that Cedar was not correcting some alleged violations as fast as they wanted them corrected, so they went on union time and

drove around Cedar's mine to find 35 alleged violations (Tr. 828; 860) which Pantuso reported to UMWA so that the West Virginia Department of Mines could be asked to check them (Tr. 153; C Exh. 10(C)). The WV Department of Mines found that 20 of the 35 alleged violations did not exist (Tr. 211). Cedar was not given any notice that the 35 alleged violations had been reported and had no opportunity at all to correct any of them prior to the inspection. Therefore, at least 20 of the 35 alleged violations did not exist at the time they were reported by Pantuso.

In order for Pantuso to sustain his complaint in this proceeding, he needed to prove, among other things, that he was engaged in a protected activity at the time of his suspension subject to discharge. He failed to prove that he was engaged in any protected activity when he refused to obey Holbrook's direct orders or when he threatened to knock Kirk's nose off. Reporting nonexistent violations to MSHA and the WV Department of Mines did not help to prove engagement in a protected activity at the time Pantuso was suspended subject to discharge.

The Question of Ramsey's Credibility

The arbitrator referred to Ramsey's having been unsure at the arbitration hearing as to whether Pantuso ever said anything about withdrawing from the left bench on August 31, the day before he was discharged (Arb. Dec. or C Exh. 2, pp. 5 & 15). Ramsey stated that he had not given any thought to the matter at the time he was first asked that question because he did not understand why a withdrawal statement on the previous day was in any way related to Pantuso's refusal on September 1 to obey Holbrook's direct orders to get in the truck with Tackett for transportation to a completely different working site on the right bench (Tr. 434). Ramsey said that after he had given the matter some thought, he decided that Pantuso did say something on August 31 about the fact that he could withdraw from the left bench (Tr. 427-428; 481; 490-494).

It has been my experience that the most credible witnesses are sometimes uncertain about statements which may have been made, but which they did not consider to be significant at the time they were said. The mere fact that Ramsey was willing to amend his testimony to say that Pantuso may have mentioned on August 31 that he could withdraw shows the effort of a witness to be fair and truthful and does not indicate that he was trying to misrepresent the actual facts. Ramsey was also unsure about the dates on which certain other events occurred. For example, he could not be certain when the last shot on the left bench was

fired until his counsel referred to the blasting log (Tr. 452). Ramsey was also easily confused by counsel. At one point, he was persuaded by Pantuso's counsel to concede that he may have gone to the 24/48-hour meeting, although he first stated that he was not present (Tr. 447). Ramsey did not attend the 8:45 a.m. meeting held on September 1, 1983 (Tr. 935), and could have had the two meetings confused. As hereinafter pointed out, the two meetings were even confused by Cedar's counsel when Cedar's reply brief was written.

Ramsey prepared a statement about the events of August 30, 31, and September 1, prior to the hearing held before the WV Board. That statement was received in evidence by the Board (Tr. 437) and it does not refer to any statement by Pantuso on August 31 that he could withdraw and that is a further indication that Ramsey did not consider the statement, if made, to be anything more than a part of Pantuso's and Browning's having raised dubious safety complaints to retaliate for Kirk's having issued the written directive on August 24 that drilling helpers were thereafter to remain outside the cabs on the drills in order to observe any safety hazards which might develop (Tr. 427).

As compared with Ramsey's uncertainty about when some events actually happened, Pantuso had memorized every detail of what happened on August 30, 31, and September 1 to such an extent that he even corrected Cedar's counsel when he made a mistake as to a date in his question (Tr. 168). The ability of a witness to be certain about every small detail is more likely to indicate fabrication than is the inability of a witness to recall with certainty whether a specific statement was ever made. After all, both Pantuso and Browning conceded that if Ramsey ever heard Pantuso say anything on August 31 about withdrawing, he made no reply to indicate that he had heard the remark (Tr. 137; 342-343). It is, therefore, not surprising that Ramsey had difficulty in recalling whether anything about withdrawing was ever said by Pantuso on August 31.

The Arguments Advanced in Pantuso's Initial Brief Must Be Rejected for His Failure To Analyze the Record Correctly

Pantuso's initial brief is 31 pages long. The brief relies primarily on Pantuso's and Browning's testimony as the source of its statement of the facts. Since I have already shown in this decision that Pantuso's and Browning's lack of credibility makes it impossible to accept their testimony, Pantuso's brief is necessarily erroneous in the allegations which are set forth as facts on pages 1 through 13. Some of the erroneous statements are discussed below.

On page 2, the brief purports to cite Willis and Browning as witnesses, but transcript pages 38 and 284 cited on that page, refer to testimony given by Bess and WV Inspector Brown, not Browning, who was Pantuso's buddy and the only witness who supported his claim of having withdrawn at the time of his suspension and discharge. The first part of Pantuso's brief tries to show that the left bench where Pantuso was working from August 22 up to his discharge was an extremely hazardous place to work, but that claim was thoroughly discredited by nearly all the witnesses, including the two WV inspectors, as I have shown in the 21 findings of fact which are set forth on pages 6 through 16 of this decision.

Pantuso exaggerated the conditions which he discussed throughout his testimony. For example, on page 2 of his brief he tries to show that DeWeese called his attention to the fact that the highwall on the left bench was falling in. All that DeWeese actually told him was that he had seen a crack in the sloping embankment above the 15-foot highwall which then existed and that Pantuso should keep an eye on the highwall while working on the left bench. Pantuso had not even seen the crack until it was pointed out to him by DeWeese and the only reason DeWeese saw it was that he was operating a dozer within 2 or 3 feet of the 15-foot highwall and his tractor was high enough to make his eyes about even with the top of the highwall so that he could observe the crack in the embankment at a point which was about 10 feet above the highwall. The only material which had fallen from the highwall was coming from the sloping embankment above the highwall and there was such a small amount of material that it only took DeWeese 25 to 30 minutes to clean off the bench so that initial drilling could be started on the left bench (Tr. 324-325). At no time while Pantuso worked on the left bench was there ever a crack in the highwall itself. All of the cracks and claimed hazards in the highwall were in old spoil which had been made above the highwall as a result of prior mining (Tr. 741; 749; R Exhs. 6 & 7).

On page 3 of Pantuso's brief, he cites Ramsey's testimony to support a claim that the drill was moving in the direction of the area where the crack mentioned by DeWeese existed, but the testimony cited is on page 393 and examination of that testimony shows that Ramsey was confused by having been shown some pictures made on September 12 to show what sequence of drilling existed on August 20. Between August 20 and September 12, two different shots had been set off on the left bench and the level of the bench had been lowered about 25 feet by having two dozer operators push away all the loose earth resulting from those shots. The direction of drilling discussed by counsel at pages 393 to

395 is impossible to determine because the Chairman of the WV Board and counsel for the parties discuss exhibits in terms, such as "here", which are not subject to clear interpretation by anyone who was not present in the hearing room at that time.

The photographs which are a part of this record were all made on September 12 which was 11 days after Pantuso's discharge and after the dozer operators had lowered the level of the bench by 25 feet. As I stated at the outset of this decision (p. 3 above), the pictures are completely void of interpretation because of their poor reproduction and I have not based any findings of fact on what may or may not be determinable from the originals of those pictures. Even the original photographs were criticized by the witnesses as being of poor quality (Tr. 277; 772; 1036).

On page 4 of Pantuso's brief, he concentrates on showing that Holbrook is a person given to rages who will not listen to people when they try to talk to him. I have already dealt with that claim in the preceding part of this decision (pp. 25-26) and it should not be given any credence as the incident involving Billy Christian is presented in a greatly biased manner.

Pantuso's brief (p. 5) primarily deals with an exaggerated description of the terrible condition of the access road leading to the left bench. I have already shown in this decision (pp. 19 and 28) that both Pantuso's and Browning's description of the access road must be completely rejected because of their claims that it could be traveled easily and speedily on September 1, but was almost impassable the day before, despite the fact that no work had been done on it between 2 p.m. on August 31 and 5:40 a.m. on September 1.

On page 6 of his brief, Pantuso repeats how serious conditions on the left bench were as of August 30, but what he fails to make clear is that he had already done all the drilling in the area where dirt from the embankment occasionally fell on the left bench and that those holes, including the so-called "dummy" holes, had been shot on August 26 (Finding No. 21, R Exh. 9). Therefore, on August 30 Pantuso was in no danger whatsoever from anything unusual and all his discussion of the terrible conditions which existed on August 30 are simply exaggerations made to support his claim of withdrawal on September 1 when he was discharged.

Pantuso's brief (p. 7) makes the astonishing claim that management was discriminating against him by suddenly on

August 31 telling him that in the future he would be expected to report for work on time instead of coming in late as he admitted had been his practice. As I have previously explained (Finding Nos. 9 and 10), it had been called to the attention of Kirk that some miners, including Pantuso and Browning, were regularly reporting late for work and Kirk had instructed the foremen to start enforcing the requirement that miners report to work on time.

Pantuso's brief (p. 8) cites Browning's testimony at page 568, but the witness who was testifying on page 568 was Lane. Lane was not discussing the subject attributed to Browning on that page, but on page 559 Lane does say that Pantuso claimed a need for having his own means of transportation. Nevertheless, Lane did not think that was a sufficient reason to refuse to obey a direct order by Tackett that he and Browning get into Tackett's Cedar-owned vehicle for transportation to their working site. That is the reason that Lane advised Pantuso to ride with Tackett and file a discrimination grievance.

Pantuso's brief (p. 8) continues with an exaggerated description of the hazardous conditions which allegedly existed on August 31, but I have shown on pages 20 and 22 of this decision that those claims are not supported by the preponderance of the evidence.

Pantuso's brief (p. 10) incorrectly states that when Pantuso arrived at Kirk's office for the 8 a.m. meeting held on September 1 that Pantuso tried to explain to Holbrook at that time that his suspension was safety-related. Pantuso cites transcript page 887 in support of that claim, but on that page Holbrook was discussing events which occurred at the portal just a few minutes after Holbrook had told Pantuso that he was suspended subject to discharge pending a further determination at a meeting in Kirk's office which was to be held at 8 a.m. Pantuso was given full opportunity to advance his claims of safety at the meeting which was postponed until Kincaid, a UMWA inspector, could travel to Kirk's office to attend the meeting (Tr. 247).

Pantuso's brief (p. 11) cites Lane's testimony at transcript page 887, but Holbrook was testifying on that page of the transcript. The testimony which Pantuso apparently intended to cite appears on page 565 of the transcript. Also on page 11 of his brief, Pantuso claims that Ramsey discussed a conversation at the 24/48-hour meeting, but Ramsey did not think that he was present for the 24/48-hour meeting and the discussion about whether any area on the left bench should be blocked off occurred before the 24/48-hour meeting. Additionally, Pantuso incorrectly states on page 11 that the

"shooter" of explosives, Paul Harold, expressed to Ramsey a belief that the left bench was unsafe. Ramsey's exact testimony on page 448 with respect to Paul Harold is as follows: "His opinion that the drill bench wasn't unsafe" (Tr. 448).

Pantuso's brief (p. 12) improperly relies upon the testimony of WV Inspector Wiseman to support his claim that conditions on the left bench constituted an imminent danger on September 1, the day of Pantuso's discharge. As I have previously explained in Finding Nos. 19 and 20, Wiseman inspected the left bench on September 6 and found no violation of any safety standard, much less the imminent danger which Pantuso alleges existed. On September 6 Wiseman did not even go on the left bench to make his examination (Tr. 521). He stated unequivocally that the two dozer operators who were working on the left bench were not exposed to any imminent danger even though they were working in the precise area where Pantuso claimed conditions were hazardous. While Wiseman did say that he would have issued an imminent-danger order if a drill had been working on the left bench, he never did explain why it was safe for the dozer operators to work there in perfect safety but would have been unsafe for drilling to be done in the same place (Tr. 522).

It is also incorrect for Pantuso to rely upon Wiseman's issuance of an imminent-danger order on September 12 to support his claim that an imminent danger existed on September 1 because the imminent-danger order was issued solely because Tackett had failed to erect danger signs near the place where materials occasionally fell from the embankment above the highwall which was then 40 feet high, but which was only 15 feet high on September 1. As I have already explained in Finding Nos. 19 through 21, circumstances on the left bench had changed considerably between Pantuso's discharge on September 1 and the issuance of the imminent-danger order on September 12. Moreover, Wiseman did not stop the drilling operator from continuing to work because Tackett had instructed him to stay outside the area of imminent danger. Consequently, even if Pantuso had still been working on the left bench on September 12, he would not have had to stop working because of the issuance of the imminent-danger order. Therefore, it is a complete distortion of the facts in this case for Pantuso to argue that conditions on the left bench on September 1 constituted an imminent danger.

Pantuso's brief (pp. 15-18) endeavors to establish the fact that Pantuso had refused to obey Holbrook's order because of his concerns related to safety, but the arguments are based on the facts erroneously stated in the first part of the brief. Since I have shown that conditions on the

left bench did not constitute an imminent danger or even expose him to any unusual hazard, as claimed by Pantuso, his argument that his discharge was motivated by his safety activities must be rejected.

Pantuso's brief (p. 19) cites the Dunmire and Estle case which I referred to on page 17 of this decision. Pantuso claims that he communicated his concerns about the safety of the left bench to Ramsey and Holbrook at the time of his suspension, but as I have shown on pages 17 to 24 of this decision, that claim has not been proven. It is true that Pantuso raised a safety-related defense at the meeting scheduled to be held at 8 a.m. Raising the defense within 2 hours after the suspension would probably satisfy the criteria expressed by the Commission in the Dunmire and Estle case, but the Commission also held that the refusal to work in a dangerous place should be based upon a reasonable belief that the hazard actually existed. The preponderance of the evidence, however, shows that the alleged hazardous conditions did not exist and Pantuso and Browning could not really have had a good-faith belief that the left bench was so dangerous that they could not work there. Moreover, as I have noted on pages 24, 28, and 29 of this decision, Pantuso had been ordered to go to the right bench to work with Wiseman, instead of Browning whose drill was on the left bench. Pantuso did not even allege that conditions on the right bench were so hazardous that he had withdrawn from working on the right bench. He did allege that Cedar was in violation on the right bench, but the only specific claim he made as to the right bench was lack of a light plant (Tr. 147). As I have already shown on page 20 above, by the time the drill operators had finished their preshift examinations and the preshift reports had been picked up by a foreman, there was enough daylight to enable the miners to observe the condition of the highwall. He also claimed that Wiseman's drill would have to be moved to the left bench, but that was based on a supposition which was never proven.

Pantuso's brief (pp. 20-25) is devoted to an argument showing that Cedar's defense in this proceeding is only pretextual and cannot be considered as a showing that Pantuso would have been discharged for his unprotected activity alone even if one were to concede that he proved that his discharge was motivated in any way by his protected activities. In this proceeding, it is Pantuso who has raised the issue of safety as a pretext to support his claim that he was engaged in a protected activity at the time of his discharge. As I have noted in Finding No. 6 of this decision, Pantuso had filed a grievance on behalf of himself and others seeking damages if their vehicles became damaged by

driving over Cedar's roads. Pantuso also sought to have Cedar supply him with a rental car if his Jeep had to be repaired. Therefore, Cedar had a justifiable reason for ordering Pantuso to get into a Cedar-owned vehicle for transportation to his working site. The fact that no other miner had been ordered to accept transportation in a company-owned vehicle is immaterial because Pantuso is the one who had made an issue of being reimbursed for any damages which his Jeep might incur from being driven over Cedar's roads. Management gave a justifiable reason for insisting on transporting Pantuso to his working site any time the road was considered to be rough enough for Pantuso's Jeep to become damaged. Cedar should not be continually exposed to having to defend itself against grievances filed by Pantuso to collect payment for any damages that might incur as a result of his driving his own Jeep to his working site when it could avoid that sort of grievance simply by transporting him in a company-owned vehicle.

While I have shown on pages 19 and 28 above that Pantuso contradicted himself by saying the access road was very rough and muddy up to September 1, but was in fine shape on that day because of his unsupported claim that he gave the left bench a preliminary inspection before reporting for work at the portal, Cedar's foremen consistently agreed throughout the hearing that the access road was muddy and rutted and that there was a possibility that Pantuso's Jeep could receive some damage by being driven over the access road (Tr. 420; 896; 952).

Pantuso's brief (p. 24) attempts to defend his threat to knock Kirk's nose off as being a justifiable act because his threat was provoked by Kirk's having shaken his finger at Pantuso when Pantuso claimed that the meeting about his suspension subject to discharge would not have been necessary if Kirk had paid attention to Pantuso's safety complaints. Kirk had come out of his office to advise the miners that the meeting scheduled for 8 a.m. would be delayed. Kirk testified that he answered a number of questions before he threatened to have Pantuso removed from the property if he heard any more outbursts from him. The meeting was being held to give Pantuso an opportunity to explain his conduct and Pantuso should have been willing to wait a reasonable period of time for additional personnel to travel to the meeting site. After all, part of the delay was necessary so that the UMWA inspector called by Lane, a mine committeeman, could be given time to get to Kirk's office.

Pantuso tried to minimize his threat to knock Kirk's nose off by claiming that he made the statement to Browning,

rather than to Kirk. Browning's testimony fails to support Pantuso's claim that his action did not constitute an assault because Browning testified that "Bill Lane, Frank McCartney, and a couple of other guys grabbed Fred [Pantuso] and moved him back and I stepped in between them" (Tr. 355). If Pantuso's conduct had not been extremely aggressive, there would not have been a need for four miners to restrain him while another miner stepped between him and Kirk. Pantuso, on a prior occasion, had been suspended for 5 days when he became involved in a fight with another miner (Tr. 915; 1005; 1010). On that occasion, Pantuso claimed that the other miner was the aggressor (Tr. 151), but the other miner was the one who had to go to the office and have blood washed from his face (Tr. 917).

Therefore, I must reject Pantuso's arguments to the effect that he satisfied the criteria of the Dunmire and Estle case by proving that he had a bona fide belief that he was being ordered to work under hazardous conditions. I also believe that Cedar's evidence satisfies the test of showing that Pantuso would have been discharged for his unprotected activities alone even if it had been proven, which was not the case, that Pantuso's discharge was motivated in any part by his protected activities.

The last portion of Pantuso's brief (pp. 26-31) is devoted to a discussion of the additional interest which is due on the back pay for which Cedar has already reimbursed Pantuso pursuant to an order of the WV Board. It is unnecessary for me to consider any "relief" issues in view of the fact that my decision fails to find that a violation of section 105(c)(1) of the Act has been proven.

The Arguments Advanced in Cedar's Initial Brief Are Based on a Predominantly Correct Analysis of the Evidence and Should Be Accepted

There are few factual errors in Cedar's initial brief. There is one on page 5 which is probably a typographical error, but it should be noted lest it be misleading. On that page, Cedar inadvertently stated that Pantuso arrived at the portal at 6:55 a.m. on September 1, 1983, the day of his discharge. As I have noted many times before (e.g. Finding No. 14), his arrival time was 5:55 a.m.

Cedar's initial brief (pp. 10-11) refers to the holding of the 24/48-hour meeting provided for under the NBCWA as having been held on September 1, 1983. That is incorrect as witness Bess stated that the 24/48-hour meeting was held at 2:25 p.m. on September 2, 1983 (Tr. 54) and Cedar's counsel pointed out at the hearing that the 24/48-

hour meeting was held on September 2, 1983 (Tr. 448). Also the arbitrator stated on page 2 of his decision that the 24/48-hour meeting was held on September 2, 1983, and on page 6 of his decision, he noted that Cedar held an investigative meeting on the morning of September 1, 1983 (C Exh. 2, pp. 2 & 6). Deems explained the difference in the two types of meetings (Tr. 1013; 1016).

Cedar's initial and reply briefs are both written with skill and attention to detail, but it almost appears as if two different attorneys may have written them on behalf of Mr. Price because on page 12 of Cedar's initial brief, Cedar enters into a lengthy discussion in which it is willing to assume, arguendo, that Pantuso's discharge was motivated, in part, by his having engaged in protected activity, but in Cedar's reply brief, Cedar appropriately argues that Pantuso failed to prove that his discharge for refusal to obey Holbrook's order and for his threat to knock Kirk's nose off was in any way motivated by a protected activity.

Pages 24 to 30 of Cedar's initial brief are devoted to arguing "relief" issues and assessment of a civil penalty. Inasmuch as my decision denies Pantuso's complaint, it is unnecessary for me to discuss that portion of Cedar's brief.

Pantuso's Reply Brief Correctly Argues Two Legal Points

Pantuso's reply brief fails even to discuss the many weaknesses in his presentation which were pointed out in Cedar's initial brief. The 5-page reply brief does, however, correctly deal with two legal issues which were advanced in Cedar's initial brief. Pages 1 through 3 of the reply brief correctly state that the Commission and its judges are not bound by an arbitrator's findings. Pantuso properly notes that the Commission held in its Pasula decision, cited on page 5 above, that a judge should give the arbitrator's decision weight if there is congruence between the issues raised under the Act and those raised under the NBCWA.

I believe that my decision in this proceeding gives the arbitrator's decision as much weight as it is entitled to receive when the vast difference between the record which was before the arbitrator is compared with the record which is before me. The record before the arbitrator was never transcribed and he erased the tapes before Cedar's counsel could obtain them for the purpose of having them transcribed (Tr. 1092). Therefore, the only way I can evaluate the evidence which was before the arbitrator is to assume that his decision discusses the primary points raised by the witnesses.

The most obvious difference between the record before the arbitrator and the one before me is that the 1,116 pages of transcript which comprise the testimony before me resulted from 9 days 4/ of hearing, whereas only 1 day of hearing was held before the arbitrator (C Exh. 2, p. 3). Without attempting to cover all the differences between the record before the arbitrator and the record before me, the following points come readily to mind:

Pantuso and Browning apparently did not claim before the arbitrator that they had gone to the left bench on the morning of September 1, 1983, to make a preinspection of the conditions on the left bench.

Pantuso does not appear to have claimed before the arbitrator that he tried to tell Holbrook that he had withdrawn because of the hazardous conditions which existed on the left bench.

Pantuso admitted in the hearing before the arbitrator that he had not given Ramsey any reason for claiming that he was withdrawing and the arbitrator held that Pantuso could not sustain a case of withdrawing under article III(i) of the NBCWA on the basis of alleged hazards which had only been communicated on a previous day.

No WV inspector seems to have testified in the hearing before the arbitrator, but he still relied upon orders introduced at his hearing or on statements by witnesses pertaining to actions taken by a WV inspector. Nevertheless, the arbitrator found that a WV inspector believed that an imminent danger existed on the left bench on September 6 and that he failed to issue an imminent-danger order on that day because Kirk had told him no one was working on the left bench. In this case, however, a WV inspector testified that he observed two dozer operators working on the left bench on September 6 and that they were not exposed to an imminent danger even though they were working in the area of the so-called slip which Pantuso claimed to be very hazardous. Also

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4/ Pantuso's brief (p. 13) fails to show that the last day of hearing was held on December 2, 1983. Cedar's reply brief (p. 20) refers to the hearing as having lasted 12 days, but I have summarized each and every day of the hearing and the total number of hearing days is 9. If 12 days of hearing were held before the WV Board, 3 of those days of hearing were not transcribed. Since no one cites a transcript page which is higher than 1,116, I am confident that the transcript mailed to me constitutes the entire record on which the parties rely.

in this case, the WV inspector stated that his order of withdrawal issued September 12 did not apply to the area where the drill was being operated on that day. Furthermore, there was extensive evidence in this case showing beyond any doubt that conditions on September 12 had changed greatly from the way they were on September 1. Consequently, what might have been held to be an imminent danger on September 12 did not even exist on September 1 when Pantuso was discharged (Finding Nos. 19-21 above).

The arbitrator does not appear to have had before him the extensive evidence which exists in the record before me showing that Pantuso had a proclivity for reporting nonexistent violations to both MSHA and the WV Department of Mines (Pages 30-31 above).

The arbitrator did not have the extensive evidence which exists in this case showing that Pantuso's allegations about having no means of communication or nearby toilet facilities were without actual factual support (Finding No. 12 and pages 21-23 above).

There was apparently no evidence before the arbitrator showing that Pantuso and Browning had refused to follow Kirk's written directive that helpers to the drill operators should remain outside the cab of the drill so as to be able to keep an eye on the drill and surrounding area to make sure that no hazardous conditions were developing which might threaten the safety of the drill operators.

There was apparently no evidence in the arbitration case showing that Pantuso's primary reason for refusing to ride with Tackett was his determination to drive his own Jeep to the working site despite the fact that he had filed a grievance seeking to be reimbursed for any damages which his Jeep might incur as a result of driving it to his working site. His grievance also sought to have Cedar provide him with a rental car to drive to work while his Jeep was being repaired (Tr. 161).

The arbitrator apparently did not have evidence before him showing that Pantuso had been told by Ramsey that Pantuso would be working with Wiseman, instead of Browning, which meant that Pantuso would not be working on the left bench in any event.

While the arbitrator mentioned several times in his decision that there was conflicting evidence, he did not try to reconcile the conflicting evidence and made his findings on the basis of evidence as to which there was no conflict. Despite the limitations which that placed on his

findings, he held that Cedar had carried its burden of proving that Pantuso committed the offenses of thrice refusing a direct order and did threaten to strike a supervisor. While he held that those offenses were sufficient cause to merit discharge, he said that he thought the offenses were associated with enough safety concerns to justify a 90-day suspension instead of discharge.

If the arbitrator had had the extensive evidence before him which has been presented in the record before me, it is highly likely that he would have upheld the discharge as justified because he placed more weight on some sort of evidence concerning a WV inspector's actions than would have been warranted if he had had the testimony of the two WV inspectors who testified in this proceeding.

In Pantuso's reply brief (pp. 3-4), he correctly argues that a complainant has a right under the Act and its legislative history to refuse to work in an area which confronts him with a threat to his health and safety and that he does not have to show in a proceeding under section 105(c)(2) of the Act that he would be exposed to the imminent danger which is required to permit a miner to withdraw himself and others under article III(i) of the NBCWA. Of course, as I have shown in my decision, Pantuso did not prove that he would be exposed to any hazards beyond those normally incurred in working in a surface coal mine if he had obeyed Holbrook's order and had ridden with Tackett to the right bench to work with Wiseman. Moreover, neither Pantuso nor Browning showed, after Holbrook had suspended Pantuso subject to discharge, the slightest concern on September 1 about the fact that other miners were scheduled to go to work on the left bench where the alleged imminent danger still existed (Pages 26-28 above).

The Arguments in Cedar's Reply Brief Are Supported by the Record

Pages 1 through 12 of Cedar's reply brief are devoted to showing that Pantuso's initial brief contains many factual errors as well as a failure to consider all the evidence, rather than just the portions which support the arguments which Pantuso makes in his initial brief. I find that Cedar's analysis of the factual aspects of Pantuso's initial brief is correct and Cedar's comments augment my finding on pages 32-39 above that the arguments in Pantuso's initial brief should be rejected for his failure to make a correct analysis of all the evidence.

The only factual error I detected in Cedar's reply brief (pp. 10-11; 17) is the same one I noted in Cedar's initial brief, that is, the failure to realize that the

24/48-hour meeting pertaining to Pantuso's suspension subject to discharge occurred on September 2 rather than September 1 when Cedar's own investigative meeting was held (Tr. 54; 448; 1013; 1016).

Summary

The 21 findings of fact on pages 6 through 16 above are based on all of the credible evidence introduced by the parties. They show that Pantuso failed to prove that a violation of section 105(c)(1) occurred when Pantuso was discharged on September 1, 1983. When Pantuso refused to obey Holbrook's thrice-repeated direct order to get into the Cedar-owned vehicle with Tackett for transportation to the right bench, he failed to raise any claim that he was refusing the direct order because he had withdrawn from working on the left bench under article III(i) of the NBCWA. Even if it had been proven that some unusual hazard existed on the left bench, Pantuso had not been asked to go to work on the left bench and the convoluted reasoning used by Pantuso to claim that he would eventually have ended up working on the left bench because his and Browning's drill was still being repaired is not supported by the preponderance of the evidence. If one uses Pantuso's argument that he would eventually have been working with Wiseman on the left bench, that alleged hazardous eventuality would not have occurred until Wiseman's drill could have been moved from the right to the left bench. That would have given Pantuso ample time within which to have invoked the provisions of article III(i) of the NBCWA and for the union and Cedar's management to have engaged in all the conferences required before a withdrawal can be carried out under that article.

The preponderance of the evidence, however, shows that no hazards existed on the left bench which would have been adequate to justify refusal to obey an order which would, at most, under Pantuso's argument, have sometime during the day have placed him on the left bench. He had already testified that on the morning of September 1, the road was easily subject to travel by a vehicle having only two-wheel drive. Browning's summoning of Ramsey to transport him to the toilet on August 31 showed that it was easy to obtain transportation off the bench in case of emergency or to find a means of communicating with the foremen in case of an emergency. Even if the repairs on Browning's drill had been completed at sometime during the shift on September 1, the drill would not have been operated under the area where rocks and dirt sometimes fell from the embankment above the 15-foot highwall which then existed. According to the testimony of the WV inspectors, the imminent-danger order issued on September 12 pertained only to Cedar's failure to

erect danger signs and not because a drill was being operated outside the area of the designated imminent danger. On September 12 the highwall had been increased to a height of 40 feet which made the falling of any rocks much more hazardous than they would have been on September 1 when the height of the wall was only 15 feet.

The preponderance of the evidence, therefore, does not support Pantuso's claim that he had a reasonable basis, under the Commission's Dunmire and Estle decision, to warrant a refusal to obey Holbrook's order that Pantuso get in the truck with Tackett for transportation to the right bench where no hazards had been alleged on August 31 or September 1. Even if Pantuso had been ordered to go to the left bench, the conditions there were not hazardous enough to justify a refusal to ride to the left bench. Finally, Pantuso did not have any safety-related excuse for threatening to knock Kirk's nose off just prior to the investigative meeting held at 8:45 a.m. on September 1, 1983.

The real pretext in this proceeding is Pantuso's claim that his refusal to obey Holbrook's order was motivated by safety-related considerations. A pretextual claim that a complainant was engaged in a protected activity is no more entitled to be upheld than an operator's pretextual claim for having discharged a miner. I find that Pantuso failed to prove that he was engaged in a protected activity when he was discharged for refusing three direct orders and for having threatened to strike a supervisor.

WHEREFORE, it is ordered:

For the reasons hereinbefore given, Pantuso's discrimination complaint filed on April 26, 1984, in Docket No. WEVA 84-193-D, is dismissed for failure to prove that a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 occurred.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 17 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 85-8-M
	:	A.C. No. 30-01185-05514
v.	:	
	:	Balmat Mine No. 4 & Mill
ST. JOE RESOURCES COMPANY, Respondent	:	

DECISION

Before: Judge Melick

This case involves a civil penalty proceeding under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act." The issue is whether a proposal for penalty should be dismissed because of its late filing under Commission Rule 27.[1]

On November 13, 1984, St. Joe Resources Company (St. Joe) was cited for a violation of the regulatory standard at 30 C.F.R. § 57.14013. The Secretary proposed a penalty of $20 and St. Joe filed a timely notice of contest on June 21, 1985. On October 10, 1985, the Commission's Chief Judge ordered the Secretary "to show cause within 30 days of the date of [the] Order, [why] the case should not be dismissed" for not filing a proposal for penalty within 45 days of the date the Secretary received a timely notice of contest. Commission Rule 27, supra. Subsequently, on October 18, 1985, the proposal for penalty was filed by the Secretary accompanied by a letter addressed to the Chief Judge stating as follows:

> Enclosed is a copy of the proposal for a penalty that was mailed to the Review Commission and the respondent on September 24, 1985. We have been

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[1]Commission Rule 27, 29 C.F.R. § 2700.27 provides in pertinent part: (a) When to file. Within 45 days of receipt of a timely notice of contest of a notification of proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission.

contacted by Mr. Heller, an attorney representing the respondent, who has already received their copy of the penalty proposal. We trust this satisfies the October 10, 1985 order to show cause as to why this case should not be dismissed.

Even assuming, arguendo, that the Secretary filed his proposal on September 24, 1985, as he alleges, that filing was at least 49 days late.

In Secretary of Labor v. Salt Lake County Road Department, 3 FMSHRC 1714 (1981), the Commission held that although its Rule 27 was not a statute of limitations, if the Secretary seeks permission to file an untimely proposal for penalty he must predicate his request upon adequate cause. In this case the Secretary has failed to state any grounds for his untimely filing. Accordingly the Respondent's request to dismiss these proceedings is granted.

ORDER

These civil penalty proceedings and the citation therein (Citation No. 2367889) are hereby dismissed.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

December 18, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 84-155-M A.C. No. 42-00071-05503
v.	:	Utelite Mine
UTELITE CORPORATION, Respondent	:	

DECISION

Appearances: Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Carsten Mortensen, Utelite Corporation, Coalville, Utah, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties, a hearing on the merits took place in Salt Lake City, Utah on September 19, 1985.

The parties waived post-trial briefs.

Citation No. 2084153 proposes a penalty of $74 and alleges respondent violated 30 C.F.R. § 55.14-1 which provides as follows:

> Guards
>
> 55.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

Issue

The issue centers on the appropriate penalty for the violation of the regulation.

Stipulation

After commencement of the hearing the parties stipulated that respondent violated the regulation.

Further, it was agreed that the unguarded sprocket was separated from a walkway by a welded handrail. A miner could not accidentally trip or fall into the sprocket. A miner would not be near the sprocket and inside the handrail unless he was doing routine maintenance. In those circumstances the machine would have been turned off (Tr. 6-8).

A computer printout indicates that in the two year period before July 11, 1984 six violations were assessed against respondent (Exhibit P1).

The company employs 20 workers in its open pit mine. It further has a capacity of producing 200,000 yards of material a year. Further, the proposed penalty will not cause undue hardship on the respondent. The condition was rapidly abated (Tr. 8-11).

Discussion

The statutory criteria for assessing a civil penalty is contained in Section 110(i) of the Act, now 30 U.S.C. § 820(i). It provides as follows:

> (i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In connection with the above, I consider that respondent's prior history of six violations in the two years before July 11, 1984 is not excessive. I further find that, with only 20 workers and a small capacity, the operator's size should be considered as small. The fact that a welded handrail separated workers from

the unguarded sprocket causes me to conclude that both negligence and gravity are not severe. The assessment of a penalty will not cause a hardship on the operator, which rapidly abated the violative condition.

In view of the statutory criteria, I conclude that the proposed penalty of $74 is excessive. I believe $30 constitutes an appropriate penalty.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R. § 55.14-1 and the citation should be affirmed and a penalty assessed for the violation.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

1. Citation No. 2084153 is affirmed and a civil penalty of $30 is assessed.

2. Respondent is ordered to pay to the Secretary the sum of $30 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge

Distribution:

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Utelite Corporation, Mr. Carsten Mortensen, Plant Manager, P.O. Box 387, Coalville, UT 84017 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

DEC 19 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 85-90 A.C. No. 33-00968-03605
v.	:	
	:	Nelms No. 2 Mine
YOUGHIOGHENY & OHIO COAL CO., Respondent	:	

DECISION

Before: Judge Melick

This case is before me on remand by the Commission on December 12, 1985, to "enter the necessary findings as to each of the six statutory penalty criteria supporting" the $750 penalty assessment for the violation of the regulatory standard at 30 C.F.R. § 75.305.[1]

The violation as charged in Order No. 2330535 reads as follows:

> The absence of dates, times and initials indicates that the weekly examinations of the left and right return air courses were not being conducted. There was [sic] no entries made in the approved book on the surface that the return air courses had ever been examined on a weekly basis.

Youghiogheny & Ohio Coal Company (Y&O) does not dispute that the cited standard requires weekly examinations to be performed in the left and right return air courses as alleged and that the person making such examinations is required to place his initials and the date and time at the place

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[1]The penalty criteria are as follows:

"The operator's history of previous violations, the appropriateness of such penalty to the size of business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i).

examined. Y&O maintains that except for the period between March 13, 1985 and April 9, 1985, proper examinations had been made. It is not disputed however that during an underground inspection of the Nelms No. 2 Mine conducted by MSHA Inspector James Jeffers on April 9, 1985, neither Jeffers nor Y&O Safety Director Don Statler were able to locate any dates, times or initials of mine examiners or any other evidence that any part of the 1,300 feet of the right and left air courses had ever been examined in accordance with the cited standard.[2]

Jeffers and Statler returned to the surface and examined the books in which the examinations of the cited air courses were required to be recorded. Assistant Mine Safety Director Robert Oszust joined in the examination. At that time neither Don Statler nor Robert Oszust was able to show Jeffers any evidence of entries corresponding to inspections of the cited air courses. Indeed Y&O continued to admit as recently as when it filed its Answer in these proceedings on September 12, 1985, that the examinations had not been recorded. At the hearings in this case however, only 13 days later, Statler testified that entries in the record book did exist and that they corresponded to examinations of the air courses on February 6, 1985, February 16, 1985, February 21, 1985, February 27, 1985, March 6, 1985 and March 13, 1985.

The entries are not however so unambiguous as to permit the unquestioned acceptance of this testimony. Moreover the one person who could have clarified this matter and answered the more important question of whether the air courses were actually inspected was not called as a witness by the mine operator and his absence was not explained. This person was Bill Dennis, the fire boss who it is now purported conducted the first five of the examinations. Under the circumstances Statler's testimony in this regard is without a credible foundation.

Within this framework I conclude that, with one exception, the required weekly examinations of the air courses had not been made from February 6, 1985 to April 9, 1985. The one exception is based upon Statler's testimony that he saw substitute Fire Boss Roy Kohler perform an examination of the air courses on March 13, 1985. Statler also admits however that he does not know whether any weekly examinations were performed between March 13 and April 9, 1985, and concedes that there were no entries in the record book corresponding to any examination between those dates.

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[2]Statler testified that he found one notation pad on the outby side of the A Entry return regulator but there is no indication that there were any entries on that pad.

According to the undisputed testimony of Inspector Jeffers, the failure to conduct weekly examinations could lead to the accumulation of float coal dust in the cited air courses. Indeed it is undisputed that float coal dust was in fact present throughout at least 500 to 600 feet of the right return air course at the time of this inspection and was admittedly an unsafe condition and a violation of the standard at 30 C.F.R. § 75.400.

According to Jeffers areas of the mine containing ignition sources such as electrical equipment including ventilation fans, a battery charger and a rock dusting machine, were vented directly into the air courses. He opined that the accumulations of float coal dust in the air courses could propagate fire or explosions from those areas exposing the seven miners working inby to serious injuries. Jeffers also observed that there had been a prior ignition at this mine of hydrogen gas from one of the battery chargers. Statler testified that he was not aware of such ignition sources but did not contravene Jeffer's testimony in this regard. Under the circumstances I find that the violation herein was quite serious. The hazard was particularly aggravated by the lengthy period during which the examinations had not been performed. Indeed each failure to conduct a weekly examination at each required location could have properly been charged as a separate violation subject to a separate civil penalty.

The violation was also the result of operator negligence. The fact that proper examinations were not being performed should have been obvious from the absence of required notations in the air courses. In addition the existence of admittedly violative amounts of float coal dust over 500 to 600 feet of the right return air course in an area frequented by supervisory personnel should have led to the discovery of this violation. Indeed Safety Director Statler conceded that a section foreman should have discovered the float coal dust in the air course and was "surprised" that it had not been found.

In addition since both the Mine Safety Director and his assistant were apparently unable to determine (until the Safety Director testified at hearing) from the ambiguous entries in the record book that proper examinations of the air courses were being made it is apparent that at the very least the entries were not adequate to clearly show to management that the examinations were in fact being made. For this additional reason the mine operator should have been alerted to the problem and seen to it that the examinations were being made and were clearly recorded as having been made. The admitted absence of any entries in the record book for the period subsequent to March 13, 1985, should also have

been known to management in light of the requirement for supervisors to countersign those entries.

In assessing the penalty in the decision below I also considered the undisputed evidence concerning the remaining 4 criteria. It was stipulated that the mine operator was of "moderate" size and that the proposed penalties would have no affect on its ability to continue in business (Tr. 5). The undisputed history report of violations (Ex. G-11) shows that overall the operator had a record preceding the date of the order at bar of 3,592 paid violations including 12 paid violations of the regulatory standard at issue. For the 2 years preceding the order at bar there were 515 paid violations including 4 paid violations of the standard at issue. This is not a good record.

I also gave credit in assessing a $750 penalty for the operators demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. The order in this case indicates on its face that both the left and right return air courses were subsequently examined by a representative of the mine operator and the results were recorded in the approved book.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 19, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 85-48
	:	A.C. No. 01-01247-03637
v.	:	
	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: George D. Palmer, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the Petitioner; Harold D. Rice and Robert Stanley Morrow, Esqs., Jim Walter Resources, Inc., Birmingham, Alabama, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with an alleged violation of mandatory safety standard 30 C.F.R. § 75.316, and 30 C.F.R. 75.1712-3(a). The respondent filed a timely answer and a hearing was convened in Birmingham, Alabama. The parties waived the filing of written posthearing proposed findings and conclusions, but were afforded an opportunity to make oral arguments on the record during the course of the hearing. Their respective arguments have been considered by me in the course of this decision.

Issue

The issue presented in this case is whether the respondent violated the cited mandatory safety standards in question, and if so, the appropriate civil penalties that should

be assessed based upon the criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 96-164, 30 U.S.C. § 801 et seq.

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

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated that the respondent and the subject mine are subject to the jurisdiction of the Act, that the respondent is a medium-size operator, and that the imposition of civil penalties will not affect the respondent's ability to continue in business. They also stipulated that the respondent's history of prior violations is average and that the violations were abated in good faith.

Discussion

Section 104(a) "S&S" Citation No. 2482846, issued by MSHA Inspector Terry Gaither on December 11, 1984, cites a violation of mandatory safety standard 30 C.F.R. § 75.316, and the condition or practice cited is described as follows:

> The approved ventilation methane and dust control plan was not being complied with in the overcast over the intake air entry (1) crosscut inby the No. 11 section switch in that the overcast wall separating the belt entry and tracks (intake) had a hole approximately 12 feet by 4 feet.

Section 104(a) "S&S" Citation No. 2482924, issued by MSHA Inspector Thurman E. Worth on December 4, 1984, cites a violation of mandatory safety standard 30 C.F.R. § 75.1712-(3)(a), and the condition or practice is described as follows:

> The bathing facilities and change rooms were not being maintained in a sanitary condition in that the drains for the showers were

backing up and not carrying the bathing water out of the showers. The floor drains in the changing rooms were backing up with the bathing water out into the changing room floors.

Petitioner's Testimony and Evidence

Kenneth W. Ely, MSHA Health Inspector Specialist, confirmed that he is involved in the approval of mine ventilation plans, and that once an operator submits a plan for approval, he studies it and makes recommendations to the district manager. He confirmed that mandatory safety standard section 75.326 prohibits the use of belt air to ventilate an active working place. He also confirmed that exhibits G-1 are documents in connection with a petition for modification of section 75.326 for the respondent's No. 4 Mine. He confirmed that an August 27, 1979, decision by the Secretary's Administrator for Coal Mine Health and Safety granting the modification was subject to certain conditions as stated at pages 7 and 8 of the decision. The particular conditions are those found in paragraph 6, page 7, which requires that permanent stoppings separating the belt haulage and intake escapeway entries shall be continuous, and the stipulation found on page 8 with respect to the construction of the stoppings (Tr. 11-14).

Mr. Ely stated that the construction of the stopping in question is a substantial project, and he likened it to the building of a virtually airtight brick or block wall for the physical separation between the intake escapeway and the beltline (Tr. 14). He defined the term "continuous" in the context of the stopping to mean "from the bottom of the intake air shafts or the intake where your beltlines actually begin, continuous to your section, and this is defined as wherever your loading point is, in the working section" (Tr. 13).

Mr. Ely identified exhibit G-3, as a March 3, 1983, supplement to the No. 4 Mine ventilation plan, whereby the respondent requested permission to "point feed," at necessary locations, the belt entry from the "smoke free" intake system. That request was approved by MSHA's district manager by letter dated March 25, 1983. Mr. Ely explained the basis for the approval of the supplement to the ventilation plan (Tr. 15-16). He confirmed that this approved proposal by the respondent was lawful and permissible under the 1979 modification petition approval (Tr. 16). However, he qualified his answer by stating as follows (Tr. 16-17):

A. Going back now, I really think we exceeded the bounds that were set up in the 1979 decision. Because in the decision of '79 it said that the construction of that stopping line would be, you know, with permanent-type stopping material and built in a workmanlike manner and would be continuous.

And by permitting an open hole in order to gain access for the air to get in there, we actually changed the wording for the "continuous" and changed the method of construction for the stopping.

Mr. Ely identified exhibit G-2, dated May 14, 1985, as a further modification approved after the issuance of the citation in this case for the original modification granted on August 27, 1979. He explained that when the ventilation problems developed in 1983, "we got into point feeds with Jim Walters at all their mines, and we discovered then as we were getting more and more into point feeds that the original petition did not make reference to point feed or did not make reference to a way to admit this air from your intake into your beltline" (Tr. 17). At that point in time, contact was made with the respondent's ventilation department, and they were informed that an additional modification to the original petition had to be filed "in order to gain some language that would give some leeway in order for the different things that had come about," particularly with respect to new technological advances in the methods for construction of stoppings. It was MSHA's view that the respondent should avail itself of the ventilation plan approval process to allow it to adopt these new construction advances, instead of resorting to petitions for modification each time somethingnew was developed (Tr. 18).

Mr. Ely quoted paragraph 2 of page 2 of the May 14, 1985, approval (exhibit G-2), particularly the words "other ventilation controls" and stated "that's where point feed came into being" (Tr. 18). He pointed out, however, that in its original "point feed" letter of March 3, 1983, the respondent assured MSHA that the control device used for point feeding would be constructed according to the method approved for a standard regulator with sufficient material readily available to completely close the openings, if necessary, and that all "point feed" locations will be posted on a map at the minesite and will be shown on the current ventilation map to be submitted in the next regularly scheduled 6-month update of the Ventilation System and Methane and Dust Control Plan.

The plan update would then include a drawing depicting the method of construction for the "point feed" device (Tr. 19-20).

Mr. Ely identified exhibits G-7 as the respondent's projected 1-year ventilation map dated December 15, 1984, which was received in his office on January 13, 1984. He confirmed that the location identified by Mr. Gaither on this map is not designated as a point feed location. He also confirmed that the map contains no regulator construction locations, and the only thing depicted is a track entry (Tr. 28).

Mr. Ely explained the method which should be used for development of point feed locations in the mine pursuant to the existing ventilation plan. He stated that point feeds are methods of controlling the air flow from an intake into a belt, and that they are to be constructed according to "regulator specifications." Such locations are constructed with intent, and the installation of a point feed is a planned installation "and not something that you would just go down and quickly knock a hole in for a problem that might develop on a moment's notice." The point feed should be constructed according to a submitted plan, with enough material available to close the regulator in the event a problem were to develop or found. The term "as necessary" as used in his review of the 1983 ventilation plan amendment, as well as the 1984 plan, conveys a meaning that such point feeds are to be placed at planned locations for a specific purpose to regulate the air flow. Since ventilation changes are involved, and since there are guidelines for installing ventilation controls, the term "as necessary" should not be interpreted to permit haphazard construction of point feeders, or to permit their installation at every crosscut or at every two crosscuts (Tr. 29).

Mr. Ely pointed out that in his review of the mine maps, there are only eight point feed locations designated as such on the current map submitted for approval, and that on the 1983 map only one location is designated as a point feed. In his view, such point feeds are constructed with intent and purpose, and are not something that is done frivolously or at a moment's notice (Tr. 29-30).

Mr. Ely described a "point feed" as follows (Tr. 32):

Q. Would you explain to us what a point feed is?

A. Okay, my concept of a point feed is a point between the intake and the belt where you build a ventilation control similar to or akin to the construction listed in the ventilation plan as a regulator, and it is used -- the purpose of it serves to admit intake air into the beltline, and into the belt air course, the same thing.

Mr. Ely identified exhibit G-4, as a July 14, 1984, MSHA approval of the respondent's ventilation plan which had been submitted by the respondent on November 16, 1983. He pointed out that item 12 on page 3 of the approved plan requires that any point feed location be posted on the mine map at the mine site and is also shown on the current ventilation map of the ventilation plan. He also pointed out that in the original point feed approval submitted by the respondent on March 3, 1983, exhibit G-3, all point feed locations were required to be posted on a map at the minesite and they were required to be shown on the current ventilation map to be submitted in the next regularly scheduled 6-month update of the ventilation plan (Tr. 20-22).

Mr. Ely testified that the effect of the change in the language as shown on the current ventilation plan map is that the respondent must submit any point feed location with its approved map as well as with the 6-month review of its ventilation plan. The respondent must also submit a projection map which projects for a year in advance any projected ventilation devices for the mine areas to be developed. These requirements would require any point feed locations to be put on the maps submitted to MSHA prior to their opening (Tr. 22).

Mr. Ely alluded to three mine maps which are applicable to this case, and he confirmed that he has discussed them with Inspector Gaither, and that Mr. Gaither has pointed out to him what he will testify to with respect to the location of the point feed in issue in this case (Tr. 22-23).

Mr. Ely identified the current mine map as exhibit G-5, and he confirmed that it is dated January 27, 1985, and that it was received in his office on April 11, 1985. He marked the map to show the location of the alleged point feed in question in this case as pointed out to him by Mr. Gaither (Tr. 25-26).

Mr. Ely identified exhibit G-6 as the respondent's mine map dated December 12, 1983, and received in his office on

February 6, 1984. He confirmed that this map is the only official map preceding the January 27, 1985, map. He also confirmed that it was submitted as part of the respondent's ventilation plan approval, which MSHA considered as an accurate depiction of the mine conditions. Neither map has any markings or designations to suggest that any of the locations pointed out by Mr. Gaither are point feed locations. The only markings at these locations are overcast depictions (Tr. 27). Although point feeder locations are shown on the map, the nearest one from the location pointed out to him as the alleged point feed in this case is 1,200 to 1,600 feet away (Tr. 28).

Mr. Ely confirmed that the standard construction method for a regulator is shown on the diagram following page 3 of the approved ventilation plan, exhibit G-4). Both "wooden plank" and "sliding door" methods of construction are shown (Tr. 34).

On cross-examination, Mr. Ely confirmed that at the time of the issuance of the citation in December, 1984, the respondent had MSHA approval to point feed under the conditions of the respondent's exhibit G-3 letter of March 3, 1983, and the subsequent MSHA approval of that method. He also confirmed that the ventilation plan in effect at the time the citation was issued was the one approved by MSHA on July 14, 1985, exhibit G-4 (Tr. 35).

Mr. Ely stated that in the event a point feed was deemed necessary and constructed after submission of the mine map to MSHA, it would not appear on the map. In the event the point feed were then closed because it was no longer needed, it would not appear on the next map submitted to MSHA (Tr. 37). Any changes made with regard to point feeders should be posted on a current basis on the map kept at the mine and any projected point feeds are required to be shown on the maps submitted to MSHA (Tr. 38). The ventilation plan provides that anticipated major changes in mine ventilation be submitted to MSHA for approval before the changes are adopted, and that any deficiencies in ventilation detected during an inspection could result in the revocation of the plan (Tr. 41). Mr. Ely stated that he did not know the basis for the citation which was issued in this case, and he was not involved in the decision to issue the citation (Tr. 50).

MSHA Inspector Terry Gaither testified as to his background and experience, and he confirmed that he issued the citation after observing that the wall of the overcast between the belt entry and the intake entry had a hole in it

measuring approximately 12 feet by 4 feet, with a piece of line brattice over it. He asked for an explanation from company safety inspector Eddie Nicholson, and someone in the inspection party stated that the hole was taken out of the overcast wall in order to take a belt header out of the belt entry (Tr. 52-53).

Mr. Gaither stated that after he informed Mr. Nicholson that he was in violation, Mr. Nicholson replied "We'll call this a point feed." Mr. Gaither then informed Mr. Nicholson that he could not randomly remove a stopping and call it a point feeder when in reality the wall was taken out to facilitate the removal of a piece of equipment (Tr. 53).

Mr. Gaither described the edges of the stopping as "rough" and he stated that the cinder or slag blocks had been knocked out and scattered around. Mr. Gaither observed no other materials in the area, and he confirmed that 14-foot long boards would have been required to cover up the hole which was knocked out of the wall (Tr. 54-55).

Mr. Gaither stated that he discussed the matter further with Mr. Nicholson, and Mr. Nicholson was under the impression that the purpose of the hole was to facilitate the removal of the belt header and that the hole was to be sealed after this equipment was removed. Mr. Gaither confirmed that the citation was orally issued underground and that he reduced it to writing on the surface and fixed the abatement time as the next day after discussing it with Mr. Nicholson (Tr. 55).

Mr. Gaither confirmed that he was familiar with the mine maps, exhibits G-5 through G-7, and that the location of the cited hole was not shown as a point feed on the working map kept at the mine office (Tr. 56).

Mr. Gaither stated that he discussed the violation further with Mr. Nicholson and assistant mine manager Eddie Ball during a close-out conference held later in the week. Mr. Ball stated that the cited location was a point feed, and he was under the impression that the brattice could be removed when necessary to remove equipment and that the location could be designated as a point feed. Mr. Gaither could not recall telling Mr. Ball that the location was not shown as a point feed on the mine map, and he could not recall Mr. Ball mentioning that it was (Tr. 57-58).

Mr. Gaither stated that he had never seen a point feed located at an overcast, and in his opinion the location was

not an intended or bona fide point feed. He believed that the hole was used to remove the belt head equipment and that it was to be sealed up after the removal of the equipment (Tr. 59). Mr. Gaither confirmed that he reviewed the mine map kept in the mine office on the day he issued the citation and the cited location was not designated as a point feed (Tr. 60).

On cross-examination, Mr. Gaither stated that he did not issue the citation because the asserted point feed location was not on the mine map. He conceded that he considered the fact that the stopping wall was not constructed as a planned point feed, but insisted that the citation was issued because the belt entry and intake entry were not separated at that point. There was a hazard presented by this condition, and the regulator was initially installed to separate the two entries (Tr. 61-62).

Mr. Gaither confirmed that while he personally disagreed with point feeding because in the event of a fire on the belt line the smoke will get into the intake and into the sections, he conceded that the approved mine ventilation plan did not prohibit point feeds. He then stated that "the basis for the citation was them not complying with the ventilation plan on the installation of point feeds" and because "a violation existed" (Tr. 62).

Mr. Gaither confirmed that while the ventilation plan did not prohibit the moving of a belt header through a point feed, Part B, page 1 of the plan specifically covered the movement of equipment in or out of a belt entry (Tr. 63).

In response to further questions, Mr. Gaither stated that the normal size of a point feed opening is 4 to 6 feet wide by the height of the entry. He had never seen an opening the size of the hole in question which measured 4 feet high by 12 feet wide (Tr. 63-64).

Mr. Gaither stated that the permanent stopping in question is defined at page 1 of the ventilation plan, exhibit G-4, and it was the wall of the overcast. The purpose of the device is to maintain air separation, and it is required to be maintained intact. The existence of the 12 x 4 foot hole led him to conclude that the stopping was not constructed or maintained to maintain permanent separation of the air, and that this condition violated the ventilation plan (Tr. 66).

Mr. Gaither confirmed that at the time the citation was issued, he was aware of the fact that the respondent had

filed a petition for modification which approved the use of point feeds as part of the mine ventilation plan (Tr. 68). He also confirmed that a properly constructed and maintained overcast separation is one which is completely constructed as a cement block wall similar to the sketch shown in the approved ventilation plan (Tr. 71).

Mr. Gaither stated that abatement was achieved by replacing the blocks in the hole and completely cementing it to make a permanent separation between the belt and the intake. He described a point feed as "a standard-sized hole framed in with boards," and stated that boards are taken off or added to regulate the amount of air passing through the opening (Tr. 72). A totally cemented wall is not, by definition, a point feed (Tr. 72).

Mr. Gaither confirmed that point feeds per se are not violations, but that "if it wasn't on the mine map and hadn't been approved, depending on the circumstances, it could be a violation" (Tr. 74). Once a point feed is approved by MSHA, it must be properly maintained (Tr. 75).

Mr. Gaither confirmed that he was in the mine a day or so prior to his inspection, and that his notes reflect that there was a hole in the stopping in question, but that he did not issue a citation (Tr 76). He also confirmed that he is aware of no regulatory definitions of "point feeds," and he stated that "its an intake regulator * * * no matter what you call it" (Tr. 77).

Respondent's Testimony and Evidence

Deputy Mine Manager Eddie G. Ball testified that at the time the citation was issued the existing mine map reflected the existence of a point feed at the location cited by Inspector Gaither, and that it had been so designated on the map for "only a day or two" (Tr. 82). He stated that the point feed had not been projected, planned, or shown on the map previously submitted to MSHA because they cannot be planned. He explained his answer further as follows (Tr. 82-83):

> Q. And is there any particular reason why that point feed would not have been projected or planned or shown on the map that had been submitted to MSHA several months before that?
>
> A. Yes, sir. On point feeds you can't plan them, say, two or three or six months ahead.

You might think you can, but you don't know what geology is going to do to you or what kind of gas bleeders you're going to run into.

You really don't know what your ventilation is going to do to you, because you can have good ventilation today, but as your sections keep advancing out and you keep advancing brattice lines, all of a sudden you lose pressure.

So then you have to make some kind of moves to either parallel more air out to it or parallel more air away from it. And, of course, with a belt line, sometimes you have to parallel more air to it, particularly if there is something back on your belt line somewhere creating a restriction behind you.

Q. Okay, now, this particular point feed was shown on the mine map previous to being constructed?

A. Yes, sir.

Q. What about after the citation and the abatement? Was it still shown on the map?

A. Yes, sir, it was.

Q. On the mine map there at the mine?

A. Yes, sir, it was.

Q. Would it have been shown on any future subsequent maps that were submitted to MSHA after it was closed off?

A. No, sir, there's no reason to; we closed it back off. But, even so, we still wouldn't have. Because immediately upon pulling that belt drive out of there we would have built a stop and a permanent stopping in by it so that we could tear the entire overcast out.

Q. So that, really, in this particular situation it would have been impossible for it, or impossible for it, to be shown on a prior map or subsequent map in that six-month projection that is sent to MSHA, is that correct?

A. It would be highly improbable that you would, because you would only be there for the length of time that you need it. It's kind of like regulators you build in return; they're only there as long as you need them.

Mr. Ball stated that he visited the location in question immediately upon being informed that the citation had been issued, and he confirmed that the point feed was constructed under his direction. He also confirmed that he was familiar with the ventilation plan specifications for constructing point feeds, and stated that the point feed in question was constructed in accordance with the plan (Tr. 84).

Mr. Ball denied that a brattice curtain was simply over the hole, and he stated that edges of the hole in the wall were "rough knocked-out." He stated that the wall was "knocked straight down, as near straight as the masons could get it." Two seven-by-nines were on each side of the hole, and it was completely boarded up and a piece of curtain was over the top of the hole. He stated that the stopping was boarded up because "we intended to pull the belt drive out of there and immediately build a stopping behind it." However, "our belt foreman got tied up in other emergency work that had to be done, so we just boarded it up and left the project until he came back to it in a week or so" (Tr. 86).

Mr. Ball stated that he was aware of the fact that Mr. Gaither had previously been in the mine because Mr. Nicholson pointed out to him (Ball) that a hole had been knocked out of the stopping and he did not know whether materials were there. In response to Mr. Nicholson's inquiry as to whether he intended to make the hole a point feed, Mr. Ball informed him that he did, and Mr. Ball stated that he informed the general mine foreman that he wanted the stopping built as a point feed that night exactly in compliance "to the letter of the law" (Tr. 86). Mr. Ball stated that he went to the cited location within an hour or two after Mr. Gaither issued the citation, and that the point feed was boarded up (Tr. 87). He described the stopping as 50-1/2 inches high and 10 feet wide on the opening (Tr. 87).

Mr. Ball stated that approximately 6 months or a year prior to the issuance of the citation, a stopping was completely taken out in order to remove a belt drive. Another MSHA inspector (Zimmerman) who was inspecting the mine advised him that he would issue a citation because of the opening between the belt and track. Mr. Zimmerman advised him that a

ventilation control was required and suggested that a point feed similar to one used in the respondent's No. 3 Mine be considered. Mr. Ball stated that this suggestion prompted him to install point feeds in the No. 4 Mine in order to move equipment in and out and to use them for ventilation control (Tr. 87).

Mr. Ball stated that prior to the issuance of the citation in this case, MSHA has never indicated that point feeds could not be used for ventilation and for moving out a piece of equipment. He stated that the use of point feeds for both purposes are accepted methods since the air may be controlled "in the event something happens." He confirmed that point feeds have been constructed and closed the same day because of certain ventilation problems, and he stated that they are constructed "as needed" (Tr. 88-89).

Mr. Ball stated that the cited stopping was closed off and completely blocked because Inspector Gaither fixed the abatement time as the next morning and did not agree with the point feed at that location. Mr. Ball stated that Mr. Gaither took the position that the point feed could not be constructed and used to remove equipment and that it served no ventilation purpose (Tr. 90). Since Mr. Gaither fixed the abatement as the following morning, Mr. Ball believed "the simplest way out of it is to build it right back now" (Tr. 90). Mr. Ball stated that Mr. Gaither never mentioned that the point feeder was not shown on the map or that the hole was not constructed as a point feed. He insisted that the entire context of his conversation with Mr. Gaither was "that is not what a point feed is for and you cannot use it for that" (Tr. 90).

Mr. Ball stated that in a citation conference with MSHA Inspector Jerry Early in Birmingham, Mr. Early informed him that a point feed cannot be used for moving equipment, and Mr. Early said nothing about improper construction or the fact that the point feed was not shown on the map (Tr. 91).

On cross-examination, Mr. Ball stated that the decision to move the belt header was made 2 weeks prior to the inspection, and the opening in the wall was started the day before the citation was issued. Instructions were given to build the point feed in the side of the overcast in order to move the belt drive. Once this was done, the stopping would be put back in place and the overcast would be removed because it was no longer needed (Tr. 93).

Mr. Ball stated that even though the hole was boarded up, since it was like a regulator, it was still constructed

as a point feed, even though it was inactive at the time. He confirmed that while the whole purpose of the point feed was to remove the belt drive, the air had to be controlled while they were in the process of removing the drive, and the control device built for this was the point feed (Tr. 98). He further explained as follows at (Tr. 98-100):

> JUDGE: Well, that's a little different. I get the impression that that was the only way that you could physically remove that belt-header was through this permanent stopping, so you knocked it down and converted it into a point feed to facilitate the removing of the belt-head? Is that correct?
>
> THE WITNESS: Yes, sir. This belt -- this section had mined out. All of the belt structure the ropes, the structure and everything had been carried out through mandoors. But you can't get the belt drive out; it's too big. We don't even want the overcast there anymore.
>
> But economically and what you say is best economically for us, and to still control the air between the belt and the track, then build a point feed. If something happened you could quickly board it up, and you've got this control that they want.
>
> JUDGE: But you didn't actually build the point feed. You converted a permanent stopping into a point feed didn't you?
>
> THE WITNESS: Yes. We kick out the sides of the walls and build a point feed.
>
> JUDGE: And his question was, you did it with the specific purpose of moving the belt-header, correct?
>
> THE WITNESS: Yes, but --
>
> JUDGE: Hear me out, now. Your initial thought was: "How are we going to get the belt-header out?"
>
> THE WITNESS: Yes.

JUDGE: So you converted a permanent stopping into a point feed?

THE WITNESS: Yes.

JUDGE: And your testimony is the reason you did that was to take the belt-header out?

THE WITNESS: Yes sir.

JUDGE: But you had to do something to control the air?

THE WITNESS: Yes, sir. So we built the point feed.

JUDGE: Well, which came first, the chicken or the egg?

THE WITNESS: Well, you can't get the drive out until you build the point feed, so the sequence of events is -- this is an overcast; it's not just a normal stopping.

We had to go down there and build two cribs on each side. Then we put three steel rails over the top there to support the roof of this overcast.

JUDGE: All right?

THE WITNESS: And then at that point we just knocked these walls out through the block to the side, set the two seven by nines in there, take the boards, and just board it up like you do an overcast.

JUDGE: All right.

THE WITNESS: The first time Mr. Gaither was there they hadn't boarded it all up. They were in the process of building it.

JUDGE: Well, the first time he was there did that get his attention?

THE WITNESS: That got his attention. Mr. Nicholson is the one that told me. "Eddie,

you've got this hole in the brattice down here, it's not finished, and he was questioning it."

That's when I told Mr. Oliver, our general mine foreman: "You see that that is constructed proper as the law requires."

JUDGE: Do you know whether anybody specifically told Mr. Gaither when he initially saw that opening what your intent was?

THE WITNESS: Yes. Mr. Nicholson informed us that he told him what we were doing.

JUDGE: But did you tell Mr. Gaither?

THE WITNESS: No, sir; he did not ask me. Until after this citation I had no contact with him.

Mr. Ball stated that when he viewed the "hole" in question shortly after the citation was issued, it was a well constructed regulator which was in compliance with the ventilation plan. He confirmed that it was constructed in accordance with item No. 12 of the plan, and in accordance with the plan sketches for a wood-board type regulator (Tr. 109).

Inspector Gaither was called in rebuttal, and he testified that the condition of the hole when he observed it at the time he issued the citation was not as described by Mr. Ball. Mr. Gaither surmized that someone started to work on the hole by putting up headers and boards before Mr. Ball arrived on the scene (Tr. 114). Mr. Gaither stated that the belt header equipment could have been removed by constructing a door and pulling it through the door, or the stopping could have been removed and an air lock curtain installed during an idle shift so that the resulting ventilation changes could not affect the men who normally work the section. Once the equipment was removed, the stopping could be replaced (Tr. 115).

Mr. Gaither stated that the permanent overcast has never been removed, and that the respondent is free to remove it at any time. He recommended that any equipment be removed during an idle shift when no miners are inby, and that this could be done by putting up check curtains, taking down the wall, and then putting it back up after the equipment is removed (Tr. 117).

Mr. Gaither stated that when he observed the hole it was covered with a brattice cloth and he observed no boards installed across it. The hole did not look like any of the other point feeders in the mine, and he saw nothing to indicate to him such a point feeder was being constructed (Tr. 118). When asked about his previous observation of the hole, Mr. Gaither responded as follows (Tr. 118-119):

Q. Had you seen point feeders in this mine before?

A. Yes, sir.

Q. Did this look like a point feeder?

A. No, sir, it didn't.

Q. Did it look like a point feeder in being? One that was being constructed?

A. I didn't see anything there to indicate that it was being constructed.

Q. Well, now, when you saw it the day before, the opening, what conjured up in your mind then? Why didn't you issue a citation?

A. I don't really know, unless I went back and checked the plans. I didn't have the ventilation plan with me or the petition for modification. I probably went back and checked the plans.

Q. Well, now, on Monday, when you were there before, you saw this opening, was your curiosity aroused as to what that opening was doing?

A. Yes.

Q. And did you have a conversation with Nicholson?

A. Yes, sir.

Q. And what was that? What were you led to believe from him?

A. I was led to believe that it was in there to take equipment out.

Q. To take equipment out?

A. They had a header there to take out.

Q. Did you have any conversation with anyone else that day?

A. No, I don't recall; I don't think so. I don't think we talked about it. I probably told them then that it needed to be blocked up.

Q. But you issued no citation?

A. No, sir.

Q. And then the next day when you went back there you decided to issue the citation?

A. I don't know if it was the next day, but after that I did. If they were going to take the equipment out, they should have had it out and the hole blocked back up.

Mr. Gaither stated that a point feeder may not be constructed simply to facilitate the removal of equipment. He confirmed that he issued the citation because the stopping was not constructed in accordance with the ventilation plan, and the hole in the stopping did not maintain air separation between the belt and the intake. A point feed with a door which is used solely for ventilation control would not be a violation. As long as the ventilation is not interrupted, it would not be a violation to take equipment through the stopping door (Tr. 121).

Mr. Gaither stated that he did not determine whether the ventilation was interrupted with the brattice over the hole in the stopping, and he took no air readings (Tr. 128). The ventilation plan required that the separation of air be maintained with a permanent stopping, and since the stopping had a hole in it which was covered by a brattice it was no longer a permanent stopping. Although air separation may have been maintained with the brattice cloth, it was not maintained by a permanent stopping as required by the plan (Tr. 129).

Mr. Ely was recalled and he stated that the purpose of the introduction of the point feed in 1983 was to allow air to be admitted from the normal air intake into the belt entry

in order to supplement the air in the belt entry and to preclude the accumulation of noxious and flammable gases. The integrity of the stopping line must be maintained in order to maintain the air flow in the designated direction and to maintain the intake escapeway "smoke free" in the event of an emergency. A physical separation must be maintained, and if a hole is knocked out of the stopping, a pressure change would result, and in the event of a fire it could spread from one entry to another (Tr. 130-132).

Mr. Ely stated that under section 75.322, any ventilation changes must be done on idle work shifts. Once a hole is knocked out of a stopping, a determination must be made as to the effect of the hole on the ventilation currents in the mine, and one "cannot go down there and knock a hole whenever you feel like it" (Tr. 133). As long as the ventilation is not changed to the point where it materially affects the air supply on the mine splits, the use of point feeds is not prohibited (Tr. 133-134). Mr. Ely explained further at (Tr. 134-138):

> Q. Earlier this morning when Mr. Palmer asked you if you had any idea or any notion as to why the inspector issued this citation you said you didn't. Now after hearing the inspector's testimony do you have any idea why he issued it?
>
> A. Yes. From what I have heard this morning, I would have believed that the point feed was put there for the purpose of gaining access to this piece of equipment, not for the purpose of a ventilation control.
>
> Q. Let's assume that was done. What does that violate?
>
> A. What does --
>
> Q. What's wrong with the operator constructing his point feed for the purpose of facilitating moving of the equipment?
>
> A. Well, let's take it down the road a little bit.

Q. Let me just back up just a second. The operator in this case did not initially construct the point feed as such. He had a permanent stopping in there. And I used the term "converted." Isn't that --

A. I have no problem.

Q. That's what he did, right?

A. Converted it. You know, he had a purpose in mind. He had a job to do and he constructed this device to help him facilitate his job.

Q. But his first purpose when he put the permanent stopping in there was to have it as a permanent stopping, correct?

A. That is correct.

Q. We have to assume that if he had always wanted a point feed there he would have put a point feed there in the first place.

A. That's right.

Q. It seems much simpler than going to all the trouble of putting up a wall then knocking it out. In any event, he converted a permanent stopping into a point feed.

A. Right.

Q. And he did that for the specific purpose of getting out the belt-header and removing it.

A. That's correct.

Q. Now, what's illegal about that?

A. You are destroying the integrity of a stopping line between an intake escapeway and a belt entry. And that is in violation of another regulation in the law.

Q. Well, why weren't these other regulations cited?

A. Because this stopping line serves the purpose for these other regulations, too. They have a dual purpose. You must maintain the integrity of that intake escapeway.

Q. And the inspector's contention here that by making this opening it failed to maintain the integrity of the stopping line, that's what the violation is all about?

A. That's right.

Q. Is that your notion as to why he issued that?

A. That's right. They failed to maintain the integrity of the stopping line. And if an operator were to carry it to the point that -- to give you an example that was given this morning -- a one-foot hole.

If I wanted a one-foot hole to facilitate the putting of rock dust in an area and so I knocked a one-foot hole, and my hose doesn't reach and I go on down here and I knock another hole, and pretty soon you've got a mine full of holes, and you have destroyed the integrity of that stopping line.

Q. And you think that this is the same principle that is involved here?

A. Well, it comes back to the intent again. Was the need there primarily to facilitate air flow, or was the need there primarily to facilitate the transferrence of this piece of equipment?

Q. Now, what if the mine operator in this case decided to put up a point feed to not only regulate the air but also to facilitate movement of equipment at some point in time? He knows he's going to mine so far and he's got to come back and take all of that equipment out of there, and he decides that's what he wants to do. Could he do that?

A. If the primary objective of that point feed is to facilitate the flow of air, we would have no problem.

Q. What's the primary purpose of a regulator under this mine control plan?

A. To regulate the flow of air to the different areas of the mine. If he has a regulator in his return, and a fire boss examiner on his weekly examination were traveling down that return and he wanted to step through it, I would have no objection to him stepping through that regulator.

Q. So in this case, even though there is no evidence or no showing that ventilation was in any way interrupted, or there was no impact on the ventilation by the punching of this hole through there and constructing the point feed, your theory would be that the integrity of that wall has still been changed?

A. That's right. And if we were to -- if we had such a system that you could go down and destroy at will whatever holes you wanted to put holes in there, then you're destroying a separation of your intake escapeway from that belt entry. And if there was an emergency, or for whatever reason, you have less control the more you have.

Mr. Ely reiterated that the intent of constructing point feeders is to regulate air flow, and not to facilitate the movement of equipment (Tr. 139). He confirmed that point feeders were first introduced in the respondent's mines in 1982, and stated that they are peculiar to the area where those mines are located. He also confirmed that the respondent has received MSHA approval of its petitions for modification to use belt air in the faces, and that it is in the process of installing sealed monitor systems and other safeguards to achieve this and to remain in compliance with section 75.326 (Tr. 139-142).

MSHA Inspector Milton Zimmerman was called as the Court's witness to testify to the circumstances surrounding his issuance of four section 75.316 violations in February and August, 1984 (exhibits ALJ-1 through ALJ-4). Mr. Zimmerman confirmed that he issued the citations, and he commented that anytime he

finds a stopping knocked out or a hole in the stopping, the respondent attempts to justify the conditions by commenting "Oh, it's a point feed." Mr. Zimmerman stated that in these instances, he knew the cited locations were not designated point feeds and in his view "it's just a hole in a stopping, and it shouldn't exist" (Tr. 157-158).

Mr. Zimmerman stated that he was not with Inspector Gaither during his inspection in this case and had no prior knowledge that he had issued a violation. However, had he observed the same condition as testified to by Mr. Gaither he would have issued a section 104(d)(2) order "Because it was definitely a violation of the ventilation plan, and management cannot go around knocking holes in overcasts and stoppings and putting a piece of line curtain over it" (Tr. 159-160).

Mr. Zimmerman stated that if the stopping cited by Inspector Gaither was in fact a point feeder the stopping boards would have been in place and stopping materials would have been readily accessible at the stopping location. Had the boards been in place with a line curtain, and if the stopping was in fact a point feeder, he would not have issued a citation. However, if the point feeder was not so designated on the mine map kept on the surface he would have issued a citation for failure to record the point feeder on the map as required by the ventilation plan (Tr. 160). He testified further as follows at (Tr. 160-161):

> Q. But the fact that -- the question of whether or not it's a point feeder is a question of fact, what it looks like and what it is, not whether it's on a map.
>
> A. If it look like what Mr. Ball say it was, it was a point feed. If it look like what the inspector saw when he was there, it was definitely a hole in an overcast.
>
> Q. Has this problem between the point feeds and permanent stoppings been a problem or a controversy at this mine between MSHA and the mine operator?
>
> A. No controversy, just the fact that you see a hole in a stopping, and I guess Eddie Nicholson's name is on most of those, and you say, "Eddie, you got a hole in the stopping," and he say, "Oh, it's a point feed," you know.

Q. What's he mean by that?

A. Just somebody knocked a hole in a stopping and they shouldn't have.

Q. But that never got him off the hook, did it?

A. No, sir.

Findings and Conclusions

Fact of Violation - Citation No. 2482846

The respondent in this case is charged with a violation of mandatory safety standard 30 C.F.R. § 75.316, because of its failure to follow its approved ventilation methane and dust-control plan. The inspector who issued the citation found a hole in an overcast permanent stopping wall, and because of the hole, he concluded that complete air separation between the belt and intake was not maintained as required by the plan, and that the stopping was not constructed and maintained as required by the plan.

Respondent's counsel conceded that the applicable ventilation plan requires that all permanent stoppings be maintained as shown in the diagram for continuous mortar and brick construction, and that a hole in such stopping would constitute a violation of the plan (Tr. 149).

Respondent's position is that the cited overcast stopping location was in fact a properly designated point feeder under the approved ventilation plan. Respondent's counsel agreed that if I make a finding that the location was not a point feeder and simply a permanent stopping that was out of compliance with the plan, the citation would be affirmed. He also agreed that in the event I ruled that the location was a properly designated point feeder location, I could also find that it was not properly constructed and maintained in accordance with the plan, and still affirm the citation. Counsel also agreed that Inspector Gaither issued the citation because the integrity of the stopping was not maintained (Tr. 149-152).

Respondent's counsel asserted that the pivotal problem with this case is the fact that MSHA's prior approval for point feeding in the mine conflicts with the views of Mr. Ely,

Inspector Gaither, and possibly other individuals in the district office with respect to the concept of point feeding. Counsel takes the position that since point feeding has been approved for its mine, and since it has the discretion under that approval to determine where a point feed should be located and how it is to be used, it should not be penalized simply because it relied on that plan approval. Counsel also asserted that questions concerning the respondent's intended use of point feeds, and whether or not they appear on the mine map are not germane to the citation issued in this case. Counsel maintains that the issue here is whether or not it was proper to move a piece of equipment through a stopping wall which the respondent had decided was a point feed under its approved plan (Tr. 167-168).

Respondent's counsel confirmed that the respondent did not contest the four ventilation plan violations previously issued by Inspector Zimmerman, and he conceded that the violations were issued for failure to maintain complete air separation (Tr. 162). I take note of the fact that two of the violations were issued by Mr. Zimmerman after he found missing blocks in one stopping and another stopping which had been knocked out (exhibits ALJ-1, ALJ-2). Another violation, exhibit ALJ-3, is a section 104(d)(2) order which Mr. Zimmerman issued after finding that a missing stopping resulted in the failure to maintain air separation between the belt line and intake escapeway. Inspector Zimmerman noted that such air separation must be maintained except where point feeders are listed on the mine map. The order was terminated after a permanent stopping was constructed to separate the belt from the intake.

Petitioner's counsel asserted that the size of the hole in the stopping cited by Inspector Gaither supports a conclusion that the stopping was never intended to be used as a point feeder in the first place (Tr. 68). Coupled with the fact that the inspector observed no stopping materials readily available at the location, and the fact that mine map did not show the location as a pre-planned point feeder, counsel suggested that the respondent has made a feeble attempt to establish that the overcast stopping was a bona fide point feeder which was used to facilitate the movement of belt equipment (Tr. 68-70).

Although the respondent has the discretion under its approved plan to establish point feeders at necessary locations, the conditions under which this may be done are spelled out at page 3, paragraph 12 of the plan. Those conditions require that a point feeder location be so designated

on the current mine map and also be shown on the current ventilation map. A second condition is that the point feeder control device be constructed according to the approved method for constructing a standard ventilation regulator, with sufficient materials readily available to completely close the opening if necessary.

Assistant Mine Manager Ball contended that the cited permanent overcast stopping was in fact an "inactive" point feeder which was constructed as such for the specific purpose of facilitating the removal of the belt drive. He also contended that this was done to control the air during the week that the belt drive was planned to be removed (Tr. 97). However, he then admitted that the permanent stopping was actually "converted" into a point feeder by knocking down the sides of the walls and installing boards. I find Mr. Ball's position to be rather contradictory. It seems strange to me that the respondent would go to the expense of constructing a solid masonry block wall stopping, only to knock it down to remove a piece of equipment that it knew had to be removed in the first place.

Mr. Ball testified that the purported point feeder was so designated on the mine map at the time the citation issued. However, the mine map was not produced at the hearing, and Inspector Gaither testified that the location of the permanent stopping which he cited was not shown as a point feed on the working mine map maintained at the mine office.

Inspector Gaither testified that even if the hole had been 1-foot by 1-foot, he would have issued the citation because air separation was not being maintained as required by the plan (Tr. 68). Mr. Gaither stated that in order to maintain air separation, the cited overcast permanent stopping was required to be constructed and maintained as a solidly cement block and mortared wall as depicted in the sketch which is a part of the plan. He confirmed that the blocks were replaced and the wall was recemented in order to achieve abatement. Since it was not reconstructed in the manner in which point feeders are normally constructed in the mine, the respondent's contention that it was a point feeder is contradictory (Tr. 72). He testified that point feeders are constructed with a normal sized hole 4 to 6 feet wide which is framed by boards which may be removed and replaced to regulate the amount of air passing through the opening. Since the cited stopping was not constructed in that manner, he believed that the respondent never intended to use it as a point feeder. Respondent's counsel conceded that a stopping

was quickly constructed once the citation issued, but contended that simply because this done cannot serve to establish that the respondent did not intend it as point feeder (Tr. 79). Although counsel alluded to an "obvious valid reason" for constructing the stopping to achieve abatement, since none were forthcoming, I can only conclude that abatement was achieved to insure compliance and to preclude the issuance of a closure order.

Mr. Ball asserted that Mr. Gaither had previously observed the hole in the stopping before he issued the citation and that he discussed the matter with respondent's safety inspector Eddie Nicholson. Mr. Ball stated that prior to the issuance of the citation, Mr. Nicholson informed him about "the hole out stopping" and asked him whether he (Ball) intended "to make that a point feed." At that point in time, Mr. Ball advised his general foreman that he wanted the stopping built as a point feed that night (Tr. 86). Mr. Ball stated that he knew it was built that way prior to the issuance of the citation because he went to the location an hour or two after the citation was issued and found it boarded up (Tr. 87). Mr. Ball admitted that he did not discuss the matter with Inspector Gaither until after the citation was issued.

Inspector Gaither testified that when he observed the stopping hole during his inspection, there were no boards installed across it, a piece of curtain was hanging over the hole, and he saw no evidence of any construction taking place. He confirmed that Mr. Nicholson was with him and that when he asked Mr. Nicholson for an explanation, someone in the inspection party offered an explanation that the hole was knocked in the overcast wall in order to remove the belt header. At that point in time, Mr. Gaither stated that he informed Mr. Nicholson that this could not be done, and that Mr. Nicholson simply replied "We'll call this a point feeder."

During a subsequent conversation, Mr. Gaither stated that Mr. Nicholson advised him that it was his impression that the hole was knocked out to facilitate the removal of the belt header and that the hole was to be sealed up after the equipment was taken out. Since Mr. Nicholson was not called to testify in this case, and since I find Mr. Gaither to be a credible witness, I accept his version of the events. Further, Mr. Gaither's version, contrary to that of Mr. Ball, supports a conclusion that the permanent overcast stopping was initially constructed for that purpose, and that it was not constructed as a point feeder. Further, I reject any notion that the respondent was in the process of constructing

a point feeder at the time of the inspection. I conclude that it simply knocked a hole in the permanent stopping to facilitate the removal of the belt header, and that Mr. Ball's testimony is simply a less than credible attempt to justify what was done.

After careful consideration of all of the credible testimony and evidence adduced in this case, I cannot conclude that the respondent has rebutted the petitioner's contention that the cited overcast stopping was not in fact a bona fide point feeder. I conclude and find that the overcast stopping was not a point feeder. I accept Inspector Gaither's testimony with respect to the condition of the stopping as credible evidence of the fact that it was not intact and was not constructed and maintained as required by the plan, and that the large hole in the stopping precluded the required maintenance of air separation between the belt entry and intake entry. The fact that the purported point feeder was not so designated on the map, and the fact that stopping materials were not present or readily available at the stopping location lend additional support to the inspector's contention that the overcast stopping was not in fact a designated point feeder.

I conclude and find that the cited overcast stopping in question was in fact a permanent stopping within the meaning of the approved plan. The applicable plan provisions found at page one, including the construction sketches referred to by the inspector which are part of the plan, required that such stoppings be constructed of stacked or mortared conventional or solid masonry blocks. Since the overcast stopping in question was not so constructed or maintained as required by the plan when the inspector found it, I conclude and find that a violation of the plan has been established. Since it is clear that a violation of the approved plan constitutes a violation of section 75.316, the citation IS AFFIRMED.

Citation No. 2482924, issued on December 4, 1984, charges a violation of mandatory standard 30 C.F.R. § 75.1712-3(a), in that the bathing facility change rooms were not maintained in a sanitary condition because of backed-up shower floor drains. The respondent admitted that the violation occurred as stated by the inspector who issued the citation, and the parties settled the matter at the hearing. The parties subsequently filed a joint motion for approval of the proposed settlement pursuant to 29 C.F.R. § 2700.30. The citation was modified to delete the inspector's "significant and substantial" finding,

and the respondent agreed to pay the full amount of the proposed civil penalty of $178. After consideration of the arguments presented in support of the proposed settlement, the joint motion IS GRANTED, and the settlement IS APPROVED.

History of Prior Violations

The parties have stipulated that the respondent has an "average history of prior violations." However, since the petitioner did not submit a computer print-out of the mine history, I have no way of knowing what an "average" history is or whether or not the respondent's compliance record warrants any additional increases or decreases in the civil penalty which I have assessed for the violation in question. However, I have considered the four prior citations issued by Inspector Zimmerman at the mine as part of the respondent's compliance record and this is reflected in the penalty assessed for the violation in question.

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

The parties have stipulated that the respondent is a medium-sized operator and that the imposition of a civil penalty will not adversely affect its ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues.

Negligence

I conclude that the violation resulted from the respondent's failure to exercise reasonable care to insure compliance with the requirements of its ventilation plan. The evidence adduced in this case established that mine management had knowledge of the existence of the hole in the overcast stopping, and I conclude that its failure to insure against such a condition constitutes ordinary negligence.

Gravity

There is no evidence in this case that the respondent was experiencing any ventilation problems in the mine at the time the citation was issued, and the parties agreed that this was the case (Tr. 140). Although Inspector Gaither confirmed that he took no air readings and did not determine whether the air ventilation was interrupted during the time the hole in the stopping existed with a brattice cloth over it, (Tr. 127), the fact is that the integrity of the stopping was not maintained and complete air separation as required by

the plan was not maintained. Further, the overcast stopping was an intergral and important part of the underground ventilation system and methane and dust-control plan. Under the circumstances, I conclude and find that the violation was serious.

Good Faith Compliance

The parties stipulated that the violation was timely abated in good faith, and I adopt this as my finding on this issue.

Significant and Substantial Violation

The petitioner advanced no arguments as to why it believes that the violation is significant and substantial, and the inspector's testimony does not address this question. As pointed out earlier, the inspector made no air readings and did not determine whether or not the ventilation was interrupted. As a matter of fact, he conceded that even with the brattice cloth over the hole in the stopping, any leakage would be minimal and "so small you couldn't measure it." He also stated that while air separation was not maintained because the permanent stopping was destroyed, he conceded the possibility that separation was maintained even with the brattice cloth over the hole (Tr. 129). Under the circumstances, I cannot conclude that the petitioner has presented any evidence to support a conclusion that the violation presented a reasonable likelihood of an accident or injury of a reasonably serious nature. Accordingly, the inspector's "S&S" finding IS VACATED.

Penalty Assessment

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 a civil penalty assessment in the amount of $200 is appropriate and reasonable for the section 104(a) Citation No. 2482846, issued on December 11, 1984.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $200 for the violation in question. Respondent is also ORDERED TO PAY a civil penalty in the amount of $178 for Citation No. 2482924, which has been settled by the parties. The civil penalty assessment payments are to be made to MSHA

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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DEC 19 1985

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 84-210-R
v.	:	Citation No. 2260516; 4/11/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 84-211-R Citation No. 2419672; 4/23/84
	:	Docket No. WEVA 84-212-R Order No. 2419748; 4/23/84
	:	Docket No. WEVA 84-216-R Citation No. 2419745; 4/23/84
	:	Docket No. WEVA 84-217-R Citation No. 2419488; 4/25/84
	:	Docket No. WEVA 84-219-R Citation No. 2419750; 5/1/84
	:	Docket No. WEVA 84-281-R Order No. 2419796; 5/24/84
	:	Martinka Mine No. 1
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 84-364 A. C. No. 46-03805-03590
v.	:	Docket No. WEVA 84-394 A. C. No. 46-03805-03594
SOUTHERN OHIO COAL COMPANY, Respondent	:	Docket No. WEVA 85-59 A. C. No. 46-03805-03600
	:	Docket No. WEVA 85-80 A. C. No. 46-03805-03612
	:	Docket No. WEVA 85-90 A. C. No. 46-03805-03620
	:	Docket No. WEVA 85-110 A. C. No. 46-03805-03623
	:	Docket No. WEVA 85-116 A. C. No. 46-03805-03626
	:	Martinka Mine No. 1

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on July 18, 1985, and December 17, 1985, motions for approval of settlement in the above-entitled cases. 1/ All of the cases had been scheduled for hearing during the same week, but the cases in Docket Nos. WEVA 84-210-R, WEVA 84-281-R, WEVA 85-90, and WEVA 85-110 were scheduled for hearing by separate orders because different attorneys are representing the Secretary of Labor in those four cases from the attorney who is representing the Secretary in the remaining 10 cases. Shortly after the four cases were set for hearing, counsel for the parties settled them and promptly filed a motion for approval of settlement in those four cases. Counsel in the remaining 10 cases requested an extension of the hearing date so that the parties could further consider the possibility of settling those cases also. I did not act upon the first motion for approval of settlement because I wanted to consider all of the cases in a single decision and I anticipated that a settlement would be reached sooner than it was in the remaining 10 cases.

I shall first consider the motion for approval of settlement filed with respect to the four cases in Docket Nos. WEVA 84-210-R, et al. Under the motion for approval of settlement, SOCCO would pay reduced penalties totaling $605 instead of the penalties totaling $1,105 proposed by MSHA. 2/ Section 110(i) of the Federal Mine Safety and Health Act of 1977 lists six criteria which are required to be used in assessing civil penalties.

The proposed assessment sheets in the official files indicate that the Martinka Mine No. 1 here involved produces about 2,283,000 tons of coal annually and that SOCCO produces about 13,559,000 tons of coal per year at all of its mines. Those production amounts support a conclusion that SOCCO is a large operator and that penalties in an upper range of magnitude would be appropriate under the criterion of the size of SOCCO's business.

1/ The Secretary's counsel also filed on December 16, 1985, a motion to vacate the citations which are the subject of the notices of contest in Docket Nos. WEVA 84-216-R and WEVA 84-217-R. The motion additionally asks that the related civil penalty cases in Docket Nos. WEVA 84-364 and WEVA 85-116 be dismissed.

2/ The second motion for approval of settlement filed on December 17, 1985, agrees to reduce total penalties to $789 from the total penalties of $1,076 proposed by MSHA.

The motion for approval of settlement states that payment of civil penalties will not adversely affect SOCCO's ability to continue in business. Therefore, the penalties need not be reduced under the criterion of whether payment of penalties would cause SOCCO to discontinue in business.

As of the date when the violations here involved were cited, SOCCO had been assessed penalties for 382 violations during 1,299 inspection days. Application of those figures to MSHA's assessment formula described in 30 C.F.R. § 100.3(c) requires assignment of zero penalty points under the criterion of SOCCO's history of previous violations. Consequently, no portion of the penalty has to be assessed under the criterion of history of previous violations.

In order to evaluate the remaining three criteria of SOCCO's good-faith effort to achieve rapid compliance, negligence, and gravity, a brief discussion of the specific alleged violations is appropriate. The only violation for which a penalty of more than $20 is sought in Docket No. WEVA 85-110 is for a violation of section 77.1605(p) because stop-blocks or derail devices had not been installed to protect persons from runaway cars where haulage equipment would enter the mine. MSHA considered that the violation was serious, that it was associated with a low degree of negligence, that SOCCO had demonstrated a good-faith effort to achieve rapid compliance, and proposed a penalty of $105 which SOCCO has agreed to pay in full. I find that the penalty proposed by MSHA under section 100.3 of its assessment formula is adequate in the circumstances and that SOCCO's agreement to pay the proposed penalty should be approved.

In addition to the alleged violation of section 77.1605(p) discussed above, the petition for assessment of civil penalty filed in Docket No. WEVA 85-110 seeks assessment of a civil penalty of $20 for a violation of section 75.1203 alleged in Citation No. 2420016 which was affirmed by my summary decision issued on April 15, 1985, in Docket No. WEVA 84-296-R, 7 FMSHRC 543. After issuance of that decision, counsel for SOCCO filed on June 10, 1985, a motion to withdraw its notice of contest in Docket No. WEVA 85-110 and thereby discontinue its opposition to paying the penalty of $20 proposed by MSHA for the violation of section 75.1203 alleged in Citation No. 2420016. The motion states that "payment of this amount is forthcoming." Counsel for the Secretary did not file an answer either opposing or favoring the granting of SOCCO's motion to withdraw its notice contesting Citation No. 2420016 and there is nothing in the official file to explain whether the proposed $20 penalty is still "forthcoming" or has been paid.

In Mettiki Coal Corp., 3 FMSHRC 2277 (1981), the Commission approved a somewhat similar disposition of a civil penalty case, except that the Secretary's counsel in that case filed a motion to withdraw the petition for assessment of civil penalty after Mettiki Coal had withdrawn its notice of contest of the penalties proposed by MSHA. In the Mettiki case, Mettiki actually paid the full amount of $10,000 being sought by the petition for assessment of civil penalty and the only reason the Secretary filed the motion to withdraw the petition for assessment of civil penalty was to defeat the judge's refusal to accept a settlement proposal previously submitted by the parties. The result of the filings in the Mettiki case was that the parties retroactively restored the posture of the case to the initial procedure provided for the proposing of penalties under section 105(a) of the Act. Under section 105(a), if a party declines to protest a proposed penalty, the "penalty shall be deemed a final order of the Commission and not subject to review by any court or agency."

In order to make this case conform with the procedure approved by the Commission in the Mettiki case, I shall hereinafter dismiss the petition for assessment of civil penalty filed in Docket No. WEVA 85-110 insofar as it seeks assessment of a penalty of $20 for the violation of section 75.1203 alleged in Citation No. 2420016 and grant the motion filed by SOCCO to withdraw its notice of contest insofar as it sought review of Citation No. 2420016. The grant of the motion will be conditioned upon the payment by SOCCO of the penalty of $20. If SOCCO has already paid the penalty, it may, of course, ignore the condition associated with the grant of its motion. Inasmuch as the violation involved pertained to the manner in which SOCCO went about making its mine map ultimately available to a person who resided on the surface of the land where SOCCO's mine is situated, it appears that a penalty of $20 is reasonable under the many extenuating circumstances which were associated with issuance of the citation.

The petition for assessment of civil penalty filed in Docket No. WEVA 85-90 proposes a penalty of $1,000 for an alleged violation of section 75.1722(a) because the guard for the chain drive at a belthead had been removed 2 days prior to the time the inspector examined it and no work was being done to replace the guard. Although a sign had been erected at one end of the travelway along the drive, no sign had been erected at the other end of the travelway to warn a person of the lack of a guard on the drive. The inspector cited the violation in an order issued under the unwarrantable failure provisions of section 104(d)(2) of the Act and MSHA waived the provisions of its regular

assessment formula in section 100.3 of the regulations and assessed the penalty on narrative findings written pursuant to section 100.5.

MSHA's narrative findings considered the violation to be very serious because the mine floor around the belt drive was wet and slippery and those conditions increased the likelihood of a person's falling into the exposed moving parts. The violation was considered to have resulted from a high degree of negligence because it was believed that SOCCO had been aware of the violation for about 2 days and had done nothing toward having the guard replaced.

The motion for approval of settlement is accompanied by a letter from SOCCO's counsel offering to settle the issues pertaining to Order No. 2419796 if MSHA would amend the order to allege the violation in a citation issued under section 104(a) of the Act so as to remove the inspector's finding that the violation was the result of an unwarrantable failure on SOCCO's part. SOCCO's counsel stated in his letter that if a hearing were to be held, the mine foreman would testify that he had erected danger signs at both ends of the travelway and the firebosses who examined the area at the end of the day and afternoon shifts would testify that they did not report any violation or hazardous conditions existing in the vicinity of the belthead. Finally, one of SOCCO's safety assistants would testify that he had accompanied an MSHA inspector who checked the area of the belthead on the day before the instant order was issued and cited no violation or hazardous condition in the vicinity of the belthead.

The motion for approval of settlement states that it would be difficult to prove at a hearing that the alleged violation of section 75.1722(a) was the result of an unwarrantable failure in light of the evidence which would be presented by SOCCO. Consequently, MSHA agreed to modify the order to a citation issued under section 104(a) so as to delete the inspector's finding that the violation was the result of an unwarrantable failure.

I find that the parties have given adequate reasons to warrant a reduction in the proposed penalty from $1,000 to $500 because it is obvious that a large part of the proposed penalty was based on the inspector's finding that unwarrantable failure was involved. The violation was still serious and therefore it is appropriate to approve the settlement agreement under which SOCCO will still be paying a substantial penalty of $500 for the violation of section 75.1722(a).

The second motion for approval of settlement filed on December 17, 1985, discusses the petitions for assessment of civil penalty filed in Docket Nos. WEVA 84-394, WEVA 85-59, and WEVA 85-80. Only a single alleged violation is being contested in each of those cases. The parties' settlement of the civil penalty issues also permits me to dismiss the notices of contest which were filed in the related contest proceeding in Docket Nos. WEVA 84-219-R, WEVA 84-212-R, and WEVA 84-211-R.

I have already discussed the three criteria of SOCCO's ability to pay penalties, history of previous violations, and the size of its business. The previous findings with respect to those three criteria remain unchanged and will be applicable for considering the second motion for approval of settlement. The remaining three criteria of negligence, gravity, and good-faith abatement will be considered in evaluating the parties' settlement agreement pertaining to the three civil penalty cases mentioned in the preceding paragraph.

The petition for assessment of civil penalty filed in Docket No. WEVA 84-394 seeks to have a penalty assessed for an alleged violation of section 77.1700 because the driver of a truck was operating alone in a remote area without a communication system to call for help should he become exposed to a hazardous condition. MSHA used the assessment formula in section 100.3 and proposed a penalty of $119 after finding that the violation was relatively serious, was associated with a moderate degree of negligence, and was abated within the time given by the inspector in his citation. The motion for approval of settlement states that SOCCO has agreed to pay the full amount of $119 proposed by MSHA. I find that MSHA proposed a reasonable penalty pursuant to its assessment formula and that the parties' settlement agreement provides a satisfactory means of disposing of the case in Docket No. WEVA 84-394.

In Docket No. WEVA 85-59, a penalty is sought to be assessed for an alleged violation of section 77.1104 because an accumulation of loose coal, coal dust, and float coal dust existed under the Nos. 17- and 54-inch belt conveyors. MSHA waived the use of its regular assessment formula described in section 100.3 and proposed a penalty of $800 on the basis of narrative findings written pursuant to section 100.5. While the narrative findings do not separate the amount of the penalty which was assigned under the criterion of negligence from the amount attributed under the criterion of gravity, it is likely that a large portion of the penalty was assigned under the criterion of negligence because the violation was cited in an order

issued under the unwarrantable-failure provisions of section 104(d)(2) of the Act. The inspector based the finding of unwarrantable failure on his belief that SOCCO had failed to provide adequate personnel to clean up the accumulations and had not tried to stop the excessive amount of water which appeared to be a contributing factor to the accumulations.

The motion for approval of settlement shows that MSHA has changed the order to the category of a citation issued under section 104(a) of the Act and that SOCCO has agreed to pay a reduced penalty of $550. The reduced penalty is based on a further investigation of the circumstances surrounding the conditions which were observed by the inspector. It appears that SOCCO had assigned two employees to work on cleaning up the accumulations shortly after they occurred and that they were in the process of cleaning up the spillage at the time the order was issued. Also water was coming out of the mine onto the inclined conveyor belt and then washing coal back down the incline but SOCCO was not intentionally putting water on the conveyor belt as the inspector had first concluded.

I find that the parties have given adequate reasons for reducing the degree of negligence previously considered to be associated with the violation. Additionally, the description of the accumulations shows that they were extremely wet and would not have been likely to have caused a fire or an explosion. SOCCO showed a good-faith effort to achieve rapid compliance by cleaning up the accumulations within 2 hours after the inspector cited the violation.

In Docket No. WEVA 85-80, a penalty is sought for an alleged violation of section 77.205(a) because a sloped roof under the scale house needed to be protected by installing a railing or barrier to prevent a person from falling off the roof when work is required to be done by a person standing on the roof. MSHA proposed a penalty of $157 under section 100.3 of its assessment formula after finding that the violation was relatively serious, was associated with a moderate degree of negligence, and was abated within the time provided for by the inspector in his citation.

The motion for approval of settlement states that the parties have agreed to reduce the penalty to $120 because it was established that employees are seldom required to go onto the roof to work. The citation was originally written to allege a violation of section 77.204 and was thereafter modified to allege a violation of section 77.205(a). Section 77.204 applies to protecting persons from falling through openings in surface installations by erecting railings or barriers, whereas section 77.205(a) requires an

operator to provide a safe means of access to all working places. Since the violation pertains to an undescribed type of work which is required to be performed on top of a roof which exists under a scale house, it may well be that no standard precisely covers the type of hazard from which the inspector was trying to protect employees. After the violation was cited SOCCO did install a railing to protect any person from falling who might have to work on the roof. It is obvious that the inspector accomplished the purpose for which the citation was written. In such circumstances, SOCCO is paying a reasonable penalty in agreeing to pay a reduced penalty of $120 instead of the penalty of $157 proposed by MSHA. Therefore, I find that the parties' settlement agreement should be approved.

The motion for approval of settlement states that SOCCO will file a motion to withdraw its notices of contest in the event the judge approves the parties' settlement agreement. I see no need to delay disposition of the contest cases in Docket Nos. WEVA 84-211-R, WEVA 84-212-R, and WEVA 84-219-R until after this decision has been issued and SOCCO has filed motions to withdraw three of the seven notices of contest which are involved in this proceeding. This decision disposes of all issues raised in the seven contest cases and the seven related civil penalty cases either because SOCCO has withdrawn its notice of contest of the penalty proposed by MSHA under section 105(a) of the Act, or because SOCCO has agreed to pay the full penalty proposed by MSHA, or because SOCCO, for justifiable reasons, has agreed to pay reduced penalties, or because MSHA has moved to have two citations vacated. In each case, there is no longer any reason to wait for the further filing of one or more pleadings by SOCCO before disposing of the contest cases which are related to the civil penalty cases. Cf. Old Ben Coal Co., 7 FMSHRC 205 (1985).

Motion To Vacate Two Citations

The petitions for assessment of civil penalty filed in Docket Nos. WEVA 84-364 and WEVA 85-116 seek assessment of penalties for alleged violations of sections 75.317 ($119) and 77.107-1 ($20), respectively. The alleged violations of sections 75.317 and 77.107-1 were the subject of notices of contest filed in Docket Nos. WEVA 84-216-R and WEVA 84-217-R. Granting the motions to vacate the underlying citations will make it possible to dismiss the four interrelated cases without assessing any civil penalties.

The citation involved in Docket Nos. WEVA 84-364 and WEVA 84-216-R is No. 2419745 which alleged a violation of section 75.317 because only one of three methane detecting

devices was operative. That section provides that methane detecting devices shall be in a permissible condition before each shift is worked. The motion to vacate the citation notes that the alleged violation pertained to SOCCO's preparation plant where only one methane test has to be made each shift pursuant to section 77.201-1. Since one operative methane detector is adequate for checking the few areas which have to be tested for methane accumulations, the parties concluded that section 75.317 had not been violated so long as one of three detectors was in working order. The parties also doubt that the cited underground standard is applicable to a surface facility like the preparation plant here involved.

I find that the motion to vacate has given valid reasons for requesting that Citation No. 2419745 be vacated. The motion to vacate is hereinafter granted, Citation No. 2419745 is vacated, and the pertinent contest and civil penalty cases in Docket Nos. WEVA 84-216-R and WEVA 84-364 are dismissed.

The citation involved in Docket Nos. WEVA 85-116 and WEVA 84-217-R is No. 2419488 which alleged a violation of section 77.107-1 because SOCCO had not given proper emphasis to the work of surface electricians when it administered its electrical retraining program. Section 77.107-1 provides for each operator to submit for approval by MSHA a program setting forth "what, when, how, and where he will train and retrain persons whose work assignments require that they be certified or qualified." The primary thrust of the alleged violation was that SOCCO's annual retraining program was structured to give primary emphasis upon the retraining of underground electricians without providing enough specific retraining for persons who work only as surface mine electricians. The motion to vacate the citation explains that SOCCO had in effect at the time the citation was issued an annual retraining plan which had been approved by MSHA. The violation was cited in response to a complaint by an employee filed under section 103(g) of the Act. Investigation of the complaint resulted in a conclusion by MSHA that SOCCO's program for surface electrical personnel could be improved and SOCCO subsequently agreed to modify its instruction program. In such circumstances, the parties say that they do not believe SOCCO should be cited for violating an annual retraining plan which MSHA had approved. Therefore, counsel for the Secretary requests that the citation be vacated and that the related contest and civil penalty cases be dismissed.

I find that the motion to vacate has given valid reasons for requesting that Citation No. 2419488 be vacated. The motion to vacate is hereinafter granted, Citation No. 2419488

is vacated, and the pertinent contest and civil penalty cases in Docket Nos. WEVA 84-217-R and WEVA 85-116 are dismissed.

WHEREFORE, it is ordered:

(A) The motions for approval of settlement filed on July 18, 1985, and December 17, 1985, are granted and the settlement agreements are approved.

(B) The motion to vacate Citation No. 2419745 issued April 23, 1984, alleging a violation of section 75.317 and Citation No. 2419488 issued April 25, 1984, alleging a violation of section 77.107-1 is granted and those two citations are vacated.

(C) On the basis of the vacation of Citation No. 2419745 in paragraph (B) above, the petition for assessment of civil penalty filed in Docket No. WEVA 84-364 is dismissed and the related notice of contest filed in Docket No. WEVA 84-216-R is dismissed.

(D) On the basis of the vacation of Citation No. 2419488 in paragraph (B) above, the petition for assessment of civil penalty filed in Docket No. WEVA 85-116 is dismissed and the related notice of contest filed in Docket No. WEVA 84-217-R is dismissed.

(E) Pursuant to the settlement agreement filed on July 18, 1985, SOCCO shall, within 30 days from the date of this decision, pay civil penalties totaling $605.00 which are allocated to the respective alleged violations as follows:

Docket No. WEVA 85-110

Citation No. 2260516 4/11/84 § 77.1605(p)	$ 105.00
Total Settlement Penalties in Docket No. WEVA 84-110	$ 105.00

Docket No. WEVA 85-90

Order No. 2419796 5/24/84 § 75.1722(a), modified to a citation	$ 500.00
Total Settlement Penalties in Docket No. WEVA 85-90	$ 500.00
Total Settlement Penalties Pursuant to Motion of 7/18/85	$ 605.00

(F) (1) The petition for assessment of civil penalty filed in Docket No. WEVA 85-110 is dismissed to the extent that it sought assessment of a proposed penalty of $20.00 for the violation of section 75.1203 alleged in Citation No. 2420016 dated June 19, 1984, so that the proposed penalty may be paid pursuant to section 105(a) of the Act. (2) SOCCO's motion to withdraw the notice of contest is granted subject to SOCCO's paying the proposed penalty of $20 within 30 days from the date of this decision if SOCCO has not already paid the proposed penalty.

(G) Pursuant to the settlement agreement filed on December 17, 1985, SOCCO shall, within 30 days from the date of this decision, pay civil penalties totaling $789.00 which are allocated to the respective alleged violations as follows:

Docket No. WEVA 84-394

Citation No. 2419750 5/1/84 § 77.1700	$ 119.00
Total Settlement Penalties in Docket No. WEVA 84-394	$ 119.00

Docket No. WEVA 85-59

Order No. 2419748 4/23/84 § 77.1104, modified to a citation	$ 550.00
Total Settlement Penalties in Docket No. WEVA 85-59	$ 550.00

Docket No. WEVA 85-80

Citation No. 2419672 4/23/84 § 77.205(a)	$ 120.00
Total Settlement Penalties in Docket No. WEVA 85-80	$ 120.00
Total Settlement Penalties Pursuant to Motion of 12/17/85	$ 789.00

(H) The notices of contest filed in Docket Nos. WEVA 84-210-R, WEVA 84-211-R, WEVA 84-212-R, WEVA 84-219-R, and WEVA 84-281-R are dismissed.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 20, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 85-108-M A.C. No. 16-00995-05504
v.	:	Proppant Plant
SOHIO ELECTRO MINERALS CO., Respondent	:	

DECISION

Before: Judge Broderick

On December 9, 1984, the parties filed a joint motion for decision on the record, and agreed to waive their rights to a hearing.

Respondent does not deny that the violation charged in the citation involved herein occurred. The parties submit that the only issue before me for resolution is the appropriate penalty for the violation.

The citation charged a violation of the mandatory safety standard contained in 30 C.F.R. § 56.14-1, because the tail pulley for the main truck loadout conveyor was not guarded. A walkway next to the tail pulley was used by maintenance employees, but "is a very low travel area and the conveyor is only run intermittently with very little employee exposure." A CAV inspection in 1982 and four follow up MSHA inspections of the same equipment did not result in citations, nor was Respondent notified that the unguarded pulley was a violation. The citation involved herein was abated the same day it was issued. The inspector believed that Respondent's negligence in permitting the violation was low. He concluded that the occurrence of the event against which the cited standard is directed was reasonably likely to occur and the injury resulting from the occurrence could reasonably be expected to be fatal.

Respondent is of moderate size, and has a favorable history of prior violations. The violation was moderately serious. Even though few employees were exposed, the injury which could result was expected to be serious. The prior

inspections tend to diminish the factor of negligence. I conclude that Respondent's negligence was minimal. It abated the condition promptly and in good faith.

I conclude that based on the criteria in section 110(i) of the Act, an appropriate penalty for the violation is $100.00 which I will reduce by 10% for prompt, good faith abatement.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that citation 2239899 issued May 9, 1985, IS AFFIRMED.

IT IS FURTHER ORDERED that Respondent shall within 30 days of the date of this decision pay the sum of $90.00 as a civil penalty for the violation found herein.

James A. Broderick
James A. Broderick
Administratiave Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

December 20, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 84-217 A. C. No. 15-08906-03508
v.	:	No. 3 Mine
CIRCLE J. COAL COMPANY, INC., Respondent	:	

DECISION

Before: Judge Fauver

This case was set for hearing on December 4, 1985, pursuant to notice of hearing issued on September 18, 1985, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801, et seq. The notice of hearing required the parties to file prehearing statements not later than November 26, 1985.

Respondent did not file a prehearing statement. Because of this failure, Respondent was issued a Show Cause Order on November 29, 1985, giving Respondent 15 days to show cause why it should not be held in default and the proposed penalties be assessed without further proceedings herein. Respondent has not responded to the Show Cause Order.

ORDER

WHEREFORE IT IS ORDERED that:

1. The allegations of fact in Citation No. 2167760, June 4, 1984, Citation No. 2291403, June 4, 1984, and Citation No. 2291404, June 4, 1984, are deemed to be true and are hereby incorporated in FINDINGS OF FACT herein.

2. The allegations of violations in the above citations are deemed to be true and are hereby incorporated as CONCLUSIONS OF LAW herein.

3. Respondent is ASSESSED the following civil penalties for the violations found herein:

CITATION NO.	CIVIL PENALTY
2167760	$20
2291403	$46
2291404	$20

4. Respondent shall pay the above-assessed civil penalties in the total amount of $86 within 30 days of this Decision.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

DEC 20 1985

WEST VIRGINIA REBEL COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. KENT 85-18-R
	:	Citation No. 2183908;
v.	:	9/20/84
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. KENT 85-19-R
	:	Order No. 2183909; 9/21/84
	:	No. 1 Surface Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 85-68
	:	A.C. No. 15-06365-03530
v.	:	No. 1 Surface Mine
WEST VIRGINIA REBEL COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: J. Edgar Baily, Esq., and George V. Gardner, Esq., Gardner, Moss, Brown & Rocovich, Roanoke, Virginia, for West Virginia Rebel Coal Co. (Rebel);
Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor (Secretary).

Before: Judge Broderick

STATEMENT OF THE CASE

On October 12, 1984, Rebel filed Notices of Contest, contesting citation 2183908 issued on September 20, 1984, under section 104(a) of the Federal Mine Safety and Health Act and order 2183909, issued on September 21, 1984 under section 104(b) of the Act. Rebel denied that it violated the Act as charged in the citation and order. The Secretary filed its answer on December 31, 1984.

On January 14, 1985, Rebel filed a motion for entry of default and for vacation of the citation and order on the ground that the Secretary's answer was not timely. The motion was denied by an order issued February 5, 1985.

The citation contested herein was issued for Contestant's alleged failure to comply with an order to reinstate miner Larry Duty issued by me in the case of Secretary/Duty v. West Virginia Rebel Coal Co., Docket Nos. KENT 83-161-D and KENT 83-232-D. The withdrawal order contested herein was issued on the ground that no apparent effort had been made to abate the violation previously cited.

The Secretary filed a proposal seeking the assessment of a civil penalty for the violation alleged in the contested citation and order. Since the contest and penalty cases involve the related citation and order, they are hereby consolidated for the purpose of this decision. On October 25, 1985, the parties submitted factual stipulations and moved to have the cases decided on the augmented record, waiving their rights to an oral hearing. Each party has also filed a supplemental statement setting forth its position on the issues involved herein. I accept the stipulations and have considered the entire record including the documentary exhibits filed by the parties. I have also carefully considered the contentions of the parties.

FINDINGS OF FACT

1. At all times pertinent hereto, Rebel was the operator of a coal mine in Martin County, Kentucky, known as the No. 1 Mine. The mine produced over 700,000 tons of coal during the four quarters preceding the alleged violations.

2. Secretary/Duty v. West Virginia Rebel Coal Co., Docket Nos. KENT 83-161-D and KENT 83-232-D, (Duty case) consolidated Discrimination Proceedings, were heard by me in July and September 1984, having been reassigned to me after Judge Joseph B. Kennedy, to whom they were originally assigned, recused himself.

3. On September 11, 1984, I issued an order from the bench in the Duty case, ordering that Rebel forthwith reinstate Complainant Duty to the position from which he was discharged on March 3, 1983.This order reaffirmed the written order of reinstatement issued by Judge Kennedy on May 25, 1983. Rebel was represented by counsel at the hearing when the bench order was issued.

4. On September 14, 1985, Duty reported to work at Rebel's work site where he was refused reinstatement at the direction of Rebel's counsel.

5. On September 18, 1984, I issued a written order of reinstatement in the Duty case, restating and reaffirming the bench order of September 11, 1984. A correction to the September 18, 1984 order was issued October 3, 1984.

6. On September 20, 1984, at approximately 7:00 a.m., Duty again reported for work at Rebel and was refused reinstatement by Milton Preston, Safety Director for Rebel.

7. On September 20, 1984, at 7:15 a.m., MSHA Inspector Creech issued a 104(a) citation because of Rebel's refusal to reinstate Duty. The citation was served on Milton Preston. Termination was due on September 21, 1984 at 7:00 a.m.

8. On September 21, 1984, Duty returned to the mine at approximately 7:00 a.m. and was again refused reinstatment by Preston.

9. On September 21, 1984, at 7:10 a.m. Inspector Creech isued a 104(b) withdrawal order because no apparent effort was made to abate the citation by reinstating Duty.

10. On October 9, 1984, Rebel filed a Petition for Interlocutory Review with the Commission in the Duty case, which was denied by Commission Order of October 12, 1984.

11. On October 15, 1984, Rebel filed a Motion for a Stay of the Order of Reinstatement in the Duty case. I denied the motion by order issued October 18, 1984.

12. Duty was not reinstated by Rebel prior to October 26, 1984 when he would have been laid off in accordance with the union contract.

13. On September 20 and 21, 1984 when the citation and order involved herein were issued, neither Milton Preston nor counsel for Rebel had seen a copy of my written order of September 18, 1984.

14. Rebel is a debtor in possession and is operating the subject mine under the authority of Chapter XI of the Bankruptcy Act, and by direction of the Bankruptcy Court for the Eastern District of Kentucky. Rebel was placed in Chapter XI for reorganization under the Bankruptcy Code on June 27, 1984. A Chapter XI operating order was issued by the Bankruptcy Court to Rebel on September 21, 1984.

15. On June 1, 1984, Rebel entered into a consulting agreement with Minmag, Inc., whereby Minmag undertook to direct the affairs, operations and enterprises of Rebel. The agreement was approved by the Bankruptcy Court on July 9, 1984.

16. From September 20, 1982 to September 19, 1984, eighty-five violations were charged against Rebel. Rebel paid the assessments on 32 of these violations.

17. Rebel has debts totalling approximately sixteen million dollars.

ISSUES

1. Whether Rebel was properly cited for its failure to comply with the order of temporary reinstatement?

2. If so, whether the order of withdrawal was properly issued for the failure of Rebel to comply after the issuance of the citation?

3. If a violation is established, what is the appropriate penalty?

CONCLUSIONS OF LAW

Rebel is subject to the Federal Mine Safety and Health Act of 1977 in the operation of the subject mine and I have jurisdiction over the parties and subject matter of this proceeding.

On September 11, 1984, I issued an order in open court that Rebel reinstate Complainant Duty to the position from which he was discharged on March 3, 1983. This order was issued because of my finding that Rebel was not in compliance with the order of temporary reinstatement issued in the same proceeding by Judge Kennedy on May 25, 1983. My order was issued pursuant to section 105(c)(2) of the Act. Rebel failed or refused to comply with the order. The fact, if it is a fact, that Rebel's safety director was not aware of the order is irrelevant. Rebel was aware of and bound by the order. Rebel's action in refusing to comply with the order was a violation of an order promulgated pursuant to the Act. Therefore, it was a violation of section 104(a) of the Act, and the issuance of a citation was mandatory. I conclude that the citation contested herein, No. 2183908 issued September 20, 1984, was properly issued. The citation gave Rebel 24 hours to abate. I conclude that this was a reasonable abatement time.

Because Rebel failed to comply in the time set for abatement, the 104(b) order was properly issued.

At the time the citation and order were issued, Rebel was of moderate size. Given the nature of the violation charged herein, I conclude that the history of previous violations is not helpful in determining an appropriate penalty. Therefore the penalty assessed will not be increased or decreased because of Rebel's violation history. The violation was serious and was intentional. Rebel now argues that my order was issued in error. However, it did not perfect a challenge to it prior to the issuance of the citation and order. It did not demonstrate good faith in attempting to achieve rapid compliance after notification of a violation. On the contrary, it flouted an order of the Commission and refused to comply after the citation was issued.

Rebel is in bankruptcy. Whether it will be able to continue in business is problematic. Any penalty I assess might be said to have an effect on its ability to continue operating. Nevertheless, a substantial penalty is required for the serious, continued violation of a Commission order. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation found herein is $1,000.

ORDER

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

1. Citation No. 2183908 issued September 20, 1984 is AFFIRMED.

2. Order No. 2183909 issued September 21, 1984 is AFFIRMED.

3. West Virginia Rebel Coal Company, Inc. shall within 30 days of the date of this order pay the sum of $1,000 as a civil penalty for its violation of section 105(c) of the Act.

James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

DEC 20 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 85-95 A.C. No. 33-02308-03620 A
v.	:	Raccoon No. 3 Mine
DENZIL PROCTOR, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Broderick

On December 9, 1985, Petitioner moved to withdraw its Petition for a Civil Penalty, and for dismissal of this proceeding.

Respondent is charged in this proceeding as an agent of the corporate mine operator, with knowingly authorizing, ordering, or carrying out the violation charged against the operator. The Motion states that further review of the facts developed during discovery proceedings and discussions between counsel persuaded Petitioner that there are mitigating circumstances which show that Respondent's actions were more in the nature of an error in judgment than a knowing violation of the safety standard alleged. Respondent does not oppose the motion.

Based on the representations in the motion, which I accept, the motion is GRANTED, and this proceeding is DISMISSED.

James A Broderick

James A. Broderick
Administrative Law Judge

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DEC 20 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 84-79 A.C. No. 01-00758-03601
v.	:	No. 3 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: George D. Palmer, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner;
R. Stanley Morrow, Esq., and Harold D. Rice, Esq., Birmingham, Alabama, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for the alleged violation of 30 C.F.R. § 75.1403-8(d) for which a citation was issued on April 4, 1984. Termination was required by 8:00 a.m., April 6, 1984. The citation referred back to a notice to provide safeguards issued July 27, 1976. Respondent contends that the safeguard notice did not establish a mandatory safety standard, the violation of which could support the assessment of a civil penalty.

Pursuant to notice the case was called for hearing in Birmingham, Alabama on October 22, 1985. Luther McAnally and T. J. Ingram testified on behalf of Petitioner. Respondent did not call any witnesses. Both parties have filed post-hearing briefs.

I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

Respondent is the owner and operator of an underground mine in Jefferson County, Alabama, known as the No. 3 Mine.

The operator is of "medium" size, and has an average history of prior violations.

On July 27, 1976, Federal Mine Inspector T. J. Ingram issued a Notice to Provide Safeguards based on an inspection conducted the same day. The notice stated that "the authorized representative of the Secretary . . . directs you to provide the following specific safeguards - adequate clearance and signs at necessary points, clearance side free of material." The notice went on to provide as follows:

> Specific Recommended Safeguards:
>
> Several locations along the track haulageways that were used for travel had clearance less than 24 inches. Refuse, loose rock and supplies obstructed the available clearance in the provided walkways. Signs were not provided in places where the clearance side could be changed. The track haulage roads should have a continuous clearance on one side of at least 24 inches from the farthest projection of normal traffic. Where it is necessary to change the side on which clearance is provided, 24 inches of clearance should be provided on both sides for a distance of not less than 100 feet and warning signs should be posted at such locations. Track haulage roads . . . should have clearance on the 'tight' side of at least 12 inches from the farthest projection of the normal traffic. . . the clearance space on all track haulage roads should be kept free of loose rock, supplies and other loose materials.

On August 20, 1976, the Inspector notified Respondent that the required safeguards specified were provided. A violation notice (now called a citation) was issued on February 23, 1977 charging a violation of the safeguard notice. It was extended twice and on November 28, 1977 at 10:40 a.m. an order of withdrawal was issued under section 104(b) of the Act because the condition had not been abated. The order was terminated on November 30, 1977 at 11:50 p.m. when the condition was abated. A citation was issued on January 29, 1979 charging a violation of 30 C.F.R. § 75.1403-8(b) because a continuous clearance on one side of at least 24 inches was not being maintained along the track entry. An order of withdrawal was issued on February 5, 1979 because of failure to abate. The citation and order were terminated thereafter. Neither the citation nor the order referred to the notice to Provide Safeguards.

Citations were issued on January 22, 1981, September 12, 1983, and September 27, 1983, all charging violations of 30 C.F.R. § 75.1403-8(b) because of failure to follow the notice to provide Safeguards of July 27, 1976.

The citation involved in this proceeding was issued April 4, 1984 and charged that:

> The track haulage road over which men and material are transported the required clearance was obstructed by timbers - crib blocks - pipe - belt rollers and structures - cement blocks - large rocks - hydraulic jacks - 3x10 lumber and coal.

It referred to the safeguard notice issued July 27, 1976.

An order of withdrawal was issued on April 9, 1984 at 1:00 p.m. because the condition cited was not abated and "little or no effort has been made to remove the loose rock and coal from the required clearance." The order was terminated on April 9, 1984 at 10:30 p.m. when the track was cleaned up.

Inspector McAnally testified that when he came into the mine on April 4, 1984 he saw "junk" scattered all over the track haulage road. Clearance was obstructed on both sides. The haulageway is used for hauling materials and supplies and for hauling personnel in mantrips. It is used on all three shifts. The Inspector stated that when he returned on April 9, 1984, some of the junk, such as the belt structures and other loose materials, had been removed, but the rock and coal had not been removed and the required clearances were not provided. Because of this testimony, I do not accept the stipulation that "the alleged violation was abated in good faith."

Respondent did not offer any rebuttal testimony. Therefore, I find that the conditions cited by the Inspector on April 4, 1984 existed in the haulageway, and that they had not been abated at the time the withdrawal order was issued.

REGULATORY PROVISIONS

30 C.F.R. § 75.1403 provides as follows:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

30 C.F.R. § 75.1403-1 provides in part as follows:

(a) Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under § 75.1403. Other safeguards may be required.

(b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

30 C.F.R. § 75.1403-8 provides in part as follows:

(b) Track haulage roads should have a continuous clearance on one side of at least 24 inches from the farthest projection of normal traffic. Where it is necessary to change the side on which clearance is provided, 24 inches of clearance should be provided on both sides for a distance of not less than 100 feet and warning signs should be posted at such locations.

(c) Track haulage roads developed after March 30, 1970, should have clearance on the 'tight' side of at least 12 inches from the farthest projection of normal traffic. . .

(d) The clearance space on 11 track haulage roads should be kept free of loose rock, supplies and other materials.

ISSUES

1. Whether Respondent's failure to comply with the terms of the Notice to Provide Safeguards constitutes a violation of a mandatory safety standard for which a penalty may be assessed?

2. If so, what is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 (the Act) in the operation

of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

Section 314(b) of the Act is repeated in the regulation at 30 C.F.R. § 75.1403. It authorizes a Federal inspector to require that a mine operator provide specific safeguards to minimize hazards on a mine-by-mine basis, with respect to the transportation of men and materials. 30 C.F.R. § 75.1403-1 directs the Secretary to advise the operator in writing of the specific safeguard that is required. If the operator fails to maintain the safeguard thereafter, a notice under section 104 of the Act (a citation) shall be issued. Thus, the inspector is in effect authorized to establish a mandatory safety standard applicable to the conditions in a specific mine, without following the notice and comment requirements applicable to rule making. For this reason, the authority conferred on the inspector and his exercise of that authority must be strictly construed. Secretary v. Jim Walter Resources, Inc., 1 FMSHRC 1317 (1979) (ALJ); Consolidation Coal Company v. Secretary, 2 FMSHRC 2021 (1980) (ALJ); U.S. Steel Mining Co., Inc. v. Secretary, 4 FMSHRC 526 (1982) (ALJ). I agree with Respondent here that the test is whether it was given notice that the safeguards set out in the notice in this case were mandatory standards.

The notice in question is on a Department of Interior form. It notifies the operator that upon an inspection the authorized representative of the Secretary "directs you to provide the following specific safeguards (this is printed on the form) -- adequate clearance and signs at necessary points, clearance side free of material. . ." (this was written by the Inspector) (emphasis supplied by me). Beneath this language the form contains the printed words: "Specific Recommended Safeguards:" This phrase is centered above a blank space on the form. The Inspector then added by hand the conditions which he found and which prompted the notice. Following this, he wrote in the requirements of 30 C.F.R. § 75.1403-8(b), (c), (d), copying the regulations verbatim except for the addition of the word "the" at the beginning of subsection(b). These provisions all contain the word "should." However, it is clear that the regulation intends a mandatory standard: the provisions of 1403-2 through 1403-11 are intended to guide the inspector in determining the safeguards which should be required.

I conclude that the notice in this case required the operator to maintain his track haulageways with adequate clearance free of material, and that the specific provisions of the notice as to the extent of clearance, though phrased with the word "should," intended and were understood to be mandatory. That they were so understood is evidenced by the fact that 4

citations were issued between January 1979 and September 1983, for failure to follow the safeguard notice and were not challenged by the operator. The fact that they were served upon different representatives of the operator is unimportant. The operator as an entity is charged with knowledge of them.

The provisions of the regulations clearly intend that after the original notice is issued, compliance with its terms is mandatory. The use of the term "should" in the subsequent subsections does not argue otherwise. Nor does the fact that these subsections were copied verbatim in the notice by the inspector argue that the notice intended other than a mandatory provision.

I conclude that a violation of a mandatory standard was charged in the citation and was estabished by the evidence.

The violation was moderately serious and resulted from Respondent's negligence. The operator did not abate the violation in the time specified in the citation. Therefore, it cannot be credited with good faith in attempting to achieve rapid compliance. Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $650.00.

ORDER

Based upon the above findings of fact and conclusions of law IT IS ORDERED that within 30 days of the date of this decision, Respondent shall pay the sum of $650.00 as a civil penalty for the violation found herein.

James A Broderick
James A. Broderick
Administrative Law Judge

Distribution:

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slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 23 1985

ROGER A. HUTCHINSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 84-120-D
v.	:	
IDA CARBON CORPORATION, Respondent	:	

DECISION

Appearances: Lawrence L. Moise, III, Esq., Abingdon, Virginia, for Complainant; Joseph W. Bowman, Esq., Grundy, Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant's complaint with the Commission was filed pro se. He alleged that he was discharged because he had complained of the unsafe condition of company equipment, particularly the truck he was operating. He was involved in an accident with the truck on December 30 or 31, 1983, following which he was discharged. He retained counsel prior to the scheduled hearing, and the hearing was continued. Pursuant to notice, the hearing commenced in Abingdon, Virginia, on July 19, 1984. Roger A. Hutchinson, Robert Hutchinson, James Clevinger, Jerry Fletcher, Roger Lee Hunt and Freddy Keen testified on behalf of Complainant. Joe Robinson, John Slone, Harry R. Steele, Danny Joe Puckett, Avery Murphy, Elzie Yates and Ronald Barton testified on behalf of Respondent. Complainant had subpoenaed Butch Cure, an inspector for the Federal Mine Safety and Health Administration. He did not appear at the hearing, and the matter was continued for the possible taking and submission of his deposition. Inspector Cure had issued a citation on January 3, 1984, in which he alleged that an equipment defect affecting safety, including a sticking throttle linkage and an inoperative rear shock led to the accident following which Complainant was discharged. Inspector Cure entered a special appearance by counsel (the Solicitor of Labor) and moved to quash the subpoena. The Solicitor argued that Cure's appearance was prohibited "in private actions such as this case in which the Department of Labor is not a party." I denied the motion to quash, and

issued a new subpoena for the purpose of taking the deposition of Inspector Cure. The Solicitor filed a Motion for Reconsideration. The Motion for Reconsideration was denied and the matter further continued for the purpose of receiving deposition testimony. Mr. Cure did not respond to the subpoena. On November 1, 1984, I certified the record to the Commission for disciplinary proceedings against named attorneys in the Solicitor's office for ignoring my order and counselling the ignoring of a Commission subpoena. On June 25, 1985, the Commission rejected the certification and returned the case to me for disposition. The Commission suggested that when Commission subpoenas are ignored, the judge's only remedy is to himself seek enforcement of the subpoena in Federal District Court.

Following remand, Complainant offered in evidence a copy of the safety record of Respondent, having received it from MSHA. Respondent objected to its admission and I received part of the exhibit in evidence. I closed the record in this case by order issued October 25, 1985. Thereafter, both parties filed post hearing briefs.

I have considered the entire record and the contentions of the parties and make the following decision in this case.

FINDINGS OF FACT

At all times pertinent to this proceeding, Respondent was the owner and operator of a surface mine in Pike County, Kentucky, known as the No. 1 Surface Mine. Complainant was employed by Respondent as a miner. He began working at the subject mine in November 1982 as a rock truck driver, and continued on the job until January, 1984. He worked 6 days, 58 hours per week and was paid ten dollars an hour.

Respondent followed a practice of having weekly safety meetings, generally held at the beginning of the shift on Mondays. At these meetings and elsewhere, Complainant often raised questions involving safety: In about May, 1983, Complainant told his foreman that he was afraid to work under a large rock protruding from a highwall. The following day, he called a Federal mine inspector who made an inspection and required Respondent to put a berm around the area below the rock. On several occasions, Complainant complained of inadequate berms on elevated haul roads. He did not complain of the berms on the road or bench he travelled just prior to the accident.

On many occasions during a period of about 5 months prior to the accident, Complainant complained to his foreman that the

accelerator on his truck would stick. Complainant himself lubricated the linkage on an average of once per week. The condition was not repaired. He also complained of the steering--the truck had a tendency to jerk or shimmy to the left. Respondent worked on the problem but did not eliminate it. On one occasion Complainant was unable to down shift when going downhill. This happened about 2 months before the accident. He told his foreman about it. On the night of the accident, Complainant inspected his truck and found that the rear right shock was leaking oil. He told his foreman who stated that the cylinder was bad and the company had a new one which would be installed the following day.

On December 30-31, 1983, Complainant was working the night shift. He began work at about 5:00 p.m. and was scheduled to work 8 hours. (He worked 10 hours per night for 5 nights, and 8 hours on Saturday.) At some time after midnight he was driving back from the dump travelling uphill toward the bench to obtain another load of overburden. He was travelling at less than 10 miles per hour when he hit a rut in the road at the top of the hill. This seemed to increase his speed as the truck "took off" toward the left. He saw the highwall, braced himself, tried unsuccessfully to shut off the engine, lost control of the truck, and drove into the highwall. The cab of the truck was severely damaged. The steering wheel was broken, the door jarred open, the windshield destroyed. Complainant was shaken up but not seriously injured. The truck was later repaired at a cost of between $40,000 and $50,000.

Complainant testified that he did not recall whether he hit the brake. There is no evidence of any defect in the brakes or the retarder. The distance from the crest of the hill to the highwall was approximately 100 feet. The bench was about 64 feet wide. There were no skid marks on the bench. Based on these facts, I conclude that Complainant did not engage his brakes before hitting the highwall. Complainant told his foreman, and later told the company President that he could not explain why he ran into the wall. When the truck was examined after the accident, it was found to be in first gear. The maximum speed of the truck in first gear is about 7 miles per hour.

On January 2, 1984, Respondent's President, Elzie Yates, after discussing the matter with the foreman, and the safety director, told Complainant that he was discharged because he could not give a legitimate reason for running into the highwall.

On January 3, 1984, MSHA Inspector B.G. Cure conducted a 103(g) inspection, and issued a citation charging Respondent

with a violation of 30 C.F.R. § 77.1606(c) (Equipment defects affecting safety shall be corrected before the equipment is used). The citation charged that equipment defects affecting safety of the 773 caterpillar refuse truck "such as the throttle linkage sticking and the right rear shock being inoperative" led to the accident. This conclusion was stated in the citation to be based on information received "from the truck operator and the eye witness." A separate citation was issued because 3 of the 10 panel and gauge lights were inoperative. The citations were subsequently modified to show that they were issued pursuant to section 104(a) of the Act rather than section 103(g). The time for abatement was extended because of the extensive repairs to the vehicle. On March 26, 1984 the citation was terminated when the Respondent told the Inspector that the right rear shock was repaired and new linkage was installed on the throttle of the truck. Since Inspector Cure did not testify, it is difficult to evaluate the citations, and particularly his conclusion that the shock and acceleration linkage defects led to the accident.

ISSUES

1. Whether Complainant was engaged in activity protected under the Mine Act?

2. If so, whether his discharge was motivated in any part because of protected acitivity?

3. If it was whether the adverse action was motivated also by unprotected activities and whether Respondent would have taken the adverse action for unprotected activities alone?

CONCLUSIONS OF LAW

Complainant and Respondent are protected by, and subject to, the provisions of the Mine Safety Act, and specifically section 105(c) of the Act.

In order to establish a prima facie case of discrimination, a miner has the burden of establishing that he was engaged in protected activity, and that he suffered adverse action which was motivated in any part because of that activity. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 633 F.2d 1211 (3d Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Secretary/Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984). The operator may rebut the prima facie case by establishing that the miner was not engaged in protected activity, or that the adverse action was not motivated, in any

part, by the protected activity. The operator may also raise an affirmative defense, if it cannot rebut the prima facie case, by showing that it was, in part, motivated by unprotected activities and that it would have taken the adverse action for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982); Secretary/Jenkins v. Hecla-Day, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C. Cir. 1984).

I conclude that when Complainant told Respondent about the rock overhanging the highwall in May, 1983, and when he called the Federal Inspector about it, he was engaged in activity protected under the Act. When he complained of inadequate berms on elevated roads, this also was protected activity. When he complained of the accelerator linkage sticking on his truck, and the steering problems, and the leaking right rear shock, he was engaged in protected activity. Complainant was discharged from his job on January 2, 1984. This was certainly adverse action. The crucial question is whether the evidence establishes that the adverse action was motivated in any part by the protected activity. I conclude that it does not. The incidents concerning the rock protruding from the highwall, and the inadequate berms are too remote in time to be related in any way to Complainant's discharge. There is no direct evidence that his complaints about the steering, the accelerator linkage or the shock were factors considered by Respondent in its decision to discharge him. Nor is there any evidence from which I could reasonably infer that these complaints were any part of the motive for discharge. Therefore, I conclude that Complainant has failed to establish a prima facie case of discrimination.

Further, the evidence establishes that Respondent had a legitimate business reason for the discharge (the damage to the truck) and would have discharged Complainant in any event for unprotected activities. For both of these reasons, Complainant has failed to establish that he was discharged in violation of section 105(c) of the Act.

ORDER

Based on the above findings of fact and conclusions of law, the complaint and this proceeding are DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

December 26, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-1-M A.C. No. 05-03299-05504
v.	:	Moffat Tunnel Mine
YELLOW GOLD OF CRIPPLE CREEK, INC., Respondent	:	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Charles A. Dager, President, Yellow Gold of Cripple Creek, Inc., pro se.

Before: Judge Carlson

REVIEW OF THE EVIDENCE

General Background

This case, heard under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act), arose from a January 24, 1984, inspection of the Yellow Gold of Cripple Creek Mine (Yellow Gold) by federal mine inspector James L. Atwood. Atwood issued a citation under section 30 C.F.R. § 57.5-2, alleging, in essence, that Yellow Gold lacked the proper equipment to conduct gas or fume surveys "to determine the adequacy of control measures" as required by that standard. The inspector fixed a termination or abatement date of February 7, 1984. On February 16, 1984, Atwood extended the abatement date to February 20, 1984. On May 8, 1984, the inspector returned to the mine and found that three persons were in the mine without proper gas or fume detection equipment. He therefore issued a "failure to abate" withdrawal order under section 104(b) of the Act.

The Secretary now petitions for a civil penalty of $195.00. Yellow Gold contests the violation and the penalty.

An evidentiary hearing was held in Denver, Colorado in which both parties presented evidence. No post-hearing briefs were filed.

The Secretary predicates his case for violation on the mandatory safety regulation published at 30 C.F.R. § 57.5-2 (now § 57.5002), which provides:

> Dust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures.

In the context of this case, the cited standard must be read in conjunction with two related standards which specify allowable levels of gases. The first of these, published at 30 C.F.R. § 57.5-1 (now § 57.5001), provides, among other things, that the threshold limit value for carbon dioxide is 5,000 parts per million. The provision itself is contained in a publication of the American Conference of Governmental Industrial Hygienists (petitioner's exhibit 2) which is adopted by reference in the standard.

The second standard is found at 30 C.F.R. § 57.5-15 (now § 57.5015) and provides:

> Air in all active workings shall contain at least 19.5 volume percent oxygen.

The undisputed evidence shows that Yellow Gold, a small gold mining company, holds rights to use the Moffat Tunnel near Cripple Creek, Colorado, to gain access to drifts leading off from the tunnel. Other mining companies share rights to the tunnel, which has been in existence for many years. Yellow Gold, at the times pertinent in this proceeding, was engaged in drift-driving and mapping. It had as yet undertaken no production from within the mine. It did, however, sell some rock from old dumps to which it had rights.

The evidence also shows that Yellow Gold used equipment manufactured outside the State of Colorado.

The Secretary's Case

The principal witnesses for the Secretary were James Atwood, the inspector who issued the 104(a) citation to Yellow Gold and the subsequent 104(b) withdrawal order; and Warren Andrews, a mining engineer employed by MSHA. His specialty is mine ventilation.

These witnesses testified that the atmosphere in the Moffat Tunnel was well known for its tendency to show excessive amounts of carbon dioxide. Conversely, it was common to find insufficient oxygen content in the air of the tunnel complex. The mining community in the Cripple Creek area, they averred, was well acquainted with these tendencies. Consequently, according to the government witnesses, frequent testing for oxygen and carbon dioxide levels is necessary.

Inspector Atwood testified that at the request of Charles Dager, president of Yellow Gold, he conducted a courtesy inspection of the company's workings in December of 1983. On this occasion, Atwood testified, he gave Mr. Dager a notice that gas surveys were necessary. He discussed with Dager the types of testing devices available for gas-level measurement. He also delivered to Dager a nonpenalty warning under MSHA's courtesy visit program specifying a violation of 30 C.F.R. § 57.5-2. The notice refers to a "history of concentrations of carbon dioxide" and the unavailability of any testing method for gases other than a "flame safety lamp."

The inspector testified that a Draeger detector tube system or constant monitoring system would furnish suitable measurements of both carbon dioxide and oxygen levels. The Kohler flame lamp, which respondent is conceded to have used consistently, is incapable of accurate measurement of oxygen or carbon dioxide levels, according to Atwood. On the contrary, it is useful only for detection of methane concentrations and acute oxygen deficiencies. The flame in the lamp goes out when the oxygen content of the atmosphere reaches 16.25 percent. The flame lamp, he testified, does not measure carbon dioxide at all. The inspector indicated that he explained the lamp's deficiencies to Dager at the time of the courtesy visit (Tr. 77).

When Atwood conducted the regular inspection on January 24, 1984, Yellow Gold still had no testing equipment available except for the flame lamp. This is undisputed. On that occasion, Atwood and another inspector who accompanied him, took readings with a Draeger tester and with "cricket" tubes. The latter, according to Atwood, are one-time-use tubes which are activated by breaking in the atmosphere to be tested. Laboratory analyses then reveal the particular gas concentration tested for with high accuracy. The "cricket" tests showed a maximum of .5 percent carbon dioxide. On the Draeger, tests taken at slightly different locations showed a maximum concentration between .6 and .7 percent. The Draeger showed oxygen at 19.28 percent, a figure below the allowable concentration. Atwood testified that exposure to an oxygen level below the minimum set by the standard could cause conditions ranging from dizziness to loss of consciousness. Carbon dioxide exposure above the allowable limits for that gas would produce similar results.

Inspector Atwood explained that when he issued the 104(a) citation of January 17, 1984, he allowed Yellow Gold until February 7, 1984, for abatement of the violation. On a follow-up visit on February 16, 1984, according to Atwood, no testing devices were available at the mine. Upon Mr. Dager's representation that a Draeger detection device was on order from a supplier in Grand Junction, Colorado and had been shipped, he did not at that time issue a failure to abate order under section 104(b) of the Act. Instead, he extended that abatement time to February 20, 1984.

Atwood testified that he was next able to visit the mine on May 8, 1984. Mr. Dager and two other persons were in the mine.

Again, according to the inspector, no proper testing equipment was available at the mine. He therefore declared Yellow Gold to have failed to comply with the abatement requirements specified in the 104(a) citation and proceeded to close the mine through issuance of a 104(b) withdrawal order. Atwood terminated the order two days later when Dager produced a Draeger tester which had not been at the mine on the day of the closure. Even then, the inspector testified, Mr. Dager did not have the correct tubes to test for carbon dioxide. Atwood himself furnished these so that the withdrawal order could be terminated.

Warren Andrews, the Secretary's expert in underground mine ventilation, gave testimony which essentially paralleled that of Inspector Atwood. He stressed that the United States Bureau of Mines had done an extensive study in the 1920's on the release of carbon dioxide from the rock found in the Cripple Creek area, and had documented 35 fatalities owing to excess concentrations of that gas through the year 1928. (Petitioner's exhibit 6.)

Beyond that, Andrews himself did investigations of the Moffat Tunnel in 1979 and 1981 to determine firsthand the gas levels and the ventilation requirements for safe mining. In December 1981 he recommended the installation of a fan to provide positive ventilation. 1/ Andrews made a further investigation in April of 1982 of the area of the tunnel where the crosscuts controlled by Yellow Gold were located. On February 15, 1984, he returned to the tunnel for a further survey of the Yellow Gold workings. As a result of that investigation he made updated recommendations regarding air flows and other technical ventilation concerns. Andrews indicated that in his initial 1979 survey he found the oxygen level at only 13.10 percent and the carbon dioxide at 4.97 percent.

Andrews indicated that the best gas monitoring system for the Moffat Tunnel would be a continuous system. He further indicated, however, that periodic testing could be done with the intervals dictated by the previous reading. If, for example, previous samples of carbon dioxide were as low as one-tenth of a percent, subsequent testing would be sufficient if done at the beginning of each shift. Testing every half-shift would be sufficient following readings of two-tenths to three-tenths. For readings as high as four-tenths, samplings would have to be at least hourly (Tr. 144.)

According to Andrews, in mines where certain gases have never been detected, no periodic testing should be necessary. This was not the case in the mine in question, however, where a long history showed a likelihood of carbon dioxide and oxygen problems. Andrews agreed with Yellow Gold's position that carbon dioxide levels within the mine could vary widely with shifts in barometric pressure. He did not agree, however, that barometric readings alone or in conjunction with flame lamp observations were a reliable substitute for direct readings of gas

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1/ Andrews did not mention when the fan was installed. Other evidence, however, shows that a fan was installed and in operation at least as early as April 1983 (Tr. 23-26).

levels (Tr. 143-144). With regard to the flame lamp device, Andrews insisted that it was useful in detecting acute oxygen shortages only, and was not reliable at all for excess carbon dioxide concentrations. He did agree that an experienced user could make some judgments based on changes in the height or color of the flame, but maintained that such judgments were too subjective to be reliable except, perhaps, in the case of methane detection. Methane, however, was not a concern in the Moffat area.

Yellow Gold's Case

Mr. Alexander Burr, an MSHA inspector, was called by the Secretary, but virtually all of his evidence tended to be favorable to Yellow Gold. He had inspected Yellow Gold from 1978 through April of 1983. He acknowledged that he had told Mr. Dager that use of a flame safety lamp was sufficient in the mine. He also testified his own occasional gas tests with a Draeger device turned up "nothing sufficient" to cause him to tell Mr. Dager to "have other equipment" (Tr. 23). During his years as inspector in the Moffat Tunnel, he testified, Yellow Gold's management had cooperated well.

Charles Dager, president of Yellow Gold, gave testimony for the company. He maintained that Yellow Gold's policy was always to use two Kohler flame safety lamps underground to provide continuing monitoring of gases. The lamps were lighted whenever the barometric pressure at the surface was below 29.04. According to Dager, a barometer was installed at the mine portal and a miner was always at the portal to notify miners underground of barometric changes. He believes that the safety lamps, together with monitoring of the barometer, provided the miners good protection. Moreover, he stressed that the cited standard specified no particular method frequency for taking surveys; therefore, mine operators were free to develop their own.

In the course of his testimony he acknowledged receipt of Inspector Atwood's notice on December 12, 1983, that the mine needed gas-testing equipment beyond the Kohler lamps. After some uncertainty, he asserted that a Draeger was delivered to him on February 15, 1984, and that a letter to MSHA claiming a January abatement was incorrect. He also agreed that he had not used the Draeger before the time that Inspector Atwood closed the mine. He had, he said, tried to use it once, but discovered he did not have the right tubes (Tr. 210-211). He also testified that he had voluntarily shut down the mine "a few days" after the Draeger arrived because of a lack of financing. He further testified that May 8, 1984, when Inspector Atwood issued the 104(b) withdrawal order was the first day the mine was open after the voluntary closure. Dager himself was in the mine with two other persons, doing mapping. He conceded that at that time the Draeger tester was in his automobile at Victor, Colorado.

DISCUSSION

The evidence discloses that the Moffat Tunnel had a well-established reputation for build-ups of carbon dioxide gas. It is equally certain that the oxygen content of the air in the tunnel (and the drifts angling off from the tunnel) was sometimes too low for safe work. These tendencies were confirmed by the actual sampling done at various times by MSHA officials. Given this knowledge, it follows that there was a need for periodic sampling of the mine atmosphere for presence of these two gases as required by 30 C.F.R. § 57.5-2.

Yellow Gold contends that since the standard sets forth no particular methods for gas surveys, mine operators are free to specify their own methods of testing. I cannot agree. The cited standard must be read in conjunction with those other standards which specify the minimum or maximum levels of gases. Moreover, 30 C.F.R. § 57.5-2 plainly implies that the device or method used must produce a reasonably accurate and reliable result. In this regard, the shortcomings of the Kohler flame safety lamp are all too apparent. I am persuaded by the testimony of Inspector Atwood and Mr. Andrews that the lamp was truly useful in warning of oxygen deficiencies only when those deficiencies become acute. The undisputed evidence shows that the flame in the lamp goes out only when the oxygen reaches a low of 16.25 percent. The oxygen-level standard, however, prescribes a minimum of 19.50 percent. The lamp is not designed to signal when the oxygen level reaches minimally safe level prescribed by the standard. Moreover, the lamp gives no useful measurement of carbon dioxide content.

On the other hand, the undisputed evidence shows that several more sophisticated devices are marketed which will give reasonably accurate readings of both gases. Yellow Gold was obliged to have and use one of those devices.

In complaining of the lack of specificity of the cited standard, Yellow Gold also draws attention to the requirement that surveys be conducted "as frequently as necessary." Yellow Gold suggests that the phrase is too vague to be enforceable.

It is fundamental that any statute, regulation, or standard must give adequate warning of what is required to the persons whose conduct is to be covered by the enactment. In Connally v. General Construction Co., 269 U.S. 385, 391 (1925), the Supreme Court stated;

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Statutes and standards, however, cannot be considered in a vacuum. Courts have generally required that when a safety regulation is examined for meeting due process certainty requirements, it must be looked at "in light of the conduct to which it is applied." Ray Evers Welding Co. v. OSHRC, 625 F.2d 726, 732 (6th Cir. 1980). General terms such as "unsafe" or "dangerous" or "as necessary" appear frequently in federal safety and health standards. This approach has been recognized as necessary where narrower terms would be too restrictive. Standards, that is to say, must often be made "simple and brief in order to be broadly adaptable to myriad circumstances." Kerr McGee Corporation, 3 FMSHRC 2496 (1981). In Alabama By-Products Corporation, 4 FMSHRC 2128 (1982) the issue was whether the Secretary could enforce a standard requiring machinery to be kept in "safe operating condition." In holding that this language was not too vague the Commission declared:

> [I]n deciding whether machinery or equipment is in safe or unsafe operating condition, we conclude that the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

See also Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230 (5th Cir. 1974); United States Steel Corporation, 5 FMSHRC 3 (1983), 81-136, January 27, 1983.

When the "reasonably prudent person" test is applied, the standard in question here meets constitutional due process requirements. Also, upon the record before me, I must conclude that a reasonably prudent person familiar with the circumstances shown to have existed in the Moffat Tunnel, including any facts peculiar to the mining industry, would have recognized the need to test the tunnel air at least several times a day with adequate equipment. This is so because the evidence conclusively demonstrates a genuine potential for high carbon dioxide levels and low oxygen levels in the mine.

As to the actual frequency of the testing, the guidelines set out in Mr. Andrew's testimony appear reasonable. The real point here, however, is that Yellow Gold did no testing at all with an adequate testing device. Had the company had any sort of testing schedule with a Draeger or other effective device, that schedule could be considered in light of the "reasonable and prudent" test.

As it is, however, it is plain to me that Yellow Gold violated the cited standard.

We now consider whether Inspector Burr's representations to Mr. Dager concerning the adequacy of the Kohler flame safety lamp for gas testing furnishes Yellow Gold a legal excuse for the violation. I must hold that it does not. It is clear that Burr's assurances to the Yellow Gold official were incorrect and misleading. No issue of estoppel is fairly raised, however, because before the issuance of the citation Yellow Gold had ample and repeated warning from Inspector Atwood that Burr's opinion was wrong and that MSHA would insist upon a better testing implement than the archaic flame safety lamp. Thus, while it is unfortunate that Inspector Burr misadvised the respondent, that fact cannot justify Yellow Gold's non-compliance.

The Secretary proposes a civil penalty of $195.00. Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the mine operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to continue in business, and the gravity of the violation itself.

The Yellow Gold operation is quite small. The Secretary produced no evidence on the company's history of violations. Yellow Gold's president acknowledged that payment of the proposed penalty would not interfere with its ability to continue in business. I must classify the gravity of the violation as moderate. The evidence shows that excessive concentrations of carbon dioxide or insufficient oxygen could, under the proper circumstances, cause death. No large crews were underground at the relevant times, however, and some protection was provided by the ventilation fan. Yellow Gold's negligence in failing to conduct adequate gas testing was moderate. At an earlier date, when the operator was relying on Inspector Burr's advice on the Kohler flame safety lamp, there would have been no negligence. By the time of the citation, however, Yellow Gold knew, or certainly should have known, that its testing practices and equipment were not in compliance with the law.

The chief penalty element in this case, however, is Yellow Gold's failure to achieve timely abatement. The inspector's original abatement deadline was reasonable. Even so, he extended it further. Yet, when he again visited the mine on May 8, 1984, three people were underground but the Draeger, which had never been used, was elsewhere. I have not overlooked that the mine was voluntarily closed from sometime in February 1984 until sometime in early May. Mr. Dager claims that he received the Draeger tester on February 15, 1984, and that he voluntarily closed the mine "four or five days" later (Tr. 202, 210). The accuracy of these recollections is questionable. Earlier in the hearing the witness had said he closed the mine "in January or February" of 1984. It is

particularly doubtful that he had the Draeger on February 15, since the inspector was at the mine on February 15 and issued the extension for abatement to February 20. Those dates are documented. Moreover, in a letter from Mr. Dager directed to MSHA on December 8, 1984, he declared that abatement had been "accomplished within a week of the original citation, 1-24-84." (Exhibit P-8). Because of this confusion one cannot be certain whether the mine was voluntarily closed before or after the final abatement date of February 20, 1985. (Abatement was not necessary while the mine was closed down.) It is certain, however, that when the mine reopened in May of 1984, no Draeger or other suitable tester was available. Abatement was required by then, and it had not occurred. If Mr. Dager's testimony is to be accepted, Yellow Gold had from February 15, 1984, to May 8, 1984, to discover that the Draeger device had not been delivered with the proper tubes for carbon dioxide testing. Under these circumstances I must hold that abatement was not timely and that Yellow Gold failed to exercise full good faith in its abatement attempts.

Having considered the facts in light of all the statutory criteria for penalty assessment, I conclude that $195.00 is an appropriate civil penalty.

CONCLUSIONS OF LAW

Based upon the entire record in this case, and the findings of fact contained in the narrative portion of this decision, the following conclusions of law are made:

(1) That the Commission has jurisdiction to decide this matter.

(2) That Yellow Gold violated the standard published at 30 C.F.R. § 57.5-2 (now 30 C.F.R. § 57.5002), as alleged.

(3) That the extended time for abatement set by the Secretary was not unreasonable.

(4) That Yellow Gold failed to fully abate the violation within the extended time for abatement set by the Secretary.

(5) That $195.00 is the appropriate civil penalty for the violation.

ORDER

Accordingly, the citation is ORDERED affirmed, and Yellow Gold is ORDERED to pay a civil penalty of $195.00 within 30 days of the date of this decision.

John A. Carlson
Administrative Law Judge

Distribution:

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

DEC 27 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. WEST 84-3 A.C. No. 05-03455-03520
v.	:	Dorchester No. 1 Mine
DORCHESTER COAL COMPANY, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq. and Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Phillip D. Barber, Esq., Welborn, Dufford, Brown & Tooley, Denver, Colorado, for Respondent.

Before: Judge Carlson

This case was fully heard upon the merits in Denver, Colorado. Before the matter was taken up for decision, the parties asked for time in which to work out a settlement.

The parties have now submitted a settlement agreement which, if approved, would resolve all pending issues.

Specifically, the parties agree that respondent violated the standard charged in the citation, but did so in reliance upon the erroneous verbal representations of an MSHA district official as to the requirements of the standard.

The Secretary therefore seeks to amend the proposed civil penalty from the $79.00 originally sought to the sum of $1.00. Conditioned upon the approval of the agreement, Dorchester moves for leave to withdraw its notice of contest.

Having heard all of the evidence in this case, and having considered the representations made in the settlement agreement, I am convinced that the terms of the agreement are wholly appropriate.

Accordingly, the settlement agreement is ORDERED approved in its entirety. Respondent, Dorchester Coal Company, is ORDERED to pay a civil penalty of $1.00 within 40 days of the date of this decision.

John A. Carlson
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

DEC 27 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF GEORGE M. SWANK, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 85-31-DM
	:	MSHA Case No. 84-14
	:	Ironclad Mine
v.	:	
SILVER STATE MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Carlson

The parties, through counsel, have filed a stipulation which settles all matters at issue in this discrimination proceeding.

It should be noted that the original complaint in this case was filed by the alleged discriminatee, pro se. Later, the Secretary of Labor, who had originally declined to prosecute on behalf of the complaining miner, was granted leave to intervene under Commission Rules 2700.4(a) and (c). Rick P. Sauer, Esq., who filed his entry of appearance as private counsel for the complainant after the filing of the original pro se complaint, but before the Secretary's intervention, did not withdraw after the Secretary's intervention, and participated in the settlement negotiations and signed the agreement.

The specifics of the agreement are as follows:

> 1. Respondent hereby agrees to compensate George M. Swank in the amount of $2,100.00 for loss of back wages and other expenses from his termination.
>
> 2. Respondent hereby agrees to waive payment of any and all loans made by Respondent to George M. Swank prior to his termination.
>
> 3. In the interest of achieving an expeditious disposition of Mr. Swank's claims against Respondent, the Secretary of Labor proposes no penalty be assessed against Respondent.

4. The parties recognize that George M. Swank, through his private attorney, may have other claims against the Respondent arising from the same facts which gave rise to the discrimination action, and that those other claims may be settled in whole or in part by agreements between Mr. Swank, acting through his private attorney, and respondent. However, the parties agree that no such agreement will be binding on the Secretary and that the above agreement represents the sole and entire agreement to which the Secretary is a party in this action.

5. Each party agrees to bear its own costs and expenses.

Having considered the agreement, and the contents of the file, I conclude that the proposed settlement is appropriate and should be approved in all respects. Accordingly, respondent Silver State Mining Company shall pay to George M. Swank, within 40 days of the date of this decision, the sum of $2,100.00, whereupon all other provisions of the settlement agreement shall be deemed effectuated and this proceeding shall be considered terminated.

SO ORDERED.

John A. Carlson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 27, 1985

OLD BEN COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 84-229-R
v.	:	Order No. 2142766; 4/25/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 84-230-R
	:	Order No. 2142767; 4/25/84
	:	Docket No. WEVA 84-231-R
	:	Citation No. 2143361; 7/10/84
	:	Formerly Order No. 2143361; 4/26/84
	:	Docket No. WEVA 84-232-R
	:	Order No. 2272727; 4/26/84
	:	Docket No. WEVA 84-269-R
	:	Order No. 2143410; 5/22/84
	:	Docket No. WEVA 84-270-R
	:	Order No. 2143411; 5/22/84
	:	Docket No. WEVA 84-271-R
	:	Order No. 2145709; 5/22/84
	:	Docket No. WEVA 84-272-R
	:	Order No. 2145710; 5/22/84
	:	Docket No. WEVA 84-273-R
	:	Order No. 2145712; 5/22/84
	:	Docket No. WEVA 84-274-R
	:	Order No. 2145713; 5/22/84
	:	Docket No. WEVA 84-275-R
	:	Order No. 2145716; 5/22/84
	:	Docket No. WEVA 84-276-R
	:	Order No. 2438191; 5/22/84
	:	Mine No. 20

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 84-324
	:	A. C. No. 46-02052-03517
v.	:	Docket No. WEVA 85-56
	:	A. C. No. 46-02052-03527
OLD BEN COAL COMPANY, Respondent	:	Docket No. WEVA 85-71
	:	A. C. No. 46-02052-03528
	:	Docket No. WEVA 85-78
	:	A. C. No. 46-02052-03529
	:	Mine No. 20

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on December 18, 1985, a motion for approval of settlement in the above-entitled proceeding. Under the parties' settlement agreement, Old Ben Coal Company would pay penalties totaling $10,650 instead of the penalties totaling $16,200 proposed by MSHA.

Section 110(i) of the Federal Mine Safety and Health Act of 1977 lists six criteria which are required to be used in determining civil penalties. MSHA proposes penalties by using various types of assessment procedures which are described in Part 100 of Title 30 of the Code of Federal Regulations. If MSHA considers alleged violations to be somewhat routine in nature, it employs an assessment formula which is described in section 100.3 of its assessment procedures. When penalties are proposed under section 100.3, penalty points are assigned under the four criteria of the size of the operator's business, the operator's history of previous violations, the operator's negligence, if any, and the gravity of the alleged violation.

The points assigned under each of the four criteria are then added and converted to a dollar amount by referring to the conversion table set forth in section 100.3(g) of the assessment formula. If the operator abates the alleged violation within the time given by the inspector in his citation, the monetary amount determined under the four criteria is reduced by 30 percent under the fifth criterion of the operator's good-faith effort to achieve rapid compliance after the violation was cited. The sixth criterion of whether the payment of penalties would cause the operator to

discontinue in business is normally not given any weight because MSHA does not consider that criterion unless the operator submits financial data to one of MSHA's district managers.

If alleged violations are considered by MSHA to be unusual in nature, particularly if the citations or orders alleging violations were issued pursuant to the imminent-danger or unwarrantable-failure provisions of the Act, MSHA waives the use of the regular assessment formula set forth in section 100.3 and proposes penalties on the basis of narrative findings made pursuant to section 100.5 of its assessment procedures. All of the penalties involved in this proceeding were proposed by MSHA on the basis of narrative findings because all of the orders or citations were issued in conjunction with imminent-danger orders or pursuant to the unwarrantable-failure provisions of the Act, i.e. sections 107(a) and 104(d).

MSHA's narrative findings mention facts pertaining to all the criteria, except whether payment of penalties would cause the operator to discontinue in business. MSHA's findings concentrate on the two criteria of negligence and gravity. At the conclusion of its findings, MSHA gives a monetary amount, but does not specify how much of the penalty has been proposed under any single one of the five criteria which have been discussed. Therefore, all of MSHA's penalties proposed in this proceeding are the result of a subjective process which is not well defined. In such circumstances, a motion for approval of settlement only has to show the existence of extenuating circumstances, which could not have been known by MSHA when its narrative findings were written, to justify a reduction in MSHA's proposed penalties.

The motion for approval of settlement follows the procedure discussed above and gives ameliorating facts not considered by MSHA to support the parties' agreement to reduce all of MSHA's proposed penalties, except for the penalty proposed by MSHA for the violation of section 75.303 alleged in Order No. 2145037, by an amount ranging from $100 to $2,000. Before I consider the reasons for reducing penalties given in the Secretary's motion for approval of settlement, I shall discuss four of the six criteria in a generalized manner because the motion for approval of settlement justifies all the reductions in MSHA's proposed penalties under the two criteria of negligence and gravity.

The proposed assessment sheet in the official file in Docket No. WEVA 85-78 indicates that Old Ben's No. 20 Mine, here involved, produces about 604,000 tons of coal annually and that all of Old Ben's mines produce approximately 10,658,000 tons of coal per year. Those production figures

support a conclusion that Old Ben is a large operator and that any penalties approved in this proceeding should be in an upper range of magnitude to the extent that they are determined under the criterion of the size of Old Ben's business.

The motion for approval of settlement states that payment of penalties will not cause Old Ben to discontinue in business. Therefore, it will be unnecessary to reduce any of the penalties under the criterion that payment of penalties would cause Old Ben to discontinue in business.

The motion for approval of settlement and all of the inspectors' terminations of orders or citations indicate that Old Ben demonstrated a good-faith effort to achieve rapid compliance. As indicated above, when MSHA is proposing penalties under section 100.3, it reduces penalties by 30 percent when an operator demonstrates a good-faith effort to achieve rapid compliance. Since the penalties in this proceeding were all proposed under section 100.5, MSHA has not indicated what weight, if any, it has given to Old Ben's good-faith abatement of all alleged violations.

When I am assessing penalties in a contested proceeding, I do not decrease a penalty otherwise determined under the other criteria unless an operator shows an outstanding effort to achieve rapid compliance by doing something unusual such as voluntarily shutting down production and assigning his entire work force to abating one or more alleged violations. Likewise, I do not increase a penalty otherwise determined under the other criteria unless the operator shows outright recalcitrance in trying to achieve compliance. Since the motion for approval of settlement and the inspectors' termination sheets fail to show either an outstanding effort to achieve rapid compliance or a lack of good-faith in trying to achieve compliance, I shall assume that no penalty proposed by MSHA has been increased or reduced under the criterion of good-faith abatement.

It is not possible to determine from MSHA's narrative findings how much of the proposed penalties were attributed to the criterion of Old Ben's history of previous violations. The narrative findings simply state that the "number of previously assessed violations * * * appear on the attached Proposed Assessment." The proposed assessment sheets show the number of assessed violations, excluding $20 penalties assessed under section 100.4 and promptly paid, for the 24-month period preceding the occurrence of the violations alleged in each docket.

Under section 100.3(c) of MSHA's regular assessment formula, assessed violations are divided by the number of inspection days to derive a factor which is then applied to a table in section 100.3(c) to determine the number of penalty points which should be assigned for a given violation. The proposed assessment sheet in each of the four dockets here involved provides numbers which result in factors ranging from 2.0 in Docket No. WEVA 84-324 to a factor of .81 in Docket No. WEVA 85-56. Application of those factors to the table in section 100.3(c) would require that 18 penalty points be assigned in Docket No. WEVA 84-324 and only 6 penalty points in Docket No. WEVA 85-56. The assessed penalties and inspection days shown in the proposed assessment sheets are completely different from a tabulation of assessments and inspection days included in the back-up materials in Docket No. WEVA 85-71. In that docket, MSHA shows that Old Ben was assessed 80 penalties during 172 inspection days for the years 1983 and 1984. The factor resulting from use of the aforesaid information would require assignment of only two penalty points under section 100.3(c).

The motion for approval of settlement (p. 22) provides some additional facts to be considered in evaluating Old Ben's history of previous violations. It is there stated that Old Ben has not previously been assessed for a violation of sections 75.503, 75.509, 75.603, 75.703, and 75.1725(a). When I am assessing penalties in a contested proceeding, I increase penalties when there is evidence showing a large number of previous violations of the same standard which is under consideration and I assess no amount under the criterion of history of previous violations if there is evidence showing that the operator has not previously violated that particular standard. The motion for approval of settlement also shows that Old Ben has been cited for only one previous violation of sections 75.514 and 75.807, has been cited for two previous violations of section 75.1003, and has been cited for 10 previous violations of section 75.200.

Previous violations of section 75.200 are a matter of concern because a large number of all fatalities in underground coal mines are caused by roof falls. Knowing that Old Ben has 10 previous violations of section 75.200 is not, by itself, very useful information unless facts are also known concerning two aspects of the 10 previous violations. One aspect is the date on which an alleged violation occurred. The date is important because the time of occurrence shows whether Old Ben is improving its record of previous violations by reducing the violations which have recently occurred. The other important consideration is

the dollar amount assessed for a given violation because usually the size of the penalty provides an indication of the seriousness of the previous violations. Since neither the motion for approval of settlement nor the official files contain any information as to the dates of the previous violations or the amounts of the assessments, there is no way to be certain that the penalties proposed by MSHA in this proceeding include an appropriate amount which has been included in each proposed penalty under the criterion of history of previous violations.

Probably the most useful information as to the criterion of history of previous violations is the fact that Old Ben had a relatively favorable history of previous violations for the two years of 1983 and 1984. Inasmuch as all but one of the violations under consideration in this proceeding were cited in April, May, and June of 1984, I believe it is safe to conclude that the proposed penalties, all of which are in an upper range of magnitude, include an appropriate amount under the criterion of history of previous violations. Only one settlement penalty is for an amount of less than $500. Therefore, I conclude that the settlement amounts are adequate, even in the case of a large operator, to allow for attributing an appropriate amount of the penalties under the four criteria of size of the operator's business, ability to pay penalties, history of previous violations, and good-faith abatement.

I shall hereinafter discuss the two remaining criteria of negligence and gravity in each of the cases here involved and summarize the reasons given by the parties in support of the grant of their motion for approval of settlement.

Docket No. WEVA 84-324

MSHA seeks assessment of penalties for two alleged violations in Docket No. WEVA 84-324. The first violation was alleged in Citation No. 2272911 which stated that section 75.200 had been violated in the Nos. 2 and 5 entries in 3rd Right Section because Old Ben had deviated from its roof-control plan by not following the sight lines established by survey spads provided by Old Ben's engineers. MSHA's narrative findings proposed a penalty of $500 after finding that the violation was serious because it could have contributed to a roof fall and that Old Ben was highly negligent for failure to recognize that the entries had been developed off center.

The motion for approval of settlement indicates that Old Ben has agreed to pay a reduced penalty of $150. The parties have justified the reduction by explaining that the

primary hazard associated with developing entries off center is that pillar sizes may become dangerously eroded and thereby leave excessively wide entries with inadequate roof support. The actual facts showed, however, that while the entries had been developed off center, there was no indication of a reduction in pillar size. In such circumstances, MSHA recognized that the alleged violation was not as serious as it had originally been considered. As a result of MSHA's recognition of the nonserious nature of the violation, the order was modified to a citation issued under section 104(a) of the Act and the inspector's designation of "significant and substantial" 1/ was eliminated.

The second violation for which a penalty is sought to be assessed in Docket No. WEVA 84-324 was cited in Order No. 2143361 which alleged a violation of section 75.703 because proper frame ground protection was not provided for a scoop while the batteries were being changed at the charging station. MSHA proposed a penalty of $650 after finding that the violation was serious in that it could have contributed to an electrical shock hazard and that Old Ben was highly negligent in failing to maintain a proper ground while batteries were being changed.

The motion for approval of settlement indicates that Old Ben has agreed to pay a reduced penalty of $500. The parties justify a reduction in the proposed penalty by emphasizing that the frame ground was still connected at the time the order was written. While it is true that the ground wire was loose and could eventually have resulted in a shock hazard, it was still connected and the parties believe that some reduction of the proposed penalty is warranted in light of that extenuating fact. In such circumstances, the Secretary's counsel states that the degree of negligence is reduced which, in turn, supports the parties' agreement to reduce the penalty to $500.

I find that the parties have given sufficient justification to support a reduction of the penalties proposed in Docket No. WEVA 84-324.

1/ The citation was originally issued under section 104(d)(1) of the Act which provides for a finding that the alleged violation is of such nature that it could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. Even after a citation is modified to show issuance under section 104(a), the inspector may indicate on the citation whether he considers the violation to be "significant and substantial". Consolidation Coal Co., 6 FMSHRC 189 (1984).

Docket No. WEVA 85-56

MSHA seeks assessment of penalties for three alleged violations in Docket No. WEVA 85-56. The first violation was alleged in Citation No. 2142768 which stated that Old Ben had violated section 75.1725(a) by failing to maintain the No. 6 shuttle car in a safe operating condition in that the reverse accelerator rod was out of adjustment which caused it to stick in the reverse direction. The citation was issued in conjunction with imminent-danger Order No. 2142766. MSHA proposed a penalty of $5,000 on the basis of findings that the violation was extremely serious because one miner was killed when she was pinned against a coal rib and that Old Ben was highly negligent for failing to have the shuttle car in safe operating condition.

The motion for approval of settlement indicates that Old Ben has agreed to pay a reduced penalty of $3,000 and states that a reduction is warranted because there is evidence to show that the shuttle car was being greased at the time of the accident and that the very controls which were cited as sticking by the inspector had just been greased prior to the accident and were thought to be in proper condition. The reason that the shuttle car was energized was for the purpose of turning the wheels so that grease fittings could be reached. The person in charge of the maintenance work had warned the victim twice before the shuttle car was energized and she had indicated that she was "okay". Old Ben takes the position that its employees were unaware of any defects in the shuttle car's controls and says that the sticking of the controls may have resulted from the panic and haste with which the pedals were applied when the shuttle car began to move toward the victim after it was energized.

I find that the motion for approval of settlement provides adequate reasons for the parties' agreement to reduce the penalty to $3,000. A penalty in that amount is warranted because the motion indicates that the inspector found the accelerator rod to be out of adjustment which may have caused the controls to stick in the reverse position.

MSHA seeks assessment of a penalty for another alleged violation of section 75.1725(a) in connection with Citation No. 2142769 which stated that the No. 7 shuttle car was not maintained in a safe operating condition because it also had a reverse accelerator rod out of adjustment so that the accelerator would stick in reverse direction. MSHA proposed a penalty of $2,000 based on findings that the violation was very serious because the shuttle car could have moved when

energized so as to cause injury to another miner. The citation was issued in conjunction with imminent-danger Order No. 2142767 which was the second order issued with respect to sticking accelerator rods.

The motion for approval of settlement indicates that Old Ben has agreed to pay a reduced penalty of $1,500 for the second alleged violation of section 75.1725(a). The reduction is based on some of the same points made with respect to the first alleged violation of section 75.1725(a) in addition to the pertinent observation that the No. 7 shuttle car, like the No. 6 shuttle car, was in the process of being serviced so that it is somewhat inappropriate to charge that Old Ben had failed to maintain the shuttle car in a safe operating condition while Old Ben's employees were engaged in the process of bringing the shuttle car into a safe operating condition.

In a settlement proceeding, it is not possible to deal with conflicting points of view because there are no witnesses whose statements may be scrutinized under cross-examination. In such circumstances, I believe that the motion for approval of settlement has shown adequate reasons for reducing the penalty to $1,500.

The third violation for which a penalty is sought to be assessed in Docket No. WEVA 85-56 was alleged in Order No. 2142771 which was issued under section 104(d)(2) of the Act and which states that Old Ben violated section 75.509 by allowing its shuttle cars to be oiled and greased while they were energized. MSHA proposed a penalty of $2,000 based on findings that the practice of working on energized shuttle cars was well known to management and that energized cars could move and crush any employee who might be working on them.

The motion for approval of settlement states that a reduction in the proposed penalty to $1,100 is warranted because MSHA's narrative findings in the official file conflict with the findings of the inspector who wrote the order here involved. The inspector interviewed the witnesses and he considered the degree of negligence to be moderate and he believed that any injury that might result from the practice of oiling and greasing energized equipment would be lost work days or restricted duty for one employee.

It is obvious that the person who wrote the narrative findings in the official file was influenced by the same inspector's findings written at the time an employee was killed when the No. 6 shuttle car was energized so that oiling and greasing could be completed on it. The area from

which employees were withdrawn by the instant order involves the No. 6 shuttle car along with three others. Therefore, it is debatable as to whether the inspector's findings are more accurate than the narrative findings which served as the basis for proposing a penalty of $2,000.

On the other hand, it is a fact that section 75.509 prohibits working on energized equipment "except when necessary for trouble shooting or testing." The motion for approval of settlement states that the No. 6 shuttle car which killed an employee had been energized for the sole purpose of turning the wheels so that grease fittings could be reached. It would appear that such an energization might be considered as coming within the exception to the prohibition against working on energized equipment. If that kind of temporary energization was the practice about which management had knowledge, then it would seem that a penalty of $1,100 is adequate because Order No. 2142771 may have cited a borderline violation which should not be associated with an excessive penalty. Therefore, I find that a reduction in the proposed penalty to $1,100 is appropriate.

Docket No. WEVA 85-71

MSHA seeks to have penalties assessed for seven violations in Docket No. WEVA 85-71. The first violation was alleged in Order No. 2145709 which alleged that Old Ben had violated section 75.1003(c) because an energized 300-volt DC trolley wire was not guarded where miners had to pass under it in order to check pumps. Also two carloads of mine supplies were parked under the unguarded wire which was about 4 or 5 feet off the mine floor. MSHA proposed a penalty of $1,000 on the basis of narrative findings to the effect that the violation was very serious and that Old Ben was highly negligent in failing to assure that the wire was guarded.

The motion for approval of settlement states that Old Ben has agreed to pay a reduced penalty of $800. The only reason the motion gives for reducing the proposed penalty by $200 is that Old Ben's negligence was only moderate. In connection with the last alleged violation discussed above, the motion for approval of settlement correctly observed that MSHA's narrative finding of high negligence was in conflict with the inspector's finding of moderate negligence. I found in that instance that a conflict between the inspector's finding and the narrative finding was some indication that the narrative finding might be in error. In this instance, however, the inspector also rated Old Ben's negligence as being high so that there is no conflict between the narrative finding and the inspector's finding as to negligence.

I believe that other reasons exist for reducing the penalty by $200. Neither the inspector's order nor the narrative findings discuss whether the mine supplies parked under the unguarded wire had been loaded while the cars were parked in that location or whether the supplies were parked in that location for the purpose of being unloaded or had been left there only temporarily until they could be transported to another area of the mine. Although the cars were at a mantrip station, there is no discussion in the order or the narrative findings as to whether employees were required to get in and out of mantrips under the place where the trolley wire was unguarded. Moreover, if loaded supplies were parked under the trolley wire, it is unlikely that a person who was going to check pumps would go to the trouble of climbing over loaded cars to get to the pumps. The fact that the inspector believed that only one person might be injured by the unguarded wire is a rather strong indication that employees did not get in and out of mantrip cars at the location where the trolley wire was unguarded. The lack of information on which to base a finding that the violation was very serious justifies a reduction of the penalty to $800.

The second violation was alleged in Order No. 2145713 which stated that Old Ben had violated section 75.200 because loose coal brows existed along the ribs in an active haulage and travelway. The size of the coal brows ranged from 3 to 6 feet in length, 2 to 6 inches in thickness, and from 24 to 36 inches in height. MSHA proposed a penalty of $800 on the basis of narrative findings to the effect that the violation was serious and that it was associated with a high degree of negligence. The motion for approval of settlement states that Old Ben has agreed to pay a reduced penalty of $500 on the basis that the degree of Old Ben's negligence was not as great as the narrative findings indicated.

There is a dearth of information as to whether the coal brows were of such a nature that Old Ben's section foreman and preshift examiners could not have avoided seeing the loose coal brows, as the narrative findings allege. Sometimes conditions which are obviously hazardous to an inspector are not perceived in the same way by conscientious section foremen. Therefore, I believe that the motion has shown an adequate reason to reduce the proposed penalty to $500.

The third violation was alleged in Order No. 2145714 which stated that Old Ben had violated section 75.603 because a temporary splice in the trailing cable to a shuttle car had not been made in a workmanlike manner and was not mechanically strong and well insulated. MSHA proposed a

penalty of $600 based on narrative findings to the effect that the violation was serious and was associated with a high degree of negligence. The motion for approval of settlement states that Old Ben has agreed to pay a reduced penalty of $500 and that the reduction has been agreed to by the parties because the location of the splice was such as to reduce Old Ben's negligence sufficiently to warrant a reduction in the penalty. I find that the parties have shown a reason for reducing the penalty by $100.

The fourth violation was alleged in Order No. 2145031 which stated that Old Ben had violated section 75.514 because a splice in a trolley wire was not properly made and the trolley wire was sagging and out of two hangers. MSHA proposed a penalty of $750 on the basis of narrative findings to the effect that the violation was serious and was associated with a high degree of negligence. The motion for approval of settlement states that Old Ben has agreed to pay a reduced penalty of $500 and that the parties have agreed to the reduction because the nature of the violation and its location justify a finding that Old Ben's degree of negligence was less than it was found to be in the narrative findings. I agree that a reduction in the penalty to $500 is warranted, particularly since the hazard was the possibility of a fire rather than exposure of miners to a possible shock hazard.

The fifth violation was alleged in Order No. 2145035 which cited Old Ben for a violation of section 75.1003 because a trolley feeder wire was not guarded at a place where miners passed under it at a point near the Foundation Mains 15 stopping. MSHA proposed a penalty of $600 based on narrative findings to the effect that the violation was serious because it exposed miners to an electrical shock hazard and that Old Ben was highly negligent for having failed to guard the wire. The motion for approval of settlement states that Old Ben has agreed to pay a reduced penalty of $500 and the motion supports the reduction in the penalty by observing that the constantly changing conditions in the workplace made the degree of Old Ben's negligence, in failing to realize that the trolley wire needed guarding, less than was indicated in MSHA's narrative findings. I conclude that the parties have given a satisfactory reason for reducing the proposed penalty by $100.

The sixth violation was alleged in Order No. 2145036 which stated that Old Ben had violated section 75.200 because the roof had not been properly supported in the third right 013 working section in that spalling had occurred around some bolts from rib to rib, and some roof bolts measured from 6 to 8 feet from the rib. The lack of proper supports existed

for a distance of about 200 feet. MSHA proposed a penalty of $1,000 based on narrative findings to the effect that the violation was serious as it could have contributed to a roof-fall accident and that Old Ben was highly negligent in allowing the roof supports to deteriorate to the extent found by the inspector.

The motion for approval of settlement indicates that Old Ben has agreed to pay a reduced penalty of $600. The reduction in the proposed penalty is primarily based on the fact that the inspector on August 1, 1984, issued a modification of the order reducing his finding of high negligence to moderate. The person who wrote the narrative findings apparently did not take that change in the inspector's finding as to negligence into consideration in proposing a penalty of $1,000. I find that the parties have shown an adequate reason for reducing the proposed penalty to $600.

The seventh violation was cited in Order No. 2145037 which stated that Old Ben had failed to report in the preshift book the existence of bad roof conditions and ventilation deficiencies. MSHA proposed a penalty of $500 based on narrative findings to the effect that the violation was serious and was associated with a high degree of negligence. The motion for approval of settlement indicates that Old Ben has agreed to pay the proposed penalty of $500 in full. The proposed penalty is reasonable in the circumstances and Old Ben's agreement to pay the full proposed penalty is approved.

Docket No. WEVA 85-78

MSHA seeks to have only one penalty assessed in Docket No. WEVA 85-78. That penalty was alleged in Order No. 2145712 which cited Old Ben for a violation of section 75.807 because a high-voltage cable had not been placed in a position which would prevent its being accidentally touched by miners or damaged by mining equipment. MSHA proposed a penalty of $800 based on narrative findings to the effect that the violation was serious and was associated with a high degree of negligence.

The motion for approval of settlement indicates that Old Ben has agreed to pay a reduced penalty of $500 and the motion justifies the parties' agreement to reduce the penalty on the ground that a high-voltage cable has a great deal more protection built into its layers of insulation than low-voltage cable and that Old Ben's negligence in failing to place the cable where it would not be accidentally contacted by a miner was less than the narrative findings

had indicated. It is also noted that all the protective layers of insulation were in good condition at the time the violation was cited. I find that the parties have given a satisfactory reason for agreeing to reduce the proposed penalty to $500.

The motion for approval of settlement (p. 22) contains a paragraph giving the type of exculpatory language approved by the Commission in Amax Lead Company of Missouri, 4 FMSHRC 975 (1982), to the effect that Old Ben has made the agreements and stipulations set forth in the motion for approval of settlement only for the purpose of reaching a settlement of the issues without having to resort to a hearing and that its agreements in this proceeding are to be used only for carrying out the purposes of the Federal Mine Safety and Health Act of 1977.

The Contest Proceeding

The motion for approval of settlement does not refer to any of the notices of contest which were filed by Old Ben in this consolidated proceeding. Section 105(d) of the Act requires that notices of contest be filed within 30 days after a citation or order is issued. Therefore, notices of contest are sometimes filed for protective reasons and are not always followed by the filing of related penalty proceedings before the Commission because Old Ben may pay penalties proposed by MSHA pursuant to section 105(a) of the Act without such proposed penalties ever becoming the subject of a penalty case filed before the Commission.

Some of Old Ben's contest cases involve imminent-danger orders issued under section 107(a) of the Act without citing violations as a part of the orders. The inspectors, however, did issue citations under section 104(a) of the Act, and the citations referred to the fact that they had been issued in conjunction with imminent-danger orders. Therefore, while it may not appear that some of Old Ben's notices of contest were precisely related to the issues raised in the civil penalty cases, the dates on which the various orders were issued and contested by Old Ben show that Old Ben filed its notices of contest to oppose the issuance of the citations and orders which have been disposed of in the parties' settlement agreements discussed in the first part of this decision approving settlement.

Counsel for Old Ben has advised me that he has no objection to my dismissing all of the notices of contest listed in the caption of this decision at the time I issue my decision in this consolidated proceeding.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement filed on December 18, 1985, is granted and the parties' settlement agreement is approved.

(B) Pursuant to the parties' settlement agreement, Old Ben, within 30 days from the date of this decision, shall pay civil penalties totaling $10,650.00 which are allocated to the respective alleged violations as follows:

Docket No. WEVA 84-324

Citation No. 2272911 2/21/84 § 75.200	$ 150.00
Order No. 2143361 4/26/84 § 75.703	500.00
Total Settlement Penalties in Docket No. WEVA 84-324	$ 650.00

Docket No. WEVA 85-56

Citation No. 2142769 4/25/84 § 75.1725(a) ...	$ 1,500.00
Citation No. 2142768 4/25/84 § 75.1725(a) ...	3,000.00
Order No. 2142771 4/26/84 § 75.509	1,100.00
Total Settlement Penalties in Docket No. WEVA 85-56	$ 5,600.00

Docket No. WEVA 85-71

Order No. 2145709 5/22/84 § 75.1003(c)	$ 800.00
Order No. 2145713 5/22/84 § 75.200	500.00
Order No. 2145714 5/22/84 § 75.603	500.00
Order No. 2145031 6/1/84 § 75.514	500.00
Order No. 2145035 6/4/84 § 75.1003	500.00
Order No. 2145036 6/4/84 § 75.200	600.00
Order No. 2145037 6/4/84 § 75.303	500.00
Total Settlement Penalties in Docket No. WEVA 85-71	$ 3,900.00

Docket No. WEVA 85-78

Order No. 2145712 5/22/84 § 75.807	$ 500.00
Total Settlement Penalties in Docket No. WEVA 85-78	$ 500.00
Total Settlement Penalties in This Proceeding	$10,650.00

(C) The 12 notices of contest filed in Docket Nos. WEVA 84-229-R, WEVA 84-230-R, WEVA 84-231-R, WEVA 84-232-R, WEVA 84-269-R, WEVA 84-270-R, WEVA 84-271-R, WEVA 84-272-R, WEVA 84-273-R, WEVA 84-274-R, WEVA 84-275-R, and WEVA 84-276-R are dismissed.

Richard C. Steffey
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

November 25, 1985

SOUTHWESTERN PORTLAND CEMENT COMPANY, Contestant	:	CONTEST PROCEEDINGS
GARY PRITCHETT, Union Representative	:	Docket No. CENT 85-71-RM
	:	Citation No. 2235007; 1/10/85
and	:	Docket No. CENT 85-81-RM
PETE BARRERAZ, Union Representative	:	Order No. 2238401; 4/10/85
v.	:	Docket No. CENT 85-82-RM
	:	Order No. 2238402; 4/10/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Odessa Cement Plant

ORDER

Southwestern Portland Cement Company (SPCC) has moved for a summary decision herein. The Secretary of Labor opposes the motion. Briefs have been filed by SPCC and the Secretary in support of their positions.

The facts are these:

CENT 85-71-RM

1. In this case Citation No. 2235007 was issued under Section 104(d)(1) of the Act. The citation in its format indicates that it was issued on January 10, 1985. The body of the citation itself recites that it was issued on March 21, 1985.

2. The citation alleges that three miners were exposed to an undetermined amount of heat and gas while working in the SPCC multiclone. It is further alleged that SPCC's actions constituted an unwarrantable failure to comply with 30 C.F.R. § 56.15-6.

3. Subsequently, on May 1, 1985, the citation was modified by formally changing the issuance date from January 10, 1985 to March 21, 1985. It was further stated in the amendment that "the violation was believed to have occurred on January 10, 1985." 1/

1/ The facts in this paragraph only appear in CENT 85-119-M, a penalty case pending before this judge for the alleged violation of Citation 2235007.

4. Between March 21 (the date Citation 2235007 was issued) and May 1 (the date the citation was modified) two contested withdrawal orders were issued. These contests are now docketed as CENT 85-81-RM and CENT 85-82-RM.

CENT 85-81-RM

5. In this case SPCC contests MSHA's order number 2238401 issued under Section 104(d)(1) of the Act.

The foregoing order alleges SPCC violated 30 C.F.R. § 56.9-40. The order was issued April 10, 1985 after an MSHA inspector had completed an investigation.

The order claims that SPCC's operation of its #183 forklift constituted an unwarrantable failure by SPCC to comply with the regulation.

CENT 85-82-RM

6. In this case SPCC contests MSHA's order 2238402 issued under Section 104(d)(1) of the Act.

The foregoing order alleges SPCC violated 30 C.F.R. § 56.14-27. The order was issued on April 10, 1985 after an MSHA inspector had completed an investigation.

The order claims that SPCC's operation of its #183 forklift (on an occasion other than as alleged in Citation 2238401) constituted an unwarrantable failure by SPCC to comply with the cited regulation.

Discussion

SPCC contends that under Section 104(d) of the Act any violations, in order to be cited and made the subject of citations and withdrawal orders, must be in existence at the time of an inspection in order to subject a mine operator to liability for violations under the Act. SPCC also contends that Section 104(d) differs from Section 104(a) and other provisions of the Act since Section 104(d) introduces a time factor into the enforcement action.

The Secretary counters claiming that Section 103(g)(1) plainly provides a right to obtain an immediate inspection after notice of an allegedly violative condition is received by the Secretary.

The judge for the purpose of this order has reviewed the citation and withdrawal orders as well as the affidavits on file. These indicate that the violative condition were not actually perceived, observed or otherwise directly detected by the MSHA inspectors. Further, such violative conditions did not exist at

the time the inspectors visited the worksite. This analysis rests on the fact that MSHA conducted an after the fact investigation before issuing the citation and orders. Specifically, Citation 2235007 was issued due to events that allegedly occurred on January 10, 1985. MSHA investigated these events when it received a written employee complaint on February 7, 1985. The two withdrawal orders were issued as the result of an after the fact MSHA investigation on April 3, 1985.

An overview of the Act is necessary to resolve the issues in the case.

Section 103(a) of the Act provides: "Authorized representatives of the Secretary ... shall make frequent inspections and investigations in ... mines each year for the purpose of ... (4) determining whether there is compliance with the mandatory health or safety standards ..."

Section 103(b) of the Act, speaking only of an "investigation," provides: "For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a ... mine, the Secretary may, after notice, hold public hearings, ...

The contrast between the foregoing sections indicates that Congress saw an investigation as something different from an inspection.

Of considerable significance, the most used enforcement tool, Section 104(a), mentions both inspections and investigations. It provides that "if, upon inspection or investigation, the Secretary ... believes that an operator of a ... mine ... has violated this Act, or any ... standard, ... he shall, with reasonable promptness, issue a citation to the operator.... The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

Section 104(d)(1), in contrast to Section 104(a), relates only to "inspections," providing that "if, upon any inspection of a ... mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as can significantly and substantially contribute to the cause and effect of a ... hazard, and if he finds such violation to be caused by an unwarrantable failure ... he shall include such findings in any citation given to the operator under this Act."

The second sentence of Section 104(d)(1) provides for the withdrawal order in the enforcement chain or scheme contemplated by Congress in this so-called "unwarrantable failure" formula.

Significantly, it provides that "If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation ... and finds such violation to be also caused by an unwarrantable failure ..., he shall forthwith issue an order requiring the operator to cause all persons ... to be withdrawn from ... such area ...."

If the position of the Secretary in this case were adopted, that is, if withdrawal orders could be issued on the basis of an investigation of past occurrences, the effect would be to increase the 90-day period provided for in the second section of Section 104(d)(1) by the amount of time which passed between the occurrence of the violative condition described in the order and the issuance of the order.

Section 104(d)(2) of the Act permits the issuance of a withdrawal order by the Secretary if his authorized representative "finds upon any subsequent inspection" the existence of violations similar to those that resulted in the issuance of the Section 104(d)(1) order.

Summing up, it is clear that nowhere in Section 104(d) is the issuance of any enforcement documentation sanctioned on the basis of an investigation. Although Congress did not define the terms "inspection" or "investigation" specifically in the Act, there is no question but that Congress in using those terms in specific ways in prior sections of the Act, and by not using the term "investigation" in Section 104(d)(1) and (2) indicates the Congress did so with some premeditation.

Further, an example of the fact that Congress intended the words to have different meanings is provided by Section 107(b)(1) - (2) of the Act where Congress lays out an enforcement sequence whereby, based upon findings made during an 'inspection,' further 'investigation' may be made."

Finally, Section 107(a) of the Act permits the Secretary's representative to issue a withdrawal order where imminent danger is found to exist either upon an inspection or investigation.

A review of the various portions of the Act, commencing at the point where the subject words are first used on through to the end of such use, indicates that the terms were used with care and judiciously and with an understanding of the general connotations contained in their definitions. 2/

2/ Webster's New Collegiate Dictionary, 1979 at 593 and 603 indicates that the primary definition of "inspect" is "to view closely in critical appraisal: look over." On the other hand, the primary definition of "investigate" is "to observe or study by close examination and systematic inquiry."

Commission Judge Richard C. Steffey thoroughly considered the legislative history of the Act concerning these issues in Westmoreland Coal Company, WEVA 82-340-R, May 4, 1983. His views, slightly recast by the writer, are quoted at length herein because his order (on a motion for a summary decision) is otherwise unreported. He stated:

> WCC correctly argues that an order issued under Section 104(d) should be based on an inspection as opposed to an investigation. As herein before indicated, the Secretary argues that Congress has not defined either term to indicate that Congress recognizes that there is a difference between an 'inspection' as opposed to an 'investigation.' If one wants to examine the legislative history which preceded the enactment of unwarrantable-failure provisions of the 1977 Act, one must examine the legislative history which preceded the enactment of Section 104(c) of the 1969 Act.
>
> The history of the 1969 Act shows that there was a difference in the language of the unwarrantable-failure provisions of S. 2917 as opposed to H.R. 13950. S. 2917, when reported in the Senate, contained an unwarrantable-failure provision; section 302(c) which read almost word for word as does the present Section 104(d), H.R. 13950 contained an unwarrantable-failure. Section 104(c), which provided that if an unwarrantable-failure notice of violation had been issued under Section 104(c)(1), a reinspection of the mine should be made within 90 days to determine whether another unwarrantable failure violation existed.
>
> Conference Report No. 91-761. 91st Congress, 1st Session, stated with respect to the definition in section 3(1) of H.R. 13950 (page 63):
>
> The definition of 'inspection' as contained in the House amendment is no longer necessary, since the conference agreement adopts the language of the Senate bill in section 104(c) of the Act which provides for findings of an unwarrantable failure at any time during the same inspection or during any subsequent inspection without regard to when particular inspection begins or ends.
>
> Section 104(c)(1) of H.R. 13950 provided for the findings of unwarrantable failure to be made in a notice of violation which would be issued under section 104(b). Section 104(c)(1)'s requirement of a reinspection within 90 days to determine if an unwarrantable failure violation still existed explained that the reinspection required within 90 days by section 104(c)(1) was in ad-

dition to the special inspection required under section 104(b) had to determine whether a violation cited under section 104(b) had been abated. Section 104(c)(1), as finally enacted, eliminated the confusion about intermixing reinspections with special inspections by simply providing that an unwarrantable failure order would be issued under section 104(c)(1) any time that an inspector, during a subsequent inspection, found another unwarrantable failure violation (Conference Report 91-761, pp. 67-68).

The legislative history discussed above shows that Congress thought of an inspection as being the period of time an inspector would spend to inspect a mine on a single day because the inspection was to begin when the inspector entered the mine and end when he left. It would be contrary to common sense to argue that the inspector might take a large supply of food with him so as to spend more than a single day in a coal mine at one time. On the other hand, Congress is very experienced in making investigations to determine whether certain types of legislation should be enacted. Congress is well aware that an investigation, as opposed to an inspection, is likely to take weeks or months to complete. Therefore, I cannot accept the Secretary's argument that Congress did not intend to distinguish between an "inspection" and an "investigation" when it used those two terms in section 104(a) and section 107(a) of the 1977 Act.

It should be noted, for example, that the counterpart of section 104(a) in the 1977 Act, was section 104(b) in the 1969 Act. Section 104(b) in the 1969 Act provided for notices of violation to be issued "upon any inspection,' but section 104(a) in the 1977 Act provides for citations to be issued 'upon inspection or investigation.' Likewise, the counterpart of imminent-danger section 107(a) in the 1977 Act was section 104(a) in the 1969 Act. In the 1969 Act an imminent-danger order was to be written 'upon any inspection,' but when Congress placed the imminent-danger provision of the 1977 Act in section 107(a), it provided for imminent-danger orders to be issued 'upon any inspection or investigation.' On the other hand, when the unwarrantable-failure provision of section 104(c) of the 1969 Act was placed in the 1977 Act as section 104(d), Congress did <u>not</u> change the requirement that unwarrantable-failure orders were to be issued 'upon any inspection.'

The legislative history explains why Congress changed section 104(a) in the 1977 Act to allow a citation to be issued 'upon inspection or investigation.' Conference Report No. 95-461, 95th Congress, 1st Session, 47-48, states that the Senate bill permitted a citation or order to be issued based upon the inspector's belief that a violation had occurred, whereas the House amendment required that the notice or order be based on the in-

spector's finding that there was a violation. Additionally, as both the Secretary and WCC have noted, Senate Report No. 95-181, 95th Congress, 1st Session, 39, explains that an inspector may issue a citation when he believes a violation has occurred and the report states that there may be times when a citation will be delayed because of the complexity of issues raised by the violations, because of a protracted accident investigation or for other legitimate reasons. For this reason, section 104(a) provides that the issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action.

The legislative history and the plain language of section 107(a) in the 1977 Act explain why that section was changed so as to insert the provision that an imminent danger order could be issued upon an 'investigation' as well as upon an 'inspection.' Section 107(a) states, in part, that the issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110. Both Senate Report No. 95-181, 37, and Conference Report No. 95-461, 55, refer to the preceding quoted sentence to show that a citation of a violation may be issued as part of an imminent-danger order. Since section 104(a) had been modified to provide for a citation to be issued upon an inspector's 'belief' that a violation had occurred, it was necessary to modify section 107(a) to provide that an imminent-danger order could be issued upon an inspection or an investigation so as to make the issuance of a citation as part of an imminent-danger order conform with the inspector's authority to issue such citations under section 104(a).

Despite the language changes between the 1969 and 1977 Acts with respect to the issuance of citations and imminent-danger orders, Congress did not change a single word when it transferred the unwarrantable failure provisions of section 104(c) of the 1969 Act to the 1977 Act as Section 104(d). Conference Report No. 95-461, 48, specifically states 'the conference substitute conforms to the House amendment, thus retaining the identical language of existing law.'

My review of the legislative history convinces me that Congress did not intend for the unwarrantable failure provisions of section 104(d) to be based upon lengthy investigations. Congress did not provide that an inspector may issue an unwarrantable failure citation or order upon a 'belief' that a violation occurred. Without exception, every provision of section 104(d) specifically requires that findings be made by the inspector to

> support the issuance of the first citation and all subsequent orders. The inspector must first, 'upon any inspection' find that a violation has occurred. Then he must find that the violation could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. He must then find that such violation is caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standard. He thereafter must place those findings in the citation to be given to the operator. If during that same inspection any subsequent inspection, he finds another violation of any mandatory health or safety standard and finds such violation to be caused by an unwarrantable failure of such to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation to be withdrawn and be prohibited from entering such area until the inspector determines that such violation has been abated.
>
> After a withdrawal order has been issued under subsection 104(d)(1), a further withdrawal order is required to be issued promptly under subsection 104(d)(2) if an inspector finds upon any subsequent inspection that an additional unwarrantable-failure violation exists until such time as an inspection of such mine which discloses no unwarrantable-failure violations, the operator is liberated from the unwarrantable-failure chain. Conference Report No. 95-181, 34, states that 'both Sections 104(d)(1) and 104(e) require an inspection of the mine in its entirety in order to break the sequence of the issuance of orders. (Emphasis added.)

I agree with Judge Steffey and I conclude that the Act does not permit a section 104(d) order to be based on an investigation. But rather the order must be based on and it must have been a product of an inspection of the site. Section 104(d) provides that an order may be issued only if, upon an inspection of the mine, the Secretary finds a violation of a safety or health standard. Where an inspector does not inspect the site but only learns of the alleged violation from the statements of miners a section 104(d) order may not be issued.

As previously noted, when it intended to permit MSHA enforcement actions to proceed on the basis of an inspection or an investigation, Congress so provided. The section 104(d) requirement of an inspection cannot be dismissed as mere semantic inadvertence on the part of Congress.

Section 104(d) sets forth the sanctions that may be imposed against an operator under the specific conditions discussed in that section. If follows that the inspector authorized on a miner's complaint by section 103(g)(1) cannot reduce the safeguards Congress intended to provide in section 104(d). The Secretary's reliance on section 103(g)(1) is, accordingly, rejected.

As previously noted the citation and orders in contest here all indicate on their face that they were issued as a result of MSHA investigations.

Accordingly, I find that Citation 2235007 and Withdrawal Orders 2238401 and 2238404 were improvidently issued pursuant to section 104(d) of the Act.

However, such a conclusion does not mandate that the citation and orders in contest here should be vacated. The Commission has thoroughly explored the procedural propriety of a judge modifying an invalid 104(d) order. Consolidation Coal Company, 4 FMSHRC 1791 (1982); United States Steel Corporation, 6 FMSHRC 1908 (1984). The rationale as expressed in Consolidation Coal Company follows:

> We first consider the question of modification from a general perspective. Sections 104(h) and 105(d) of the Mine Act expressly authorize the Commission to "modify" any "orders" issued under section 104. This power is conferred in broad terms and we conclude that it extends, under appropriate circumstances, to modification of 104 (d)(1) withdrawal orders to 104(d)(1) citations. In this case, and in future ones raising similar issues, we will define such "appropriate circumstances." Where, as here, the withdrawal order issued by the Secretary contains the special findings set forth in section 104(d)(1), but a valid underlying 104(d)(1) citation is found not to exist, an absolute vacation of the order, as urged by the operator, would allow the kind of serious violation encompassed by section 104(d) to fall outside of the statutory sanction expressly designed for it--the 104 (d) sequence of citations and orders. The result would be that an operator who would otherwise be placed in the 104(d) chain would escape because of the sequencing of citations and orders. Such a result would frustrate section 104(d)'s graduated scheme of sanctions for more serious violations.

Consolidation Coal Company, specifically addresses the issue of whether 104(d) orders survive as alleged 104(a) violations. On this point the Commission stated 4 FMSHRC at 1794 (Footnote 9):

> Modification under such circumstances is also consistent with our settled precedent. We held in Island Creek Coal Co., 2 FMSHRC 279, 280 (February 1980), that allegations of a violation survived the Secretary's vacation of the 104(d)(1) withdrawal order in which they were contained and, if proven at a subsequent hearing, would have required assessment of a penalty. We reached a similar result in a companion case in which we held that allegations of violation also survived Secretarial

vacation of an invalid 107(a) order (imminent danger). Van Mulvehill Coal Co., Inc., 2 FMSHRC 283, 284 (February 1980). In both cases, we thus contemplated future trial of the allegations as possible 104(a) violations. (Neither of the vacated withdrawal orders had contained significant and substantial findings.) If less serious allegations of 104(a) violations survive, then, a fortiori, the more serious allegations in the present type of case should survive as potential 104(d)(1) violations. In short, the purport of our decisions is that such allegations survive, and modification is merely the appropriate means of assuring that they do.

For the foregoing reasons I conclude that SPCC's motion should only be granted in part. A total summary decision is denied because the pleadings herein indicate that a factual dispute remains as to the validity of the modified citation and orders. If, after a hearing, the evidence fails to show that the violations occurred then the citations will be vacated.

In summary, I conclude that the 104(d) citation and two 104(d) withdrawals orders are invalid because the alleged violative condition was not in existence during the period of the inspection. Further, the violations were not actually perceived, observed or otherwise directly detected by a duly authorized representative of the Secretary. I further conclude that Commission precedent requires that the 104(d) allegations should be modified to allegations of violations under Section 104(a) of the Act.

Accordingly, pursuant to Section 105(d) of the Act, I enter the following:

ORDER

1. Citation No. 2235007 alleging a violation of 30 C.F.R. § 56.15-6, docketed as case No. CENT 85-71-RM and issued under section 104(d)(1) of the Act is modified to reflect its issuance under section 104(a) of the Act.

2. Withdrawal Order 2238401 alleging a violation of 30 C.F.R. § 56.9-40, docketed as case No. CENT 85-81-RM and issued under section 104(d)(1) of the Act is modified to reflect its issuance under section 104(a) of the Act.

3. Withdrawal Order 2238402 alleging a violation of 30 C.F.R. § 56.14-27, docketed as case No. CENT 85-82-RM, and issued under section 104(d)(1) of the Act is modified to reflect its issuance under section 104(a) of the Act.

4. All proposed findings of fact and conclusions of law not expressly incorporated in this order are rejected.

John J. Morris
Administrative Law Judge

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