

DECEMBER 1988

COMMISSION DECISIONS

12-13-88	Southern Ohio Coal Company	LAKE 87-95-R	Pg. 1669
12-15-88	The Helen Mining Company	PENN 86-94-R	Pg. 1672

ADMINISTRATIVE LAW JUDGE DECISIONS

12-08-88	Lincoln Sand & Gravel Co.	LAKE 88-67-M	Pg. 1679
12-08-88	Marion County Limestone Co., Ltd.	CENT 88-77-M	Pg. 1683
12-12-88	Sec. Labor for Patrick Stanfield v. National Mines Corporation	KENT 88-171-D	Pg. 1689
12-12-88	James D. Grimes v. Consolidation Coal Co.	WEVA 88-218-D	Pg. 1701
12-16-88	Consolidation Coal Company	WEVA 88-243	Pg. 1702
12-20-88	Karst Robbins Coal Company, Inc.	KENT 88-21	Pg. 1708
12-22-88	Randy Rothermel, d/b/a Tracey & Partners	PENN 88-155	Pg. 1716
12-22-88	Consolidation Coal Company	WEVA 88-139	Pg. 1734
12-23-88	Randy G. Cunningham v. Consolidation Coal Co.	PENN 88-293-D	Pg. 1748
12-23-88	Jackie Sanders v. Gosser Construction Co.	LAKE 88-130-D	Pg. 1749
12-27-88	James River Limestone Co., Inc.	VA 88-22-M	Pg. 1750
12-28-88	Faith Coal Company	SE 88-50	Pg. 1769
12-29-88	Sec. Labor for Ford Allen Amos v. Nally and Hamilton Enterprises, Inc.	KENT 88-175-D	Pg. 1771
12-29-88	Zeigler Coal Company	LAKE 88-89	Pg. 1776
12-29-88	Sec. Labor for Raymond Long v. Cannelton Industries	WEVA 88-281-D	Pg. 1778
12-30-88	Pennsylvania Electric Company	PENN 88-227	Pg. 1780

ADMINISTRATIVE LAW JUDGE ORDERS

11-10-88	Mid-Continent Resources	WEST 88-231	Pg. 1791
12-22-88	Mid-Continent Resources	WEST 89-3-R	Pg. 1798
12-23-88	Adkins Coal Corporation	VA 87-8	Pg. 1808
12-27-88	Sec. Labor for David S. Haynes v. DeCondor Coal Co.	WEVA 89-31-D	Pg. 1810

DECEMBER 1988

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

Local Union 2333, District 29, United Mine Workers of America v. Ranger Fuel Corporation, Docket No. WEVA 86-439-C. (Judge Melick, Decision on Remand, October 25, 1988)

Secretary of Labor on behalf of Joseph Gabossi v. Western Fuels-Utah, Docket No. WEST 86-24-D. (Judge Morris, Decision on Remand, October 24, 1988)

Rochester & Pittsburgh Coal Company v. Secretary of Labor, MSHA, Docket No. PENN 88-152-R. (Judge Melick, November 17, 1988)

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

Secretary of Labor, MSHA v. Southern Ohio Coal Company, Docket No. WEVA 86-190-R, WEVA 86-254. (Judge Maurer, Decision on Remand, October 31, 1988)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 13, 1988

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
v. : Docket Nos. LAKE 87-95-R
SOUTHERN OHIO COAL COMPANY : LAKE 88-26

BEFORE: Ford B. Ford, Chairman; Backley, Doyle, Lastowka, and Nelson,
Commissioners

ORDER

BY THE COMMISSION:

In this matter pending on review, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"), counsel for the Secretary of Labor has filed a motion requesting vacation of the citation and associated civil penalty assessment in issue and dismissal of the proceeding. Southern Ohio Coal Company ("SOCCO") has filed a response indicating that it has no objection to the granting of the Secretary's motion. For the following reasons, we grant the motion.

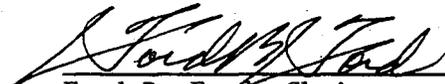
On July 22, 1987, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued SOCCO a citation alleging a violation of 30 C.F.R. § 70.100(a), the mandatory health standard that, in general, requires operators of underground coal mines to maintain continuously an average concentration of respirable dust in mine atmospheres at or below 2.0 milligrams of dust per cubic meter of air ("mg/m³"). The citation was based on analysis of twelve respirable dust samples obtained by MSHA inspectors conducting a respirable dust survey in a particular longwall section of SOCCO's Meigs No. 2 underground coal mine. The samples indicated an average respirable dust concentration of 2.1 mg/m³, a level in excess of that permitted under section 70.100(a). SOCCO contested the citation and this matter proceeded to hearing before Commission Administrative Law Judge Avram Weisberger. In his decision, Judge Weisberger concluded that SOCCO had violated the standard, affirmed the citation, and assessed a \$259 civil

penalty for the violation. 10 FMSHRC 923 (July 1988)(ALJ). We subsequently granted SOCCO's petition for discretionary review, which, inter alia, challenged the dust sampling procedures used by the MSHA inspectors in this case.

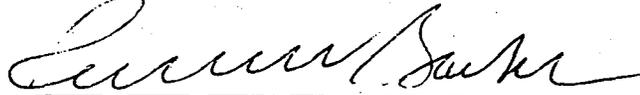
After the submission of SOCCO's brief on review, the Secretary filed with us a Motion to Vacate Citation and to Dismiss Proceeding. In this motion, the Secretary states that one of the twelve samples upon which the citation was based was not obtained in conformance with MSHA's sampling procedures. The Secretary further states that if the invalid sample were deleted from the dust analysis, the average dust concentration for the mine section in question would be 1.67 mg/m³, a permissible level. The Secretary requests that we enter an order vacating the citation and assessed civil penalty and dismissing this proceeding. On November 18, 1988, the Commission issued an order directing SOCCO to file a written response to the Secretary's motion. On November 29, 1988, SOCCO filed a Memorandum in Response, in which it asserts that it has no objection to the granting of the Secretary's motion and the dismissal of this proceeding.

As we have held, our "responsibility under the Mine Act is to ensure that a contested case is terminated, or continued, in accordance with the Act." Youghioghney & Ohio Coal Co., 7 FMSHRC 200, 203 (February 1985) ("Y&O"). A motion by the Secretary to vacate a citation or order and to dismiss a review proceeding will be granted if "adequate reasons" to do so are present. See, e.g., Y&O, supra; Kocher Coal Co., 4 FMSHRC 2123, 2124 (December 1982); Climax Molybdenum Co., 2 FMSHRC 2748, 2750-51 (October 1980), aff'd, 703 F.2d 447 (10th Cir. 1983). Here, the Secretary asserts that it now appears to her that a necessary factual predicate for the violation in issue is lacking. As the prosecutor charged with enforcement of the Mine Act, the Secretary has reached a determination that she should seek withdrawal of this proceeding. Cf. Roland v. Secretary of Labor, 7 FMSHRC 630, 635-36 (May 1985), aff'd, No. 85-1828 (10th Cir. July 14, 1986). The operator has not objected to the Secretary's motion or claimed that it will be prejudiced by the requested action. No reason otherwise appears on this record as to why the motion should not be granted.

Accordingly, upon consideration of the Secretary's motion and the operator's response, the Secretary's motion is granted. The citation and assessed civil penalty are vacated. Our direction for review is also vacated and this proceeding is dismissed.



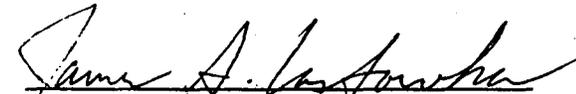
Ford B. Ford, Chairman



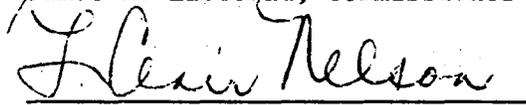
Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



James A. Lastowka, Commissioner



L. Clair Nelson, Commissioner

Distribution

David A. Laing, Esq.
Porter, Wright, Morris & Arthur
41 South High Street
Columbus, Ohio 43215

Dennis D. Clark, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 15, 1988

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

v.

THE HELEN MINING COMPANY

:
:
:
:
:
:
:
:
:
:
:

Docket Nos. PENN 86-94-R
PENN 86-181

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"). The issue before us is whether Commission Administrative Law Judge Avram Weisberger properly found that a violation of 30 C.F.R. § 75.200, the mandatory roof control safety standard for underground coal mines, was not caused by the unwarrantable failure of The Helen Mining Company ("Helen") to comply with the standard. 9 FMSHRC 1095 (June 1987)(ALJ). For the reasons that follow, we affirm the judge's decision.

The relevant facts are undisputed. The Homer City Mine is an underground coal mine located in Homer City, Pennsylvania. Homer City is the only underground coal mine in the country that utilizes the shortwall mining method. The shortwall method is a pillar extraction system whereby the roof is temporarily supported by hydraulically-pressurized shields while a remote-controlled continuous miner cuts 10-foot deep swaths from the face. The extracted coal is removed from the face area by a conveyor belt or pan line. The hydraulic shields are advanced into the void created by the cut as the face is advanced and are repressurized against the newly exposed roof. As the shields move forward, the roof that the shields had been supporting "caves" or falls creating a "gob" area behind the shields. If, because of the structure of the overburden, the main roof does not break, it will start to bend, exerting extreme pressure in the roof over the tops of the shields. Although the shields support this pressure, the roof between the inby

end of the shields and the face will show signs of stress and start to fracture, resulting in small roof falls or "pot-outs." Tr. 426-27, 433, 435-36; Battistoni Deposition, p. 16.

In August 1985, Helen installed in its H-Butt No. 4 shortwall section new Gullick Dobson shields that Helen's engineers had designed to meet the specific needs of the Homer City Mine. 1/ On January 7, 1986, Helen began using a new continuous mining machine, the Joy 14-CM, in the section. Since the remote controls on the Joy miner differed significantly from those of the machine that had been previously used, operators of the Joy 14-CM experienced some difficulty in precisely controlling the cuts made. The operators overcut the coal seam creating changes in the height of the roof of the mine. "Step-ups" in the roof generated by the overcuts ranged up to 7 inches and averaged between 3-4 inches. 2/

On January 28, 1986, William McClure, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection of the mine. McClure was accompanied by his supervisor, Robert Nelson. Upon arriving at the H-Butt No. 4 shortwall section, McClure noted that the first four shields, located in the headgate entry area, had cribbing installed between their main canopies and the mine roof, due to gaps in the roof created by pot-outs. McClure also observed that of the 53 shields, 13 had forepole pads that were not in contact with the roof. The inspector determined that four of the 13 forepole pads were not in contact due to pot-outs and the remaining nine were not in contact because a step-up had been created in the roof on the prior pass across the face. McClure measured gaps of 10 to 13 inches from the tops of the forepole pads to the roof on at least four of the shields, and lesser gaps of 2 to 10 inches over the other nine shields. The 13 forepole pads not in contact with the roof were within 4 feet of the face.

The Homer City mandatory roof control plan required that:

The space in between the shield canopy extensions and the coal face shall not exceed 4 feet. Where this spacing is exceeded, roof support shall be installed not to exceed 4 foot spacing before any work or travel is permitted in this unsupported area, except for the purpose of installing supports.

1/ The shields have five major components: (1) the main canopy, which supports up to 688 tons; (2) the forward canopy, which supports up to 44 tons and can be cantilevered against the roof; (3) the forepole extension pad (or forepole pad), which supports up to 13.9 tons and which can be extended from the forward canopy; (4) the shield hydraulic legs; and (5) the ram arm, which pushes the conveyor forward and pulls the shield ahead as the face advances.

2/ "Step-ups" are vertical overcuts into the mine roof by the continuous miner at a height greater than the height of the previous cut. Tr. 714-722; see also Tr. 495-498.

Exhibit GX-2, Diagram 16(b). McClure interpreted this provision to require the forepole pads to be in contact with the roof at a point no greater than 4 feet from the face. McClure also found that the violation of section 75.200 was significant and substantial in nature and the result of Helen's unwarrantable failure to comply with the mandatory safety standard. Therefore, the inspector issued an order to Helen pursuant to section 104(d)(2) of the Mine Act alleging a violation of section 75.200. 3/ The order was terminated within 45 minutes of its issuance, after cribbing was installed between the forepole pads of some shields and the roof, and other shields were repositioned so that the forepole pads contacted the roof.

Helen contested the issuance of the order and the Secretary's proposed civil penalty for the violation. Helen contended that the language of its roof control plan did not require the forepole extension pads to contact the mine roof within 4 feet of the face, that MSHA had never before cited the lack of contact between forepole pads and the roof as a violation of the plan, and that installing cribbing above the forepole pads posed a greater hazard than allowing forepole pads to not be in contact with the roof.

3/ Section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), states:

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

Section 75.200, which restates section 302(a) of the Mine Act, 30 U.S.C. § 862(a), provides in pertinent part that:

The roof ... of all active ... working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof.... A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted.... No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners....

Following an evidentiary hearing, the judge determined that Helen did not violate its approved roof control plan because "the ... plan did not specifically require the forepole pads to be in [contact] with the roof...." 9 FMSHRC at 1101. The judge noted, however, that section 75.200 requires, in addition to compliance with the approved roof control plan, that "the roof ... of all ... working places ... be supported or otherwise controlled adequately to protect persons from falls." 9 FMSHRC at 1103. The judge observed that the Commission has stated that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." Id. (citing Canon Coal Company, 9 FMSHRC 667, 668 (April 1987)). Finding that "... a substantial hazard ... [exists] as the gap between the roof and the forepole pad can lead to unsupported roof being exposed for the duration of a pass by the [continuous] miner," and that "a reasonably prudent person familiar with the mining industry would have recognized the hazard," the judge concluded that Helen, by allowing the gaps to exist, had failed to support or otherwise adequately control the roof at the shortwall face in violation of section 75.200. 9 FMSHRC 1104-05. The judge also concluded that the violation significantly and substantially contributed to a mine safety hazard. 9 FMSHRC at 1105-06.

In determining whether the violation of section 75.200 constituted an unwarrantable failure to comply with the regulation, the judge found that Helen had reasonably interpreted its approved roof control plan to not require the forepole pads to be in contact with the roof, had a long history of not being cited by MSHA for similar conditions, and had a reasonable belief that miners would be exposed to a serious safety hazard if they were required to install cribbing over forepole pads. Therefore, the judge concluded that Helen's failure to comply with the requirements of section 75.200 was not the result of either indifference, willful intent, or serious lack of reasonable care. 9 FMSHRC at 1106-07.

We granted the Secretary's petition for discretionary review which challenges only the judge's conclusion that the violation did not result from Helen's unwarrantable failure. The Secretary contends that the judge set the legal standard for an unwarrantable failure at a higher threshold than that intended by Congress. The Secretary argues that application of a correct unwarrantable failure standard to the facts in this case would result in a finding that Helen unwarrantably failed to comply with section 75.200. The Secretary also asserts that the judge erroneously limited his consideration of those aspects of Helen's violative conduct that might be indicative of an unwarrantable failure.

In determining whether or not Helen's violation of section 75.200 resulted from an unwarrantable failure the judge relied upon the holding in United States Steel Corp., 6 FMSHRC 1423, 1437 (June 1981), that "an unwarrantable failure may be proved by showing that a violative condition or practice was not corrected prior to the issuance of a citation or order because of indifference, willful intent, or serious lack of reasonable care." Subsequent to both U.S. Steel and the judge's

decision in the present case, however, we further addressed the proper interpretation of the term "unwarrantable failure" as used in section 104(d) of the Mine Act. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987) and Youghioghney & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). After careful consideration of the ordinary meaning of the term, the purpose of unwarrantable failure sanctions under the Mine Act, and the legislative history and judicial precedent, we held that unwarrantable failure means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." 4/ In Emery, we determined that the same "indifference, willful intent or serious lack of reasonable care" language from U.S. Steel, relied upon by the judge, in large measure describes aggravated forms of operator conduct constituting more than ordinary negligence. 9 FMSHRC at 2003-04. Accordingly, as we did in Emery, we find that the judge's approach to resolving the unwarrantable failure issue in this case is sufficiently congruent with the subsequently announced "aggravated conduct" standard to allow us to proceed to an examination of the evidence supporting the judge's finding. See also Quinland Coals, Inc., 10 FMSHRC 705, 707-08 (June 1988). Applying Emery, we find that substantial evidence supports the judge's finding that Helen did not unwarrantably fail to comply with section 75.200.

Witnesses for both parties testified that Helen's roof control plan did not expressly address whether the forepole extension pads had to contact the roof within 4 feet of the face. Helen's witnesses testified without dispute that there had never been a requirement in Helen's roof control plan that the forepole pads be in contact with the roof at any distance from the face. All witnesses to whom the question was posed also agreed that the roof control plan expressly excluded forepole pads from the bearing area specification for the shields. Tr. 218, 367, 451, 512, 516, 564-65, 605, 685. Further, Helen's witnesses consistently testified that the function of the forepole pads is to provide coverage from falling roof debris rather than to support the roof, and General Mine Foreman Dunn testified, without contradiction, that the primary roof support component on the Gullick Dobson shield is the main canopy area, located directly over the shield's hydraulic legs, rather than the forepole pad. Tr. 578-83, 601, 618-22, 628-29, 645-50, 743-44, 761-62.

We find this evidence concerning the design and function of Helen's Gullick Dobson shortwall shield system provides a substantial evidentiary basis supporting the judge's finding that Helen's conduct in relation to its violation of the standard did not constitute aggravated

4/ The judge focused his determination of unwarrantable failure upon Helen's motive in not correcting the violative condition. The judge stated "[t]he critical issue is not what caused the violative condition, but rather the operator's motive in not correcting the violative condition." 9 FMSHRC at 1106. Emery makes clear that in resolving unwarrantable failure questions, the operator's total conduct "in relation to a violation of the Act" must be examined. This examination includes the operator's conduct in causing the violation, remedying it, or both, depending upon the circumstances of the case.

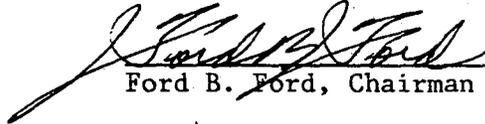
conduct exceeding ordinary negligence under Emery. Although this substantial evidence is sufficient for affirming the judge's finding, we also note other factors we find supportive of the judge's finding of no unwarrantable failure.

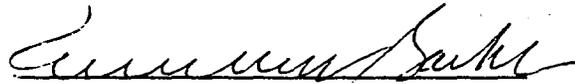
First, Helen officials testified that MSHA had not issued any citations or orders relative to the forepole pads not being in contact with the roof prior to the order in issue and the Secretary introduced no evidence of prior enforcement actions that would have put Helen on notice that forepole pad contact with the roof was required. In fact, Helen's evidence indicated that similar shields had been used for over 10 years and no controversy concerning such gaps had ever arisen. 9 FMSHRC at 1101, 1107; Tr. 566, 596, 681, 763.

Second, pursuant to meetings between Helen and MSHA officials after the subject order was terminated the Secretary approved an amended roof control plan that requires "... whenever abnormal conditions are encountered, and two or more adjacent [forepole pad] tips cannot be made to contact the roof, lagging should be installed." Exhibit GX-2, p. 15. The fact that even under the revised plan, not all forepole pads are required to be in contact with the roof can be viewed as supporting Helen's belief that the forepole pads did not have to contact the roof in order to maintain adequate roof support.

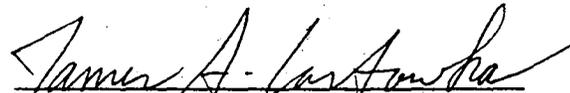
Third, there is also substantial record support for the judge's finding that Helen's officials reasonably believed that installing cribbing over the forepole pads would expose a miner to a greater hazard of roof fall than allowing the forepole pads to remain in a non-contact status. Helen's witnesses testified clearly and unequivocally that they believed the chance of a miner being injured by falling roof debris was significantly higher if the miner was installing cribbing than if some of the forepole pads were not in contact with the roof for the duration of a pass by the continuous mining machine. Tr. 609-10, 626, 769, 793. We note that the reasonableness of Helen's belief is lent some support by the fact that although no miners were injured under Helen's practice of not installing cribbing between the forepole pads and the roof, in the period between the issuance of the order in question and the hearing before the judge, during which period Helen installed cribbing between the forepole pads and the roof, two miners were injured by falling roof debris while installing cribbing. Tr. 273, 608.

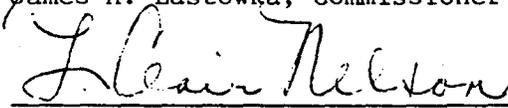
In sum, in light of all the above, we conclude that substantial evidence supports the judge's finding of no unwarrantable failure and that the failure of Helen to install cribbing in the gaps did not constitute aggravated conduct exceeding ordinary negligence. Accordingly, we affirm the finding of the judge that Helen did not unwarrantably fail to comply with the requirements of section 75.200.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

Distribution

Colleen A. Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Ronald B. Johnson, Esq.
Volk, Frankovitch, Anetakis,
Recht, Robertson & Hellersted
3000 Boury Center
Wheeling, West Virginia 26003

Administrative Law Judge Avram Weisberger
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 8 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 88-67-M
Petitioner, : A.C. No. 11-01151-05504
v. :
: Lincoln Sand & Gravel Co.
LINCOLN SAND AND GRAVEL :
CO., :
Respondent :

DECISION

Appearances: Miguel J. Carmona, Esq., U.S. Department of Labor,
Office of the Solicitor, Chicago, Illinois,
for the Petitioner.

Before: Judge Maurer

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 \$168 for three alleged violations of the mandatory safety standards found in 30 C.F.R. Part 56.

The respondent contested the violations and requested a hearing. Pursuant to notice, a hearing was convened in St. Louis, Missouri, on July 25, 1988, and while the petitioner appeared, the respondent did not. In view of the respondent's failure to appear, the hearing proceeded without them. For reasons discussed later in this decision, respondent is held to be in default, and is deemed to have waived its opportunity to be further heard in this matter.

ISSUE

The issue presented in this case is whether the petitioner has established the violations cited, and, if so, the appropriate civil penalty that should be assessed for the violations.

MSHA's Testimony and Evidence

The following MSHA exhibits were received in evidence in this proceeding:

1. A copy of the section 104(a) Citation No. 3057591, issued by Inspector James R. Bagley on October 15, 1987.
2. A copy of the section 104(a) Citation No. 3057592, issued by Inspector James R. Bagley on October 15, 1987.
3. A copy of the section 104(a) Citation No. 3057593, issued by Inspector James R. Bagley on October 27, 1987.
4. A copy of the proposed assessment data sheet.

Inspector Bagley testified that he conducted a regular safety inspection of the mine, a sand and gravel operation, on October 15, 1987.

During the course of this inspection, he observed a 3/8 inch stacker conveyor belt that he wanted to inspect, so he climbed on the walkway that is attached to that conveyor. When he stepped on the walkway, it started bouncing. He looked underneath the walkway and saw that the first two support braces supporting the walkway were broken, which left only three support braces intact. He therefore felt that the access was not safe, and that this was a violation of 30 C.F.R. § 56.11001. The walkway is used by employees to perform maintenance and repair work on the conveyor itself, and it is the only means of access to that conveyor.

A second condition discovered by the inspector was that the cover plates on several electrical junction boxes and switch boxes were not in place on board the dredge. With the covers missing, the employees were exposed to 440-volt terminals inside the boxes located approximately 5-5 1/2 feet above the floor of the dredge in an active work and travel area. The inspector found this to be a "significant and substantial" violation of 30 C.F.R. § 56.12032, which could reasonably be expected to result in a fatal electrical shock or serious burns.

During a compliance follow-up inspection on October 27, 1987, Inspector Bagley issued a third citation because he found a transformer enclosure on the south end of the repair shop which was not locked against unauthorized entry. The transformer inside the enclosure was energized to 2200 volts and the so energized terminals of the transformer were located approximately four feet above ground level. The inspector determined that this was a "significant and substantial" violation of 30 C.F.R.

§ 56.12068 because the transformer was located in a normal work area. If anyone did contact the terminals on the transformer they would receive a fatal electrical shock or a serious burn.

Respondent's Failure to Appear at the Hearing

The record in this case indicates that a Notice of Hearing dated July 1, 1988, setting this case down for hearing in St. Louis, Missouri, on July 25, 1988, was received by the respondent on July 5, 1988.

This hearing was originally noticed for 8:00 a.m. on that date. Subsequently, the week prior to the hearing in a phone call which I received from the respondent they requested a later hearing time and so I telephonically approved a change to 10:00 a.m. on the same date in the same place. This message was also conveyed to the Secretary's counsel and the court reporter so the hearing effectively was changed to 10:00 a.m., July 25, 1988. At 10:30 a.m., Mr. Miguel Carmona of the Solicitor's Office called the Lincoln Sand and Gravel Company in Lincoln, Illinois. He spoke to a Mr. Ash, who identified himself as the Office Manager for the Lincoln Sand and Gravel Company. Mr. Ash advised that they were not coming to the hearing.

The hearing proceeded in the respondent's absence. The petitioner put in her case through the testimony of Inspector Bagley and moved for an Order affirming the three citations and the proposed civil penalty.

Under the circumstances in this record, I conclude and find that the respondent has waived its right to be heard further in this matter and that it is in default. Although Commission Rule 29 C.F.R. § 2700.63 calls for the issuance of a Show Cause Order before a party is defaulted, given the facts of this case, set out above, I conclude that the issuance of such an order would be a futile gesture.

Fact of Violation

I conclude and find that the petitioner has established the three alleged violations of 30 C.F.R. Part 56 set out in Citation Nos. 3057591, 3057592 and 3057593 by a preponderance of the evidence. The testimony of Inspector Bagley fully supports the citations which he issued and his special findings concerning the "S&S" nature of the violations. Therefore, the citations are affirmed as issued.

Civil 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 the proposed civil penalty assessment of \$168 is appropriate in this case.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of \$168 within thirty (30) days of the date of this decision, and upon receipt of that payment by MSHA, these proceedings are DISMISSED.


Roy J. Maurer
Administrative Law Judge

Distribution:

Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604
(Certified Mail)

Mr. William C. Bruner, President, Lincoln Sand & Gravel Co., P.O. Box 67, Lincoln, IL 62657 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 8 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 88-77-M
Petitioner : A.C. No. 13-01953-05504
v. :
: Portable Plant No. 1 Mine
MARION COUNTY LIMESTONE :
COMPANY, LTD., :
Respondent :

DECISION

Appearances: Margaret A. Miller, Esq., Office of the
Solicitor, U.S. Department of Labor, Denver,
Colorado, for the Petitioner;
James H. Dingeman, President, Marion County
Limestone Co., Pella, Iowa, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The petitioner seeks a civil penalty assessment of \$500 for an alleged violation of mandatory safety standard 30 C.F.R. § 56.15005; an assessment of \$400 for an alleged violation of safety standard 30 C.F.R. § 56.16002(a)(1); and an assessment of \$500 for an alleged violation of safety standard 30 C.F.R. § 56.3400. All of the alleged violations were cited in a combined section 107(a) Imminent Danger Order and section 104(a) "S&S" Citation No. 3055739, served on the respondent by an MSHA inspector on October 29, 1987.

The respondent filed a timely answer and a hearing was held in Des Moines, Iowa. The parties waived the filing of any written posthearing arguments, and I have considered their oral arguments made on the record during the course of the hearing in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act; and (3) whether the violations were "significant and substantial." Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Joint Exhibit No. 1):

1. Respondent is engaged in crushing and selling of limestone in the United States, and its mining operations affect interstate commerce.
2. Respondent is the owner and operator of the Portable Plant No. 1, MSHA ID. No. L 09154.
3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("the Act").
4. The Administrative Law Judge has jurisdiction in this matter.
5. The subject order/citation was properly served by a duly authorized representative of the Secretary upon an agent of the respondent on the date and place stated therein, and may be

admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

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

7. The respondent demonstrated good faith in abating the violations.

8. Respondent is a medium-size mine operator with 13,607 tons of production in 1987.

9. The certified copy of the MSHA Assessed Violations History, marked as Exhibit P-1, accurately reflects the history of the mine for the two years prior to the date of the order/citation.

Discussion

The combined section 107(a) Imminent Danger Order and section 104(a) "S&S" Citation No. 3055739, issued on October 29, 1987, by Inspector Dennis A. Heater, states as follows:

The crusher operator was observed standing with one foot on the vibrating jaw crusher with the jaw running. The operator was attempting to break an oversized rock which was lodged in the jaw opening with a sledge hammer. If the operator should slip or lose his balance he could fall into the crusher jaws. The operator was directly above the jaw opening. The opening measured approximately 4 foot wide and could accommodate rocks approximately 2 foot in diameter. The crusher reduced rock to approximately 5 inches diameter. This order is to stop this practice immediately.

The employee did not have the aid of a safety belt or line (56.15005). Loose material on the pan feeder above him could fall and strike the operator while in this area (56.16002, 1) (sic).

The operator was placing himself in a very bad position (56.3400). This jaw crusher can only be shut down from a lower level. The practice now established, until the feasibility of obtaining a back hoe or secondary breaking hammer can be determined, will be to shut the pan feeder and the jaw crusher down, trim any loose material from the edge of the pan feeder and fill in the jaw crusher opening with this material. The operator will then attempt to break the oversize rock with a sledge hammer or remove it with the aid of a chain and back hoe.

The order/citation was terminated by Inspector Heater on November 10, 1987, and the termination notice states as follows:

The company has established a written policy along with the verbal policy issued at the time of the order. The written policy explains procedure for working around the jaw crushers not at all while the crusher is in operation. If an object becomes entangled in the jaw crusher, the jaw is to be shut down and then the object is to be removed. Letter attached.

Petitioner's Testimony and Evidence

MSHA Inspector Dennis A. Heater testified as to his experience and training, and he confirmed that he issued the combined imminent danger order and citation during the course of a regular inspection of the respondent's limestone mining operation. He explained the mining and crushing procedures performed at the mine and plant. He confirmed that he issued the order and citation after observing quarry foreman Clint Geery standing on, and straddling the jaw crusher hopper using a sledge hammer to break up a rock which had lodged at the bottom of the hopper at the opening of the jaw crusher. The crusher was in operation, and Mr. Geery had one foot on the vibrating device. The pan feeder, which dumped rock materials into the jaw crusher hopper, was located approximately 3 feet above the hopper opening where Mr. Geery was standing, and the pan feeder was shut down and was not in operation.

Mr. Heater confirmed that Mr. Geery was not wearing a safety belt or line and was not "tied off" while standing over the hopper opening. In view of the fact that the crusher was

in operation and Mr. Geery's foot was resting on the vibrating machine, Mr. Heater was concerned that Mr. Geery would fall into the crusher if he slipped while attempting to break up the rock with the sledge hammer. Mr. Heater was also concerned that the unconsolidated rock materials in the pan feeder could have moved and struck Mr. Geery, knocking him into the crusher opening over which he was standing.

Mr. Heater believed that it was highly likely that a fatal accident would have occurred had Mr. Geery continued the practice of attempting to break up or free the rock while standing in such a precarious position. Mr. Heater stated that in order to preclude distracting Mr. Geery, he did not yell at him to come down. He simply placed his hand on Mr. Geery's shoulder and moved him back and away from his position on the crusher hopper.

Mr. Heater confirmed that he discussed the matter with Mr. Geery, and that Mr. Geery informed him that he was attempting to break up the rock because it would not feed through the crusher, and that the method he was using was the only available practical method without shutting down the crusher and causing delays in production. Mr. Geery admitted that he had on previous occasions used the same method in attempting to break up rocks which became lodged in the jaw crusher opening.

Mr. Heater confirmed that he issued the imminent danger order in order to prevent Mr. Geery from continuing the practice of standing on an operating crusher opening while attempting to break up or free rock which was stuck over the jaw crushing opening without wearing a safety belt or being tied off to prevent him from falling into the jaw crusher opening located approximately 4 to 5 feet below where Mr. Geery was standing.

Mr. Heater stated that he cited the respondent with a violation of section 56.15005, because Mr. Geery was not wearing a safety belt or line and was not otherwise tied off to prevent him from falling into the crusher. Mr. Heater believed that it was highly likely that Mr. Geery could have slipped and fallen into the running and vibrating crusher because he was not tied off or wearing a safety belt.

Mr. Heater stated that he cited the respondent with a violation of section 56.16002(a)(1), because the unconsolidated rock materials which were on the pan feeder presented a hazard to Mr. Geery at the location where he was standing over the crusher hopper. In the event a truck driver inadvertently

dumped a load of rock onto the pan feeder while Mr. Geery was attempting to dislodge the rock in the crusher, the material on the pan feeder could have moved and dropped into the crusher striking Mr. Geery or knocking him into the crusher. Mr. Heater believed that Mr. Geery was exposed to the hazard of caving or sliding materials from the pan feeder, and that his exposure to this hazard while he was standing on the crusher while it was running would reasonably likely result in serious injury or death if he were to fall in the crusher. Mr. Heater confirmed that if Mr. Geery had fallen into the operating crusher, he would be unable to get out, and that the cut-off switch was in an area below the crusher and not readily accessible.

Mr. Heater stated that he cited the respondent with a violation of section 56.3400, because Mr. Geery placed himself in a hazardous position while attempting to perform secondary breakage of the rock with a sledge hammer. Mr. Heater believed that it was highly likely that an accident would have occurred and that Mr. Geery would have suffered fatal injuries had he continued the practice. Mr. Heater agreed that no one other than Mr. Geery was exposed to any hazard or injury because of the practice in question.

Mr. Heater confirmed that he discussed the order and citations with the respondent's president James Dingeman at the time of his inspection, and that Mr. Dingeman agreed that Mr. Geery should not have attempted to break or dislodge the rock while standing on the operating crusher. Mr. Dingeman immediately issued verbal instructions to Mr. Geery not to repeat the practice, and he subsequently issued a written notice to all employees instructing them not to stand on top of the crusher while it was in operation, and to shut it down before attempting to remove any material entangled in the crusher. Mr. Heater also confirmed that he had no reason or information to believe that Mr. Dingeman was aware of the fact that Mr. Geery had engaged in the practice in question. Mr. Heater also stated that he considered Mr. Dingeman to be a conscientious mine operator who was concerned for safety (Tr. 7-35).

On cross-examination, Mr. Heater stated that the materials in the pan feeder were approximately 3 feet above, and 4 feet away from where Mr. Geery was standing on the crusher. Mr. Heater agreed that any material falling from the pan feeder would not likely cause fatal injuries to Mr. Geery if they struck him, and that they were only a contributing factor to the hazard presented.

Mr. Heater confirmed that although Mr. Dingeman had previously engaged in the sand and gravel business, his limestone operation was relatively new and that he had only been in this business for approximately 3 years (Tr. 35-47).

Respondent's Testimony and Evidence

James H. Dingeman, respondent's president, confirmed that he does not dispute the fact that Mr. Geery placed himself in a hazardous position on the crusher as described by Inspector Heater. Mr. Dingeman also confirmed that he does not dispute the fact that the violations occurred as stated in the order/citation issued by Mr. Heater. Mr. Dingeman asserted that he filed his contest because of his belief that the proposed civil penalty assessments were excessive, and his belief that while it was possible that Mr. Geery could have fallen into the crusher hopper, it was not highly likely that he would have fallen into the crusher jaws because they were blocked by the large rock which was lodged at the bottom of the cone-shaped hopper.

Mr. Dingeman asserted that he is concerned about the safety of his employees and has always attempted to operate an accident-free mining operation. He confirmed that he had previously installed a chain across the crusher entrance location to prevent employees from inadvertently walking or falling into the crusher, and that prior to the issuance of the order and citation, he believed that breaking or dislodging rocks from a crusher with a sledge hammer was an acceptable industry-wide practice. He had never received any information that such a practice had ever resulted in accidents or injuries.

Mr. Dingeman stated that in order to gain access to the crusher, Mr. Geery apparently unhooked the chain which guarded that location in order to position himself on the crusher. In addition to issuing his written work policy instructions requiring the shutting down of the crusher before any attempts are made to break or dislodge rocks, Mr. Dingeman stated that he relocated the crusher shut-down switch closer to the crusher so that it would be readily accessible to all employees performing this work. These corrective actions were taken by Mr. Dingeman after the violations were issued (Tr. 47-52).

Findings and Conclusions

The respondent does not dispute the fact that the three violations occurred as stated by the inspector in the contested order/citation which was issued in this case. I take note of

the fact that all of the violations were the result of the inspector's observations of quarry foreman Clint Geery placing himself in a precarious and hazardous position on a vibrating hopper of a jaw crusher while it was in operation. Mr. Geery was attempting to break up or dislodge a large rock which had lodged in the jaw crusher opening, and he was not wearing a safety belt or otherwise tied off with a safety line to prevent him from falling into the crusher. The inspector concluded that in the circumstances, the foreman was in danger of falling into the crusher.

30 C.F.R. § 56.15005, provides as follows:

Safety belts and lines.

Safety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

30 C.F.R. § 56.16002(a)(1), provides as follows:

Bins, hoppers, silos, tanks, and surge piles.

(a) Bins, hoppers, silos, tanks, and surge piles, where loose unconsolidated materials are stored, handled or transferred shall be -- (1) equipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials.

30 C.F.R. § 56.3400, provides as follows:

Secondary breakage.

Prior to secondary breakage operations, material to be broken, other than hanging material, shall be positioned or blocked to prevent movement which would endanger persons in the work area. Secondary breakage shall be performed from a location which would not expose persons to danger.

In the answer filed in this case, Mr. Dingeman asserts that the foreman in question was a knowledgeable individual

with many years of accident-free quarrying experience, and that "if he was highly likely to fall into the crusher he would have known that" and "would not put himself in jeopardy." Although the quarry foreman did not testify in this case, I find no reason for discounting Mr. Dingeman's assessment of his work skills. However, the Commission has previously considered and rejected such an argument in at least two cases dealing with the same safety belt and safety line standard which was cited in this case. See: Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981); Great Western Electric Company, 5 FMSHRC 840 (May 1983).

In the Great Western Electric Company case, the Commission stated as follows at 5 FMSHRC 842:

Great Western argues that the skill of a miner is a relevant factor in determining whether there is a danger of falling because the miner's skill defines the scope of the hazard presented. We find that such a subjective approach ignores the inherent vagaries of human behavior. Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions, which could result in a fall. The specific purpose of 30 C.F.R. § 57.15-5 is the prevention of dangerous falls. Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). By adopting an objective interpretation of the standard and requiring a positive means of protection whenever a danger of falling exists, even a skilled miner is protected from injury. We believe that this approach reflects the proper interpretation and application of this safety standard.

That is not to say that the miner's skill is totally immaterial. The skill of a miner may be a relevant factor in determining an appropriate civil penalty for a violation. In making work assignments and giving instructions to its employees, the amount of reliance which an operator places on the relative skills of its employees may be an indication of the operator's negligence concerning the violation. A miner's skill may also influence the probability of the occurrence of the event against which a standard is directed, and so affect that element of gravity.

It is well-settled that under the Act, an operator is liable without fault for violations of any mandatory standards committed by its employees. See: Allied Products Co. v. FMSHRC, 666 F.2d 809 (5th Cir. 1982); American Materials Corp., 4 FMSHRC 415 (March 1982); Kerr-McGee Corp., 3 FMSHRC 2496 (November 1981); El Paso Rock Quarries, Inc., 3 FMSHRC 35 (January 1981); Ace Drilling Company, 4 FMSHRC (April 1980).

In addition to the respondent's candid admissions that each of the violations occurred as stated in the order/citation issued by the inspector in this case, I conclude and find that the testimony and evidence adduced by the petitioner supports and establishes each of the violations in question. I agree with the inspector's conclusion that the position of the foreman on the vibrating and operating crusher hopper without the use of a safety belt or line exposed him to a hazard of falling into the machine. I also agree with the inspector's conclusion that by positioning himself in such a manner on the crusher hopper, the foreman exposed himself to possible entrapment by the caving or sliding of rock materials from the pan feeder, and that by performing secondary breakage by means of a sledge hammer from a hazardous position without being secured from a fall, the foreman exposed himself to danger. Under all of these circumstances, the violations, and the combined order/citation issued by the inspector ARE AFFIRMED.

Significant and Substantial Violations

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

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

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary

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

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

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

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

With regard to the violation of 30 C.F.R. § 56.15005, I conclude and find that the foreman's unsecured position on the vibrating and operating crusher presented a danger of his falling into the crusher. In the event of a fall, I believe it would be reasonably likely that the foreman would have suffered injuries of a reasonably serious nature. I agree with the inspector's "significant and substantial" finding, and IT IS AFFIRMED.

With regard to the violation of 30 C.F.R. § 56.16002(a)(1), I agree with the inspector's "significant and substantial" finding. By placing himself in a hazardous position on the crusher hopper in question, the foreman exposed himself to injury from moving or falling rock materials from the pan feeder. Although

it is possible that any materials moving or falling from the pan feeder may not in and of themselves have inflicted fatal injuries, I believe one may reasonably conclude that such a fall or movement of materials could have contributed to the hazard presented. Any sudden or unexpected movement or fall of these materials could have knocked the foreman into the crusher hopper from his unsecured position, and if this occurred, the weight of the materials would likely have trapped the foreman inside the moving crusher hopper and prevented his timely exit. For all of these reasons, I also agree with the inspector's "significant and substantial" finding with respect to the violation of 30 C.F.R. § 56.3400. Accordingly, the inspector's "S&S" findings as to both of these violations ARE AFFIRMED.

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

The parties stipulated that the respondent is a medium size mine operator, and that the 1987 annual production for the mine was 13,607 tons of limestone. Mr. Dingeman stated that he employs five people, and notwithstanding the stipulation, he believes that his mining operation is a relatively small one. I agree, and I conclude and find that the evidence here supports a conclusion that the respondent is a small mine operator.

Mr. Dingeman stated that while the payment of the proposed civil penalty assessments will not put him out of business, he is concerned about the amount of the penalty, particularly since the three separate violations which were "specially assessed" by MSHA were the result of only one incident involving Mr. Geery's attempts to break or dislodge the rock from the crusher while not wearing a safety belt or otherwise securing or protecting himself from a fall into the vibrating and operating machine. I conclude and find that the penalties assessed by me will not adversely affect the respondent's ability to continue in business.

Good Faith Compliance

The parties stipulated that the respondent demonstrated good faith in abating the violations. The record establishes that the violations were immediately abated when the inspector removed Mr. Geery from his location on the crusher. Further, as soon as Mr. Dingeman was informed of the practice, he immediately verbally instructed Mr. Geery not to repeat the practice, and subsequently issued written instructions to all of his employees as to the safe procedures to be followed in

the future, and moved the stop-start switch closer to the location of the crusher. Under the circumstances, I conclude and find that the respondent exercised rapid good faith compliance in abating the violative practice and conditions in question, and I have taken this into consideration in this case.

History of Prior Violations

An MSHA computer print-out of the respondent's prior history of violations reflects that the respondent has received no citations or assessed violations prior to February 19, 1987. The information presented reflects that for the period February 19, 1987 to October 28, 1987, the respondent was assessed for five violations for which it paid civil penalty assessments totalling \$110. None of these violations involved any of the mandatory standards cited in this case. Under the circumstances, I conclude that the respondent has a good compliance record, and I have taken this into consideration in this case. I have also taken into consideration the inspector's testimony that the respondent is a conscientious and safety-conscious mine operator.

Gravity

On the basis of the unrebutted testimony of the inspector, and including my "significant and substantial" findings and conclusions, I conclude and find that all of the violations which have been affirmed in this case were serious.

Negligence

The evidence in this case establishes that the violations were the direct result of the conduct of the quarry foreman who jeopardized only his own safety by placing himself in a hazardous position on the crusher hopper while it was in operation. The inspector's unrebutted testimony reflects that the foreman admitted that he had engaged in this practice over a period of 2 years. The inspector was of the opinion that Mr. Dingeman, as the operator and owner of the quarry, was a conscientious and safety conscious mine operator, and there is no evidence that he had ever observed the foreman on an operating crusher, or that he had any knowledge of the apparent practice engaged in by the foreman.

Although Mr. Dingeman characterized the foreman as "intelligent, knowledgeable, and experienced," I have difficulty understanding why such an individual would place himself in such a precarious position on an operating crusher hopper without securing himself from a possible fall into the machine.

Mr. Dingeman testified that he had previously installed a chain across the crusher access to preclude individuals from inadvertently walking into or falling into the crusher, and that the foreman apparently unhooked the chain guarding the crusher location in order to position himself over it while attempting to dislodge the large rock with a sledge hammer. Although Mr. Dingeman believed that the breaking or dislodging of a rock with a hammer was an acceptable industry-wide practice, and that he never received any information that such a practice had ever resulted in accidents or injuries, I find great difficulty in accepting any notion that engaging in such a practice while the crusher is in operation without the benefit of a safety belt or line is acceptable, or the industry norm.

The record and pleadings in this case reflect that Inspector Heater made a finding of "high negligence" with respect to the violation of section 56.15005, and that similar negligence findings were made with respect to the violations of sections 56.16002(a)(1) and 56.3400 when the order/citation was subsequently modified by another inspector. Based on the evidence and testimony adduced at the hearing, I concur in those findings.

I conclude and find that an experienced and knowledgeable mine foreman should have recognized the fact that he was placing himself in a precarious position by attempting to break or dislodge a rock from an operating jaw crusher without first shutting down the machine or securing himself with a safety belt or line. Insofar as the foreman's conduct is concerned, I conclude and find that it clearly supports a finding of "high negligence" with respect to each of the violations which are a direct result of his action in placing himself in such a hazardous position.

It is well settled that the negligence of a mine foreman may be imputed to the operator. See: Southern Ohio Coal Company, 3 FMSHRC 1459 (August 1982); Nacco Mining Co., 3 FMSHRC 848 (April 1981). However, on the facts of this case, the evidence establishes that Mr. Dingeman had not previously observed the foreman on an operating crusher and had no knowledge of the practice admitted to by the foreman. Further, the evidence establishes that Mr. Dingeman had previously taken steps to prevent anyone from inadvertently walking or falling into the crusher by installing a chain across the access to the crusher, and the inspector believed that Mr. Dingeman was a conscientious and safety-minded-mine operator. Under these circumstances, I believe it is appropriate

in this case to take these factors in consideration in mitigating any civil penalties which should be assessed against the respondent for the violations in question. See; Allied Products Company v. FMSHRC, supra; Nacco Mining Co., 3 FMSHRC 848, 850 (April 1981); Marshfield Sand & Gravel, Inc., 2 FMSHRC 1391 (June 1980); Old Dominion Power Co., 6 FMSHRC 1886 (August 1981). I have also considered the fact that the three violations which have been affirmed as separate violations of each of the cited mandatory standards, are interrelated and arose out of one single act of the foreman.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking to account the requirements of section 110(i) of the Act. I conclude and find that the following civil penalty assessments for the violations which have been affirmed are reasonable and appropriate:

<u>Order/Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3055739	10/29/87	56.15005	\$350
3055739	10/29/87	56.16002(a)(1)	\$175
3055739	10/29/87	56.3400	\$200

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above within thirty (30) days of the date of this decision. Upon receipt of payment by the petitioner, this matter is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S.
Department of Labor, 1585 Federal Office Building, 1961 Stout
Street, Denver, CO 80294 (Certified Mail)

Mr. James H. Dingeman, President, Marion County Limestone Co.,
P.O. Box 25, Pella, IA 50219 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 12 1988

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 88-171-D
ON BEHALF OF : MSHA Case No. BARB CD 88-25
PATRICK STANFIELD, : MSHA Case No. BARB CD 88-28
Complainant :
v. : Stinson No. 7 Mine
: :
NATIONAL MINES CORPORATION, :
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrimination filed by the Secretary of Labor on behalf of the complainant Patrick Stanfield against the respondent pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The complaint alleges that the respondent discriminated against the complainant by suspending him for lodging safety complaints and by forcing him to take previously unscheduled accrued annual leave after interrogating him about his complaints. The Secretary amended her complaint and proposed a civil penalty assessment against the respondent in the amount of \$2,500, for the alleged violation.

The respondent filed a timely answer denying any discrimination and the matter was scheduled for a hearing in Pikeville, Kentucky, during December 13-14, 1988. The hearing was cancelled after the Secretary's counsel advised me the parties agreed to settle the dispute. The parties have now filed a Joint Motion seeking approval of the proposed settlement. The relevant terms of the settlement are as follows:

1. National Mines Corporation agrees to pay Mr. Stanfield gross wages for the 12 working day suspension imposed by National Mines Corporation. Such wages amount to gross pay of \$1,618.81. Mr. Stanfield was paid on a monthly salary basis as a foreman.

2. The records maintained in Mr. Stanfield's personnel and company file shall be completely expunged of all information relating to the 12 day suspension.

3. In the event that National Mines Corporation is contacted by a prospective employer of Mr. Stanfield at any time in the future, National Mines Corporation agrees not to give Mr. Stanfield a negative or unfavorable reference regarding Mr. Stanfield's job performance while employed by National Mines Corporation. National Mines Corporation will when contacted by a prospective employer of Stanfield only give such prospective employer Mr. Stanfield's job title(s) and dates of employment.

4. In light of the difficulties and contingencies necessarily attendant to the litigation of the subject case together with the complex factual disputes requiring many witnesses and the nature of the economic loss to the complainant, which by the terms of this settlement shall be recompensed, the parties agree that the proposed settlement in this case is appropriate under the circumstances.

5. In consideration of the willingness of National Mines Corporation to resolve the claim quickly by payment of the back wages due to the complainant, the Secretary agrees to modify her requested civil penalty from the proposed amount of \$2500.00 to a reduced assessment of \$300.00.

Since Section 105(c) of the Act is uniquely designed to benefit the public interest by restitution to those affected by violation of Section 105(c) of the Act, the Secretary believes that such purposes are fulfilled in this case by the settlement terms.

6. It is the parties' belief that approval of this settlement is in the public interest and will further the intent and purpose of the Federal Mine Safety and Health Act of 1977.

Conclusion

After careful review and consideration of the settlement terms and conditions executed by the parties in this proceeding, I conclude and find that it reflects a reasonable resolution of the complaint filed by MSHA on Mr. Stanfield's behalf. Since it seems clear to me that all parties are in accord with the agreed upon disposition of the complaint, I see no reason why it should not be approved. I also find no reason for not approving the reduction of the civil penalty assessment as proposed by the Secretary.

ORDER

The Joint Motion IS GRANTED, and the settlement IS APPROVED. The parties ARE ORDERED to fully comply forthwith with the terms of the settlement. The respondent IS FURTHER ORDERED to pay to the Secretary a civil penalty assessment of \$300 for the violation in question, and payment is to be made within thirty (30) days of the date of this decision and order. Upon receipt of payment by the Secretary, and full compliance with the terms of the settlement, this matter is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Charles Baird, Esq., 415 Second Street, Post Office Box 351, Pikeville, KY 41501 (Certified Mail)

Tony Oppegard, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., P.O. Box 360, Hazard, KY 40701 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

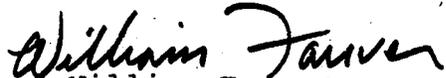
DEC 12 1988

JAMES D. GRIMES, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEVA 88-218-D
CONSOLIDATION COAL COMPANY : MORG CD 88-08
Respondent : Georgetown Prep Plant

ORDER OF DISMISSAL

Before: Judge Fauver

Pursuant to a settlement approved when this case was called for hearing on October 4, 1988, the above case is DISMISSED.


William Fauver
Administrative Law Judge

Distribution:

Thomas M. Myers, Esq., General Counsel, UMWA, District 6, 56000
Dilles Bottom, Shadyside, OH 43947 (Certified Mail)

Michael R. Peelish, Esq., Quarto Mining Company, 1800 Washington
Road, Pittsburgh, PA 15241 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 16, 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 88-243
Petitioner : A. C. No. 46-01318-03818
v. :
Robinson Run No. 95 Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: Joseph T. Crawford, Esq., Office of the
Solicitor, U. S. Department of Labor,
Philadelphia, Pennsylvania, for Petitioner.
Michael R. Peelish, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for
Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil
penalties filed by the Secretary of Labor against Consolidation
Coal Company for three alleged violations.

Citation No. 2897188

This citation was issued for a failure to report to MSHA an
injury which was originally believed to have a reasonable poten-
tial to cause death. 30 C.F.R. § 50.2(h)(2) and 30 C.F.R.
§ 50.10. At the hearing the Solicitor advised that MSHA was
vacating the citation based upon a report of the ambulance atten-
dant. Therefore, I dismissed the penalty petition insofar as
this item was concerned. I advised both counsel, and particular-
ly the Solicitor who has the burden of proving a violation, that
if a case such as this goes to hearing, appropriate medical
evidence must be presented.

Order No. 2897193

The subject order issued under section 104(d)(2) of the Act,
30 U.S.C. § 814(d)(2) recites as follows:

Welding operations were being performed
outside of the Robinson Run shop on a lowboy
haulage car and the area was not shielded.

On 02-03-88 a 104 d-2 order no. 2897259 was issued in the Robinson Run shop for welding operations being performed and the area not shielded, therefore this order will not be terminated until [sic] all persons required to performe [sic] welding operations are trained in the use of shields.

Jeff Haskins, Maintenance Foreman

Note! The work area inside the shop was shielded.

30 C.F.R. § 77.408 provides:

Welding operations shall be shielded and the area shall be well-ventilated.

The essential facts are not in dispute. Jim Flanagan, an hourly employee, was welding on a lowboy haulage car in the doorway to the shop (Tr. 23, 50, 83). The lowboy was half in and half out of the shop (Tr. 26, 86). A shield had been placed around that portion of the lowboy facing the inside of the shop (Tr. 25, 27, 35, 66). However, no shielding was placed on the side of the welding operation facing out into the yard (Tr. 25, 27, 35, Operator's Exhibits Nos. 3-8). Various employees of the operator could be in the general area and use a door to the shop which was located about 20 to 25 feet from the welding operation (Tr. 29-30, 33, 35-36).

The mandatory standard is clear. Welding operations must be shielded. Since the standard has no exceptions, the shielding requirement must be held to apply to all sides. Therefore, I conclude a violation existed. I cannot accept the operator's argument that distance constitutes a shield. There is no basis to read such a caveat into the standard. To do so would introduce an element of uncertainty into the standard, because a determination would have to be made in every situation as to how much distance constitutes a shield and under what circumstances. So too, the welder's body cannot be accepted as a shield, because he can change his position at any moment.

The violation was cited in a 104(d)(2) order. The Commission had held that the special findings in such an order may be challenged in a penalty proceeding. Quinland Coals, Inc., 9 FMSHRC 1614 (September 1987). The inspector stated the operator was guilty of unwarrantable failure because the mine foreman who was in the shop area should have known of the violation (Tr. 38, 52-53). The inspector later testified that the mine foreman did not tell the welder to erect shielding on the outside (Tr. 37, 54).

The Commission has held that unwarrantable failure means aggravated conduct, constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997 (Dec. 1987); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (Dec. 1987); Southern Ohio Coal Company, 10 FMSHRC 138 (Feb. 1988); Quinland Coals, Inc., 10 FMSHRC 705 (June 1988). The inspector's testimony falls far short of establishing unwarrantable failure under the Commission's criteria. Indeed, insofar as the record and the brief filed on behalf of the Secretary indicate, the inspector and the Solicitor are unaware of governing Commission decisions although MSHA has acknowledged and explained these decisions. See MSHA Policy Memorandum 88-2C and 88-1M, dated April 6, 1988. Accordingly, the unwarrantable finding must be vacated. The evidence shows only ordinary negligence.

The inspector originally designated this violation as significant and substantial, but the conference officer deleted this designation because the miners are required to wear safety glasses (Tr. 41-42). The term "significant and substantial" is not synonymous with gravity. In this case I conclude the Solicitor failed to show any degree of gravity. The inspector testified he knew of situations where individuals, who came in close proximity to welding operations received injuries (Tr. 32). He then defined close proximity as 6 feet (Tr. 39). However, he testified that he did not know who would pass within 6 feet of the welding operations in this case (Tr. 40). The door to the shop was located 20 to 25 feet away from the welding operations but no evidence was presented as to what, if any, injury might be sustained by persons using this door. I of course, cannot speculate on such a matter. Under the circumstances, therefore, the violation must be held nonserious.

A penalty of \$25 is assessed.

Order No. 2897194

The issue presented here is whether the cited wire was a trolley wire or a power wire. If it was a power wire, as the Secretary contends, it had to be insulated under 30 C.F.R. § 75.517. Insulation wraps around the wire and completely covers it (Tr. 112). If it was a trolley wire, as the operator asserts, it only had to be guarded in accordance with 30 C.F.R. § 75.1003. Guarding comes down over the sides of the wire, leaving the underneath exposed (Tr. 113).

After consideration of this matter and in light of all the evidence of record, including the testimony of the witnesses, I conclude that the cited wire was a power wire which should have been insulated in accordance with 30 C.F.R. § 75.517.

The record discloses that there were a number of different electrical wires in the affected area, each with its own characteristics and functions. The cited wire carried power

among the trolley wires in the track yard which was above ground (Operator's Exhibits 11-17, Tr. 117). 1/ It crossed a number of trolley wires (Tr. 109).

The operator argues that the subject wire is a trolley wire. I cannot accept this position. The term "trolley wire" is defined as:

The means by which power is conveyed to an electric trolley locomotive. It is hung from the roof and conducts power to the locomotive by the trolley pole. Power from it is sometimes also used to run other equipment. B.C.I.

A Dictionary of Mining, Mineral and Related Terms (U. S. Department of the Interior 1968).

The testimony at the hearing accords with the dictionary definition. A trolley wire runs right over the track and supplies power directly to the equipment (Tr. 107). A trolley wire is designed to allow electrical contact between it and a metal slide of the pole attached to the equipment (Tr. 147-148). The underneath side of a trolley wire is exposed so that the necessary electrical contact can occur (Tr. 151). If the trolley wire were insulated, i.e. fully wrapped, there could be no contact (Tr. 151). As already noted, the subject wire did not conduct power by means of a trolley pole to a locomotive or any other piece of equipment; it merely carried power from one trolley wire to another (Tr. 117). Additionally, a trolley wire is smaller than the cited wire and is made of copper to withstand the friction of another piece of metal touching it (Tr. 148).

Another type of wire used in the affected area was a trolley feeder wire. Based upon the evidence, I conclude the subject wire cannot be considered a trolley feeder wire. As the operator's safety supervisor testified, the purpose of a trolley feeder wire is to carry power from the initial power source over long distances to trolley wires (Tr. 142-143). Because the trolley feeder wire is larger than the trolley wire it can carry substantial voltage over greater distances without generating as much heat (Tr. 147-148). Although, the wire cited by the inspector was the same dimension as a trolley feeder wire, this alone would not make it a trolley feeder wire since its purpose was different from that of a trolley feeder wire.

1/ The cited wire does not appear on the operator's photographs because the operator removed the wire after the citation was issued. The wire's route was pencilled in on the photos (Tr. 102, 133, 154).

The operator's contention that the cited wire is a trolley wire or trolley feeder wire because it is part of the trolley wire "system", is unpersuasive. Such an approach presents too vague and uncertain a standard upon which to decide this case. Moreover, the purposes of the Act are better served by the conclusion that the wire in question was a power wire. The insulation required for a power wire completely covers all sides of the wire. It is obviously safer than guarding which covers only on the top and sides. Guarding with an exposed underside is allowed for trolley wires, because there must be an electrical contact between the wire and the pole attached to the piece of equipment being powered. Since the wire in this case did not come in contact with any pole or equipment, there was no need for its underside to be exposed. In light of the foregoing, I conclude a violation existed.

The violation was cited in a 104(d)(2) withdrawal order on the ground that the operator was guilty of unwarrantable failure. The inspector stated that because the foreman was in the area, which was pre-shifted every day, he should have known of the violation (Tr. 104, 114, 128, 130). Here again, as with the prior citation, the inspector and the Solicitor made no reference to the criteria now laid down by the Commission for determining the existence of unwarrantable failure. And here again, nothing in the record shows aggravated conduct of the sort required by the Commission and illustrated by MSHA in its Policy Memorandum, cited supra. On the contrary, the uncontradicted evidence discloses that the cited wire had been in use since 1980 without a citation being issued (Tr. 137). Although such a circumstance does not preclude subsequent enforcement, it does show the absence of aggravated conduct on the part of the operator. In light of the foregoing, the finding of unwarrantable failure must be vacated. The operator was guilty of only ordinary negligence.

I accept the inspector's testimony that a shock hazard existed because miners in the area carried bars which could come in contact with the uninsulated portion of the wire (Tr. 111, 121-122). On this basis I find the violation was serious. The inspector's finding of significant and substantial must however, be set aside. As already noted, the term "significant and substantial" is not synonymous with gravity. The Commission has defined "significant and substantial" in a precise and detailed manner and has established a four-step test to determine its existence. National Gypsum Co., 3 FMSHRC 822 (1981); Mathies Coal Co., 6 FMSHRC 1 (1984); U. S. Steel Mining Co., 6 FMSHRC 1834 (1984); Ozark-Mahoning Co., 8 FMSHRC 190 (1986); Youghiogeny & Ohio Coal Co., 9 FMSHRC 2007 (1987); Texasgulf Inc., 10 FMSHRC 498 (1988). No evidence was presented to show

whether the cited violation was significant and substantial under the Commission's guidelines. Furthermore, the Solicitor asked no questions on this issue and the inspector said nothing about it. Accordingly, this finding cannot stand.

In accordance with the foregoing findings of a violation of ordinary gravity and negligence and in light of the stipulations regarding the other statutory criteria, a penalty of \$250 is assessed.

ORDER

I have reviewed the briefs filed by counsel. To the extent that the briefs are inconsistent with this decision, they are rejected.

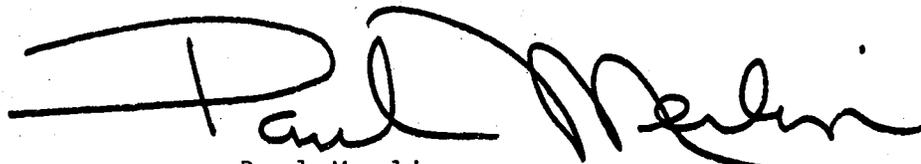
As already noted, the stipulations regarding the remaining criteria under section 110(i) of the Act, have been accepted.

Accordingly, it is ORDERED that Citation No. 2897188 be vacated, and that Order Nos. 2897193 and 2897194 be affirmed.

It is further ORDERED that the following civil penalties are assessed.

<u>Order No.</u>	<u>Penalty</u>
2897193	\$ 25
2897194	\$250

It is ORDERED that the operator pay \$275 within 30 days from the date of this decision.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Joseph T. Crawford, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Michael R. Peelish, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 20 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 88-21
Petitioner : A.C. No. 15-09351-03582
 :
v. : Karst Robbins Mine No. 4
 :
KARST ROBBINS COAL COMPANY, INC.:
Respondent :

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, TN, for
Petitioner.

Before: Judge Fauver

The Secretary of Labor brought this proceeding for civil penalties for alleged violations of safety standards under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The case was called for hearing in Kingsport, Tennessee, on August 2, 1988. Government counsel appeared with his witnesses and documentary evidence. Respondent did not attend the hearing.

The Government witnesses were sworn and testified, and the Government's evidence was received.

It is clear from the nature of the evidence in relation to the charges, and the fact of Respondent's non-appearance, that the request for hearing by Respondent was intended to delay the Government's efforts to assess and recover civil penalties. Respondent's delaying tactics are further shown by the fact that Respondent is in arrears of past civil penalties due under the Act in the amount of \$78,625 (as of October 4, 1988).

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. Respondent, Karst Robbins Coal Company, Inc., is a moderate to large sized operator with a production of 308,363 tons of coal in 1986.

2. The amount of the proposed penalties will not affect the ability of the operator to continue in business.

Citations 2797848 and 2797849

3. While carrying out a spot inspection at Respondent's No. 4 Mine on February 9, 1987, Mine Safety and Health Administration (MSHA) Inspector Elijah Myers discovered that a miner, Ira Lee Clark, had received an electrical shock on February 5, 1987, while working on a 480 volt trailing cable.

4. This accident resulted in second and third degree burns to Mr. Clark, but Respondent did not report the accident to MSHA.

5. Inspector Myers investigated the accident and found that when Mr. Clark was injured he was attempting to do electrical work on the cable, but was not a qualified electrician and was not working under the direct supervision of a qualified electrician as required by 30 C.F.R. §§ 75.511 and 75.153. This was the basis for his issuance of Citation 2797848 on February 9, 1987.

6. Inspector Myers also found that when Mr. Clark was injured the electrical circuit for the roof bolter cable had not been deenergized and locked out or tagged at the power center, as required by 30 C.F.R. § 75.511. For this reason he issued Citation 2797849.

7. Inspector Myers prepared an accident investigation report shortly after the incident. His testimony regarding the accident fully supported this report. Inspector Myers found that the injured miner, Ira Lee Clark, was assigned to do electrical repair work by his supervisor, Mr. Bill Whitt, Jr., who was at that time chief electrical supervisor and maintenance foreman.

8. When he attempted to do electrical work on the roof bolter trailing cable Mr. Clark was not a qualified electrician and he was not being directly supervised by a qualified electrician.

9. Before he began working on the cable, Mr. Clark asked the roof bolter operator, Ernest Robbins, to deenergize the cable. This was in itself an unsafe practice and also contrary to the requirements of 30 C.F.R. § 75.511.

10. Mr. Robbins pulled both "cat-heads" or plugs on the cable from the power center and laid them over the rib. He did not lock out or tag the cable. Devices to lock out or tag a disconnected cable were not available at the power center.

11. After Mr. Robbins removed the cable plugs, Frank Gross, the section foreman, came along and plugged them back into the power center. He mistakenly assumed that the cable had been accidentally disconnected by moving equipment hitting the cable.

12. Foreman Gross stated that there were no devices to lock out or tag the cat-heads at the time that the injury occurred despite his prior notification to company officials, including Danny Karst, the mine manager, of the need for such devices.

13. When Mr. Gross re-energized the cable Mr. Clark was holding the cable, attempting to resplice it. He was immediately shocked and burned. If lock out or tagging devices had been provided for the roof bolter cable and used, Mr. Clark would not have been injured.

14. Inspector Myers has 28 years of qualified electrical experience in coal mining, including work in private industry and with MSHA. In his expert opinion Mr. Clark would have been killed had Ernest Robbins not pulled the cable out of his hands. At the time of the electrical shock, Mr. Clark was helpless and unable to free himself from the live wire.

15. In July 1986, Inspector Myers had investigated an electrical fatality at the Karst Robbins No. 4 Mine involving nearly identical circumstances. Ralph Whitehead, like Mr. Clark in this case, was not a qualified electrician but attempted to repair a 480 volt trailing cable. He did not deenergize the cable and was electrocuted when he came into contact with an energized conductor.

16. A § 107(a) withdrawal order and three citations were issued by Inspector Myers in July 1986, as a result of the investigation of the Whitehead fatality.

17. Shortly after the Whitehead fatality Inspector Myers warned Eddie Karst, owner of the mine, about the danger of assigning unqualified personnel to do electrical work and the danger of doing electrical work on a cable without deenergizing the circuit and locking it out or tagging it.

18. MSHA Supervisor Henry Standafer has over 35 years qualified electrical experience in coal mining and has been electrical supervisor for District 7 of MSHA since June 1977. Mr. Standafer participated in the investigation of the Whitehead

fatality in July 1986 and helped prepare the accident investigation report.

19. Mr. Standafer described an electrical fatality that occurred in District 7 on August 8, 1983. A qualified electrician was electrocuted while attempting to repair a roof bolter cable without deenergizing the cable. This occurred at the Lesterfield Coal Company.

20. As a result of that electrical fatality, Mr. Standafer initiated a program in District 7 to warn coal operators and miners doing electrical work of the dangers of working on energized electrical equipment and to inform them that there was no need energize a trailing cable in order to "trouble shoot" it. (Tr. 51-52).

21. In that program MSHA representatives spoke with over 2,600 mining personnel within District 7, including the supervisors and affected miners at Karst Robbins. This included Respondent's supervisor Bill Whitt, Jr.

22. After the Whitehead fatality at Respondent's No. 4 Mine, in July 1986, Danny Karst, Edward Karst and Bill Whitt, Jr. were management representatives at conferences with MSHA representatives. In those conferences, MSHA emphasized the need to have only qualified electricians or properly supervised personnel doing electrical work and the importance of deenergizing and locking out or tagging circuits before doing electrical work on them.

23. At the time of the Whitehead fatality, Respondent's No. 4 Mine had only three qualified electricians for the entire mine, which employed about 300 miners in four working sections.

24. Mr. Standafer is responsible for maintaining and monitoring the mines in MSHA's District 7 to ensure that they have qualified electrical personnel. He described Karst Robbins' record for maintaining an adequate number of such miners as "very poor" (Tr. 55-57).

25. Mr. Standafer also described Respondent's record for compliance with electrical safety standards as being "very bad, very poor" (Tr. 62).

26. Mr. Standafer agreed with Inspector Myers' expert opinion in the Whitehead case, and in this case, that there was no need to have a trailing cable energized to properly carry out trouble-shooting or repair work on the cable.

Order 2785787

27. MSHA Inspector Donald Henry issued § 104(d)(2) Order 2785787 to Respondent on April 16, 1987, for a violation of 30 C.F.R. § 75.507 because Respondent was operating a power center in the return air course, rather than in the intake air course.

28. The section foreman, Jim Brogdon, stated to Inspector Henry that it was the usual procedure at this mine to maintain power centers in the return air courses.

29. The mine manager, Mr. Danny Karst, confirmed Mr. Brogdon's statement to Inspector Henry that this was the normal procedure at the Karst Robbins No. 4 Mine.

30. Because of the risk of methane explosions, and the risk of propagating fires or explosions by accumulations of coal dust, a serious threat of explosion or mine fire was caused by return air from the face area sweeping over the power center, which is not required to be permissible equipment. Such an explosion or fire could have resulted in death or serious injury to many miners.

Citation Number 3005188

31. Inspector Henry issued Citation 3005188 at Respondent's Mine No. 4 on July 1, 1987, for a violation of 30 C.F.R. § 75.200 because he found unsupported roof in two areas of a roadway leading to the 002 section.

32. One area of unsupported roof was about 2,000 feet from 002 section. Draw rock had fallen out of the roof, loosening eight roof bolts and leaving a gap three to six inches between the roof and the bearing plates attached to the roof bolts. This gap caused the roof to be unsafe and unsupported because the bearing plates were not firm against the roof.

33. Inspector Henry noticed that none of the fallen draw rock was on the mine floor in this area. This indicated to him that the ground area had been cleaned up before his observation of the dangerous roof condition.

34. Inspector Henry observed another unsafe roof area about 1,000 feet closer to 002 section. The heads of roof bolts and bearing plates were missing from about 12 roof bolts covering an area 15 feet wide and 20 feet long.

35. Inspector Henry observed evidence that the ground area had been cleaned up prior to his inspection.

36. There had been a number of roof falls in the mine before the issuance of this citation. Roof conditions at this mine were generally poor.

37. When Inspector Henry observed the two cited roof conditions he was traveling with Jack O'Rourke, mine foreman, and Bill Shuler, the mine superintendent. Neither offered any explanation regarding these unsafe conditions.

38. Respondent had not done anything to correct the roof support in the two cited areas before the inspector arrived. Both areas of dangerous roof presented a risk of death or serious injury to miners traveling in the roadway.

DISCUSSION WITH
FURTHER FINDINGS

Citations 279848 and 2797849

Respondent showed gross negligence and a reckless disregard for the cited safety standards by directing an unqualified and unsupervised miner, Ira Lee Clark, to do electrical work on a trailing cable and by failing to deenergize and lock out or tag the electrical circuit while he attempted to work on the cable. The miner received an electrical shock with serious burns, and probably would have been killed had a fellow employee not pulled the cable from his hands.

Respondent had direct, prior notice of the importance of the cited regulations when a miner was killed in an electrocution at this mine involving nearly identical circumstances (the Whitehead case, in July 1986), and in 1983 Respondent had been notified of the dangers involved in failing to comply with the same electrical standards. In addition, Respondent had been put on notice by MSHA that it was not necessary to energize a trailing cable in order to trouble shoot or repair the cable.

Order 2785787

Respondent showed gross negligence in placing a power center in the return air course, in violation of 30 C.F.R. § 75.507. This equipment is not required to be permissible (i.e., designed to prevent a methane explosion) and therefore should not be operated in return air, which would spread any possible buildup of methane from the working faces to the ignition sources in the power center. This violation constituted an "unwarrantable failure" to comply with a safety standard within the meaning of § 104(d)(2) of the Act.

Citation 3005188

The dangerous roof conditions were obvious and should have been corrected by Respondent before the area was inspected by MSHA. Respondent was therefore negligence in connection with violation. The violation was most serious because the dangerous roof conditions were in a roadway traveled by miners.

Compliance History

Respondent has a poor compliance history, as shown by numerous serious violations of safety standards in the two-year period before the inspections involved here, and as shown by the testimony of MSHA witnesses. In addition, Respondent has demonstrated a persistent and deliberate failure to pay substantial civil penalties for violations of mine safety standards that are long overdue. As of October 4, 1988, Respondent was in arrears for civil penalties in the amount of \$78,625. The recalcitrance shown by this record of nonpayment is part of Respondent's poor compliance history.

Penalty Assessments

Considering all of the criteria for civil penalties in § 110(i) of the Act, I find that the Secretary's following post-hearing proposals for civil penalties for the violations found herein are appropriate, and Respondent is ASSESSED those penalties:

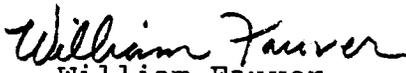
	<u>Civil Penalty</u>
Citation 2797848	\$7,500
Citation 2797849	\$7,500
Order 2785787	\$2,500
Citation 3005188	\$1,500
	<u>\$19,000</u>

Conclusions of law

1. The undersigned judge has jurisdiction over this proceeding.
2. Respondent violated the safety standards as alleged in Citations 2797848, 2797849 and 3005188 and in Order 2785787.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above civil penalties of \$19,000 within 30 days of this Decision.


William Fauver
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Mr. John Luttrell, Operations Manager, Karst Robbins Coal Company, Inc., Route 1, Box 58, Closplint, KY 40927 (Certified Mail)

kg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 22 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 88-155
Petitioner	:	A. C. No. 36-01836-03529
v.	:	
	:	Docket No. PENN 88-156
RANDY ROTHERMEL, individually	:	A. C. No. 36-01836-03530
and d/b/a TRACEY & PARTNERS,	:	
Respondent	:	Docket No. PENN 88-60
	:	A. C. No. 36-01836-03528
	:	
	:	Tracey Slope
	:	

DECISION

Appearances: Anita Eve, Esq., Office of the Solicitor,
U. S. Department of Labor, Philadelphia,
Pennsylvania, for the Secretary;
Mr. Randy Rothermel, Tracey and Partners,
Klingerstown, Pennsylvania for the Respondent.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases the Secretary (Petitioner) seeks civil penalties for alleged violations by the Operator (Respondent) of various safety standards set forth in Volume 30 of the Code of Federal Regulations. Pursuant to notice, these cases were heard in Harrisburg, Pennsylvania, on August 8 - 9, 1988. Donn W. Lorenz, Harry W. Kern, Victor G. Mickatavge, James Schoffstall, and William C. Hughes testified for Petitioner. Randy Rothermel and Cindy Rothermel testified for Respondent. Respondent also called as witnesses William C. Hughes, Donn Lorenz, James Schoffstall, and Harry W. Kern.

Neither Petitioner nor Respondent filed a Post Trial Brief or Proposed Findings although time was allowed for such to be filed.

On December 14, 1988, Petitioner filed a Motion to Vacate Citation No. 2676409 and Dismiss the Related Civil Penalty Proceeding. This Motion was not opposed by Respondent, and it is hereby granted.

Stipulations

At the hearing the Parties indicated the following facts were stipulated to:

1. The Tracey Slope Mine is owned and operated by the Respondent, Randy Rothermel.
2. The Tracey Slope Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The presiding Administrative Law Judge has jurisdiction over these proceedings pursuant to § 105 of the Act.
4. The citations, orders, modifications and terminations, if any, involved herein, were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the dates, times, and places stated herein, and may be admitted into evidence for the purpose of establishing their issuance.
5. The Parties stipulate to the authenticity of their exhibits but not to relevancy or the truth of the matters asserted therein.
6. The computer printout reflecting the Respondent's history of violations is an authentic copy and may be admitted as a business record of the Mine Safety and Health Administration.
7. The total annual production of the Tracey Slope Mine was approximately 3,240 tons of coal per year.
8. The Tracey Slope Mine is no longer in operation.

At the hearing, the Parties agreed to submit a post hearing stipulation as to Respondent's history of violations. On December 19, 1988, in a telephone conference call, with Counsel for Petitioner and Respondent's owner, it was stipulated that the history of the previous violations should be determined based on the fact that the approximate number of assessed violations in 24 months prior to the issuance of the first Citation in these cases are 40.

I. Docket No. PENN 88-60

Citation No. 2676133

30 C.F.R. § 75.1704, as pertinent, provides that ". . . two separate and distinct travelable passageways," which are to be designated as escapeways and ". . . which are maintained to

insure passage at all times of any person, including disabled persons, . . . shall be maintained in safe condition"

In essence, Donn W. Lorenz, a MSHA Inspector, testified that when he inspected Respondent's mine on March 24, 1987, of the two escapeways, one was "inaccessible" due to a rock fall. Government's Exhibit 1 depicts that the area that was described by Lorenz as being "inaccessible," was in the path leading from the face to the fourth level, which was the return escapeway. It appears to be the Respondent's position that the regulations do not require a second escapeway while a slope is being developed, and that in either event, as indicated by the cross-examination of Lorenz, access from the working face to the fourth level return escapeway could have been obtained by going inby to the main slope intake escapeway, and then traveling in a northerly direction to the intersection with the fourth level and then turning west to the return escapeway. I find however that section 75.1704, supra, by its clear language requires "two separate and distinct" escapeways, and that there is nothing further in the language of this section which would exclude its applicability to a developing slope. Also, I have taken into account Lorenz's testimony that access from the working face to the return escapeway was "inaccessible" due to a rock fall, and the cross-examination of Respondent's owner Randy Rothermel which indicates that, in essence, although the escape route was travelable, it would not be possible for a disabled person to traverse that route. Accordingly, I find that on the date in issue, the Respondent's mine did not have two separate and distinct escapeways maintained in a condition safe enough to ensure passage of all persons including disabled ones. Thus I find that there has been a violation of section 75.1704, supra.

The Citation that was issued characterized the violation herein as being significant and substantial. The only evidence bearing on this issue consists of statements by Lorenz that the escapeway was "inaccessible" due to a rock fall, and that it was "reasonably likely" that one traveling this way would "get hurt," resulting in lost work days or restricted duty (Tr. 30). Lorenz's testimony does not reveal any facts he took into account in arriving at the above opinions. Although a rock fall would clearly contribute to an element of danger to safety, in view of the fact that there is no evidence before me with regard to the extent of the rock fall and its quantity in relation to the traveled path, I have no basis to conclude that there was a reasonable likelihood that the hazard contributed to would result in an injury, and that the injury in question would be of a "reasonably serious nature." (c.f. Mathies Coal Company 6 FMSHRC 1, 3-4 (January 1984)). Accordingly, I conclude that it has not

been established that the violation herein was significant and substantial. (See, Mathies Coal Company, supra). In the same fashion, for the same reason, I cannot conclude that the violation herein was any more than a moderate degree of gravity. Further, I conclude that Respondent was negligent to only a moderate degree, as the escapeway was travelable before a roof breaking occurred, over which the Respondent had no control (Tr. 30-31). Based upon this analysis as well as the remaining statutory factors contained in section 110(i) of the Act, I conclude that a penalty herein of \$100 is appropriate.

Order No. 2676178

Harry W. Kern, an inspector for MSHA, testified, in essence, that on July 22, 1987, he requested permission from Rothermel to enter the mine to make a spot inspection. Kern said that Rothermel told him that he (Kern) was not allowed in the mine to make an inspection. Accordingly Kern testified that he then issued Order No. 2676178, a section 104(b) Order. Rothermel did not contradict this latter statement attributed to him, but indicated that on the date the Order was issued, there was a second escapeway, as the face had advanced from where it was at the date the original citation was issued, and accordingly the third slant was open all the way to the return escapeway (the fourth level).

I find, based upon Kern's uncontradicted testimony, that on July 22, 1987, Rothermel refused him permission to make an inspection. Accordingly, I find that this Order was properly issued. This Order was characterized as significant and substantial, but there was no evidence adduced on this point. I conclude that violation herein is not significant and substantial.

Citation No. 26767135

Lorenz testified that, in essence, when he inspected Respondent's mine on July 12, 1987, he did not observe any permanent stoppings in the gangway or fourth level which was the third open crosscut outby the working face. It was further his testimony that the ventilation map of Respondent's mine so indicates permanent stoppings in the third open crosscut outby the face. Rothermel, in essence, conceded that there were no permanent stoppings in either the first, second, or third slants or the fourth level. However, he testified that when he took the mine over, there was a waiver which indicated that permanent stoppings did not have to be made out of cinder blocks. However, such a waiver was not offered in evidence, and Rothermel indicated that the waiver did not specify the type of materials to be used to construct the permanent stoppings. It was further Rothermel's testimony that in 1982, when he received a citation

for a permanent stopping, he was told by special investigators that all he had to install was plywood to separate the intake and return air. It was further Rothermel's statement that subsequent to the Citation in issue, he conferred with Jim Schoffstall, Jerry Farmer, and Ed Blank, MSHA Officials, and explained to them that he had intended to put an overcast where the stopping should have been, and therefore had not installed permanent stoppings. Rothermel indicated that the MSHA Officials told him that a double brattice was sufficient. It further was Rothermel's statement that, because the slope was being developed and was at most 100 feet from the blasting, permanent stoppings could not have been installed as they would have been blown out of the slope.

I conclude, based upon Lorenz's testimony, and not contested by Respondent, that on the date in question there was no permanent stopping at the third crosscut outby the face. Such a stopping appears to be indicated on the ventilation map. Further, the ventilation plan in effect at the time, (Gx-2), indicates that permanent stopping "will be constructed of concrete blocks, cinder blocks, sheet metal or other fire-resistant material." I find that there was insufficient evidence to conclude that there was any waiver in effect, which would have allowed for the placement of stoppings at the third open crosscut outby the face, of materials other than those described in the plan. Accordingly, I find that inasmuch as there were no permanent stoppings at the third open crosscut outby the face as required by the plan and map, the plan has been violated and hence a violation of 30 C.F.R. § 75.316.

Citation 2676135 issued by Lorenz alleges the violation to be significant and substantial. However, there was no evidence adduced to support such a conclusion. Accordingly, I find that the violation herein was not significant and substantial. There is no evidence that the air on the working section was insufficient. Also there is no evidence of the contribution to any hazard as a result of the stoppings in question being of brattice, as testified to by Rothermel, rather than of the construction required in the plan. Nor is there any evidence that the difference in construction caused any increment in any hazard. Accordingly, I find that it has not been established that the gravity of the violation herein is more than low. Further, based upon the observations of Rothermel's demeanor, I find that he was truthful in his testimony, in essence, that he acted in good faith in relying upon a waiver and conversations with MSHA Officials in constructing a stopping of brattice material. Accordingly, I conclude that the Respondent's negligence herein is low. Taking into account these factors as well as the other statutory factors contained in section 110(i) of the Act as stipulated to by the Parties, I conclude that a penalty herein of \$20 is appropriate.

Order No. 2677518

Victor G. Mickatavge, a MSHA Inspector, testified that on July 22, 1987, he returned to Respondent's mine to perform a follow up inspection. He said that Rothermel told him that he (Mickatavge) was not to inspect the mine and he was not allowed entry. Mickatavge accordingly issued Order 2677518 predicated upon a violation of section 104(b) of the Act. Rothermel did not deny having refused Mickatavge permission to inspect the mine. It therefore is concluded that this Withdrawal Order was properly issued. However, there is no evidence to conclude that it was significant and substantial.

Citation No. 26767136

Lorenz testified that on March 25, 1987, the fifth level was not depicted in the last ventilation plan received by MSHA from Respondent in June 1980. He indicated that this plan depicted development only to the third level. James Schoffstall, an inspector supervisor for MSHA, indicated that development at the fourth and fifth level was beyond that depicted in the ventilation plan (Gx-2), which was approved in 1984. Rothermel indicated that for the last 12 years he has been submitting ventilation maps to MSHA, and that the last one in 1987, had been picked up by MSHA from Respondent's engineer Al Reidel. He also maintained, in essence, that the development of the fifth level would have the same ventilation as the third level, as it did not change the water gauge which created the vacuum on the fan to draw air. I find, based upon the testimony of Schoffstall and Lorenz, that on the date in issue, active workings at the fifth level had not been included or projected on a ventilation plan which MSHA had received from Respondent. Specifically, I note that 30 C.F.R. § 75.316-1 requires an operator to submit a map containing "*(6) Projections of anticipated mine development for at least 1 year*(8) All underground workings with the active working sections delineated." Inasmuch as the underground workings at the level 5 were not set forth nor projected in the most recent map on file with Petitioner, I find that Respondent herein violated section 75.316-1, supra. I find Rothermel's testimony insufficient to establish that any map containing the above information was filed with Petitioner. I do not find any merit to Respondent's argument, in essence, that it be relieved of any responsibility to file such a plan, as development of the fifth level would have been the same as development of the third level.

I find that no evidence has been adduced by Petitioner to establish either the gravity of the situation of the violation or the degree of Respondent's negligence. Based upon the lack of evidence in these areas, as well as the remaining statutory factors of 110(i) of the Act, I conclude that a penalty herein of \$20 is appropriate.

Citation No. 2676225

Kern testified, in essence, that he received information from the Denver MSHA Office that Respondent had not filed a Quarterly Employment and Production Report for the first quarter of 1987, as required by 30 C.F.R. § 50.30. The Respondent did not present any testimony or other evidence to rebut Kern's testimony. Accordingly, I find, based upon Kern's testimony, that Respondent herein violated 30 C.F.R. § 50.30. No evidence was presented with regard to Respondent's negligence in this matter, nor was any evidence presented with regard to the gravity of this violation. Taking into account the lack of these factors, as well as the remaining statutory factors in section 110(i) of the Act, I conclude a penalty of \$20 as assessed is appropriate.

Citation No. 26776177

30 C.F.R § 49.2 as pertinent, provides, in essence, that an operator shall either establish two mine rescue teams or enter into an arrangement for mine rescue services except where alternative compliance is permitted for small and remote mines, or except for those mines operating under special mining conditions. There is no evidence in this case that the requirements for these two exceptions have been met.

Kern testified that, in general, the MSHA District Offices are notified when a rescue service no longer covers a mine. He further testified that when such a circumstance occurs, the procedure is for the District Office to mail a letter to the local MSHA Office advising it of the same and indicating that a citation is to be served. According to Kern such a letter was received and a citation was served upon Respondent. No testimony was offered by Respondent nor was any evidence adduced by Respondent to rebut the testimony of Kern.

At most, Kern's testimony, based upon his personal knowledge, established that he received a letter from another MSHA Office advising him to serve a citation. However, there was no documentary evidence, nor any testimony based upon personal knowledge from which I could reasonably conclude that, in fact, the company that had previously arranged to service Respondent had terminated its relationship. Nor was any evidence presented before me to establish that Respondent did not have its own mine rescue team. Thus, I must conclude that it has not been established that there has been any violation herein of section 49.2, supra. Accordingly, this Citation must be dismissed due to lack of proof.

II. Docket No. PENN 88-155

Order No. 2932285 and Citation No. 2932286

According to Lorenz, on October 1, 1987, there was 3 to 15 percent of methane in the working section in the gangway approximately 30 feet in by the No. 3 Chute. He indicated that methane will explode when it is in the concentrations of 5 to 15 percent. In detecting the methane he used a National Mine Service methane detector. He issued Withdrawal Order No. 2932285 under the provisions of section 107(a) of the Federal Mine Safety and Health Act of 1977, providing for withdrawals from the mine in the event of "imminent danger." In addition, Lorenz also issued Citation No. 2932286 citing Respondent for violating 30 C.F.R. § 75.308 which provides, in essence, until the air at the working face is less than 1.0 percent, power shall be cut off and no work shall be permitted, and that if the air contains more than 1.5 percent, then all persons shall be withdrawn, and all power shall be cut off. According to Rothermel, the methane testing by Lorenz, which resulted in the Withdrawal Order and the above Citation, occurred at approximately 11:00 a.m., when coal had just been fired, which is the time when methane is normally released. On cross-examination, Lorenz indicated that subsequently on October 1, at approximately 1:30 p.m., at Rothermel's request he checked for methane and in the monkey it was 1.2 percent, and in the gangway 1.7 percent. Lorenz's testimony, that at the location tested in the working section, there was between 3 to 15 percent of methane, has not been rebutted. Although there were no workers doing anything at the time, there was power in the section. Given these uncontradicted statements, I find that the Withdrawal Order No. 2932285 was properly issued and Respondent was in violation of section 75.308 as cited.

According to Lorenz, the amount of methane detected was in the explosive range, and a resulting explosion would be "rather violent," (Tr. 159). Inasmuch as there were miners in the vicinity of the high methane, and power was on in the section, I find the violation herein to be significant and substantial. (See, Mathies, supra). In the same fashion, I find that the gravity of the violation herein to be high. In essence, it is Respondent's position that it was not negligent in having miners remain in the vicinity of the high methane reading, as they were sitting in close proximity to a ventilation tube providing fresh air to remove the methane, and if they had left this position, they would have had to traverse an area of high methane. Respondent also appears to maintain that the release of methane was highest when coal is fired, and that release of high methane at that time is normal. I find however, that the dictates of section 75.308, supra, unequivocally mandate withdrawal "from the area of the mine in danger thereby to a safe area," and cutting

off all electrical power whenever the air contains more than 1.5 percent of methane. Although the release of methane upon firing might have been a normal occurrence, I find Respondent negligent to a high degree in not having had the power shut off until methane levels safely returned to less than one percent. In the same vein, I find Respondent highly negligent in not having removed all its miners from the entire area of the mine endangered by the release of excessive amounts of methane. Taking these factors into account, as well as the remaining statutory factors in section 110(i) of the Act, I find the assessed penalty herein of \$1000 to be appropriate.

Citation No. 2932287

Lorenz also issued Citation No. 2932287 alleging that although Respondent had a permissible flame safety lamp with which tests were made for methane, Respondent did not have an approved methane detector, and hence violated 30 C.F.R. § 75.307-1. This section, in essence, provides that subsequent to December 31, 1970, an approved methane detector "shall be used for such test," and that a permissible flame safety lamp may be used as a "supplementary testing device." Respondent has not contradicted Lorenz's testimony that it did not have a permissible methane detector. It appears to be Respondent's position that either a methane detector or a permissible flame safety lamp is permissible. However, I find that according to the clear language of section 75.307-1, the use of permissible flame detectors is mandated and that a flame safety lamp may be used in addition to the methane detector, but not in substitution thereof. (See, Webster's New Collegiate Dictionary, 1979 edition, which defines supplementary as "added as a supplement," and supplement as "1. something that completes or makes an addition.") Hence, I find that section 75.307-1 was violated herein.

Although the citation alleges the violation to be significant and substantial, there were not facts presented to establish that Respondent's failure to have a methane detector was significant and substantial specially in light of the fact that it had a safety flame lamp. Lorenz's testimony appears to indicate that generally a methane tester is safer than a safety lamp, in that a safety lamp could sometimes go out in high concentrations of methane, and the gauze in the lamp could be ignited, causing an accident. However, there was no proof of the specific hazard contributed to by the violation herein, nor was there any proof of any likelihood that any hazard contributed to would result in an injury of a reasonably serious nature. Hence, I find that the violation herein has not been established to have been significant and substantial. For the same reasons, I find the gravity of the violation herein not to have been established to have been more than low.

Although the violation herein might have resulted from Respondent's misunderstanding of section 75.307-1, supra, I find this section is clear in its requirements. Hence Respondent is found to have been negligent herein to a moderate degree in not following the clear dictates of the regulation. Considering these factors, as well as the remaining factors in section 110(i) of the Act, as stipulated to by the Parties, I find that a penalty herein of \$50 to be appropriate.

Citation No. 2932288

Lorenz further testified that subsequent to the issuance of the 107(a) Withdrawal Order (Order No. 2932285), he told Rothermel to withdraw from the mine, and the latter indicated that he was going up No. 2 Chute to drill and shoot. He said that Rothermel took his tools and crawled through the No. 2 Chute. This testimony has not been rebutted by Respondent. Accordingly, I find that Respondent did not obey the Withdrawal Order and hence Citation No. 2932288 was properly issued. I have previously found that the underlying condition of high methane levels which gave rise to the Withdrawal Order No. 2932285 posed an imminent danger. As such, I find that Rothermel, in refusing to vacate the effected area in spite of being told by Lorenz to vacate, acted with a very high degree of negligence. The gravity of this violation was high, as Rothermel would have been subjected to high concentrations of methane. Taking these factors into account, as well as the remaining factors in section 110(i) of the Act, I find that the assessed penalty of \$2000 is appropriate.

Citation Nos. 2932309 and 2932310

On the same date, October 1, 1987, Kern issued Citation Nos. 2932309 and 2932310 alleging violations of 30 C.F.R § 75.301 concerning the quantity of air reaching the last open crosscut in the No. 2 Chute off the fifth level East gangway, and the face of the West monkey of the fifth level East gangway, respectively. In the Citations he noted the quantity of air at the last open crosscut to be only 3950 cubic feet per minute with a methane reading of 2 percent. In the face he noted the air quantity of 1291 cubic feet per meter with a methane reading of 5 percent. Section 75.301, supra, provides that the minimum quantity of air reaching the working face shall be 3000 cubic feet a minute. Respondent did not rebut the finding of Kern as to only 1291 cubic feet per minute at the face. Accordingly, I find a violation of section 75.301, supra, as alleged. Section 75.301, supra, further provides that in all active workings ". . . the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive

fumes." It further provides that the authorized representative of the Secretary ". . . may require in any coal mine a greater quantity and velocity of air when he finds it necessary to protect the health or safety of miners." In this connection, Kern presented his opinion that there was not enough air present to remove the concentrations of methane found. Respondent did not rebut this opinion or offer any contrary evidence. Accordingly, I find that section 75.301, supra, was violated herein as indicated in Citation Nos. 2932309 and 2932310.

Rothermel testified that the only machinery which was in operation when the Citations were written was a nonpermissible fan. I find, however, that what is critical is not the situation at the precise moment the Citation was issued, but I must rather take into account the presence of undiluted excess methane in the normal mining cycle which includes blasting. Based upon the previous testimony of Lorenz, I conclude that excess undiluted methane does present a situation where there is a definite safety hazard of an explosion with a reasonable likelihood that this hazard will result in an injury of a reasonably serious nature. Thus, the violation herein can be characterized as significant and substantial. For essentially the same reasons, I find the gravity of this violation to be relatively high. I find that the only evidence with regard to Respondent's negligence herein consists of testimony by Rothermel with regard to the placement of a tube from the fan to provide air to clear methane from the area. Since Respondent was making some attempts to dilute the methane I find that it acted herein with moderate negligence. Taking these factors into account, as well as the remaining statutory factors in section 110(i) of the Act, I find a civil penalty of \$750 for a violation of Citation No. 2932309 and a civil penalty of \$750 for a violation of Citation No. 2932310 to be appropriate.

Citation No. 2932312 and Order No. 2932313

Kern, on October 2, 1987, found with regard to Respondent's fan, used to ventilate the working section on the fifth level, that its glands were loose and its wires were not protected. He thus issued Citation No. 2932312 alleging the fan to be nonpermissible and thus in violation of 30 C.F.R. § 302-4(a). This latter section provides that a fan used to provide ventilation of the working face ". . . shall be of a permissible type, maintained in permissible condition" The Respondent did not present evidence as to the specific condition of the fan, but indicated that it had used the fan for some time. Respondent moved to vacate the Citation on the ground that it had a waiver for this fan, and it was not notified that this waiver, which was for the second level, and used for the third and fourth levels, could not be used for the fifth level. Neither the waiver nor its contents

were offered in evidence, (Rothermel indicated that his records had been burned). As such, I can not find that Respondent was relieved from the responsibility of complying with section 75.302-4(a) with regard to the fan in issue. I thus find that Respondent herein did indeed violate section 75.302-4, supra. In light of this conclusion, Respondent's Motion to Vacate the Citation is denied.

Petitioner has alleged that the violation herein was significant and substantial, but has not presented any evidence which would tend to establish that the specific condition of the fan, which rendered it nonpermissible, created any discrete safety hazard which resulted in a reasonable likelihood of an injury of a reasonably serious nature. As such, I must find the violation herein not to be significant and substantial (Mathies, supra). In the same fashion, I can not find that the evidence herein establishes the violation to be other than a low gravity. I find, based upon observations of Rothermel's demeanor, that the Respondent herein acted in good faith in believing that it had a proper waiver allowing it to operate the fan in question. Accordingly, I find that Respondent's negligence herein to be low. Taking these factors into account, as well as the remaining statutory factors, I find a penalty herein of \$20 to be appropriate.

Approximately 20 minutes after the issuance of the above Citation, Kern issued Withdrawal Order No. 2932313 which provides that ". . . Rothermel stated that he would not remove the auxiliary electric fan from the working section." Respondent has not presented any evidence to rebut this statement. Hence, I find this Order to have been properly issued.

III. PENN 88-156

Citation No. 2932307

Kern testified that when he was at the mine on September 10, 1987, Respondent did not have an updated map. He indicated he believed the date of the last mine map was 1986, and that he knows it was more than a year since the last map was submitted. Respondent did not offer any cross-examination of Kern, and hence his testimony was not rebutted. Schoffstall, testifying for the Respondent, indicated that Respondent's last map was submitted in April 1985, and he was "fairly certain" it set forth the third level (Tr. 307). Testimony presented with regard to other citations discussed in this decision indicates that Respondent, at the time the Citation was issued, was working on the fifth level. Since it was not contradicted that the last filed map went to the third level, it must be concluded that Respondent did not have an updated map. As such, it had been established that there was a

violation of 30 C.F.R § 75.1200 which provides, in essence, that an operator shall have an accurate "and up-to-date map." I do not find that this violation was any more than a low level of gravity. Further, Rothermel had told Kern that he had requested an engineer to prepare an updated map, and as such, I find Respondent's negligence to be very low. Accordingly, based upon these factors and the remaining statutory factors, I conclude that a penalty of \$20 is appropriate for the violation herein.

Citation No. 2932311

On October 1, 1987, Kern issued Citation No. 2932311 inasmuch as he observed, in violation of the Roof Control Plan, that Respondent had not installed manways in the No. 2 and No 3 Chutes off the fifth level gangway. Respondent maintains, referring to language on page B of the Roof Control Plan (Gx 4), that the Plan is a minimum Roof Control Plan, and that in lieu of manways, foot barriers were installed every 5 feet. The barriers were boards 1 inch thick attached to props on the bottom of the chutes, with a height of approximately 3 feet. There were three props across the approximately 15 foot wide chutes, leaving 2 feet on each side of the barriers.

I find that the lack of manways to be a clear violation of the Roof Control Plan, which in the section headed protective manways, unequivocally provides as follow: "Protective manways will be installed in the chutes along with development," (Gx 4). Also I note that, as part of the plan, paragraph 12 of the conventional safety precautions provides for "protected manways" where the pitch of the vein exceeds 20 degrees, to protect the miners from sliding and/or falling material, (Gx 4). Paragraph 2 of the conventional safety precautions clearly provides that any changes or deviation from the safety precautions is considered a violation of the Plan, (Gx 4). Respondent relies on paragraph 1 of the conventional safety precautions which indicates the Plan to be a "minimum roof control plan," (Gx 4, p. B). I find this statement to be qualified by the following phrase which appears in the end of that sentence ". . . and was formulated for normal roof and rib conditions while using the mining system described," (Gx 4, p. B). The next sentence requires the operator to provide additional support "in areas where abnormal roof or rib conditions are encountered," (Gx 4, p. B, emphasis added). Hence, it is clear that the terms of the plan are for normal conditions, and additional support is to be provided where "abnormal" conditions are encountered. There is no evidence that in the cited area the conditions were anything other than normal.

There is no evidence that the violation herein was significant and substantial in light of the protective system of the foot barriers which were installed at the mine. In the same

fashion, I find that it has not been established in these circumstances that the violation herein was anything more than a low level of gravity. Also, I find that the Respondent acted in good faith in believing that the foot barriers provided a safer protection than the manways, and hence believed that the manways were not required. Accordingly, I find that the negligence herein to be low. Taking into account these factors, as well as the remaining factors in 110(i) of the Act, I find that a penalty herein of \$20 is appropriate.

Citation No. 2676404

William G. Hughes, a MSHA Inspector, testified, in essence, that on November 9, 1987, he performed an electrical inspection of Respondent's mine. In this inspection he observed a one horsepower fan that contained an electrical connection made by twisting wires. He also observed three-phase wires that were bare and not insulated to the original dielectric insulation strength. 30 C.F.R. § 75.514 provides that all electrical connections shall be "electrically efficient." It was Hughes' testimony, which was not contradicted by Respondent or impeached upon by cross-examination, that, in essence, the connection in question was not electrically efficient as the wires being connected could be moved by the fan's vibration, thereby creating sparks and heat. Also, section 75.514, supra, provides, in essence, that all electrical connections ". . . shall be reinsulated at least to the same degree of protection as the remainder of the wire." In this connection, it was Hughes' testimony, which was not impeached upon by cross-examination or rebutted by Respondent, that the three-phase wires were bare, and were not insulated to the original dielectric insulating properties. I thus find that Respondent violated section 75.514, supra.

Rothermel, in essence, testified that the fan motor herein was guarded by a relay to prevent power from going to the fan if the fan would overheat. Accordingly it is Respondent's position that this would tend to diminish somewhat the likelihood of heat to such a degree as to cause an ignition.

It was Hughes' testimony that the type of connection herein could have been moved by the vibration of the fan, thereby creating sparks and heating of the wires. Further, it was Hughes' testimony, in essence, that inasmuch as the three-phase wires were not insulated, and 1 inch on each wire was exposed, a ground to frame, or phase to phase connection could have resulted. This in turn could have caused heat or sparks to be produced, leading to an ignition especially if high methane was present. I find Hughes' testimony more persuasive than that of Rothermel. I thus find that the violation herein, of improper connections and bare wires, to have created a discrete safety hazard. Further,

although the fan was not being used at that time, it was capable of being used, and it is clear that it would be used in the normal mining process. Further, evidence presented in Order No. 2932285 and Citation No. 2932286, *infra*, established the presence of methane when shots are fired in the normal mining process. As such, I conclude that the violation was significant and substantial.

For the same reasons I find the violation to have been of a more than moderate level of gravity. There is no evidence herein to base any finding that the Respondent's negligence was other than low. Taking these factors into account, as well as the remaining statutory factors of section 110(i) of the Act, I conclude that a penalty herein of \$100 for the violation to be a proper penalty.

Citation No. 26716405

Hughes issued Citation No. 26716405 alleging that the fan was not provided with a connection to a grounding conductor. Hughes testified that the fan did not have a ground to provide a return to the surface. A violation of 30 C.F.R. § 701-1(d) was alleged. Section 75.701-1, *supra*, provides for five types of approved grounding. Here, the only facts with regard to the type of grounding, if any, consists of Hughes' testimony that the fan herein should have had a ground to provide a return to the surface. This type of grounding is only one of the five which are approved. There is no evidence that the fan did not have one of the other types of grounds which were approved. In the absence of such testimony, I must conclude that section 75.701 has not been violated, and this Citation must be dismissed.

Citation No. 2676407

Citation No. 2676407 provides, in essence, that a 75 horsepower three-phase pump at Respondent's mine ". . . was not provided with a solid connection to a grounding conductor extending to a low resistance ground field on the surface." The Citation further alleges this to be a violation of 30 C.F.R. § 75.701-1(d).

Hughes indicated that there was no method provided for grounding of the pump (Tr. 358). He indicated that without a ground, if there is an insulation breakdown or bad connection, there could be a phase to ground connection which could cause ignition if methane were present. He also indicated that a phase to ground connection could cause a person to be electrocuted if one would come in contact with the frame. Hughes also indicated that the pump was located in the third level which is the normal passageway for men at the mine. He also indicated that although

there was a fuse disconnect which had a thermal protection it would be possible still to have a phase to ground overload with the fuses not disconnecting, and which accordingly would be fatal to one touching the frame. Hughes explained that a ground wire was attached to the pump, but the connection to the outside grounding was broken.

It was essentially Rothermel's testimony that there was a grounding wire that went outside to a low resistance ground field, and that he usually inspected it once a day, but does not recall when he last inspected it prior to Hughes' inspection. Hughes then indicated that when he observed the pump when he issued the Citation, the ground wire was attached to the pump, but the connection to the outside ground was broken. I accept Hughes' testimony as to the condition, at the date of the Citation, of the grounding connection, as it was based on his observation. In contrast, Rothermel could not recall when he last inspected the connection prior to Hughes inspection. I conclude, based upon the testimony of Hughes, that the pump was not connected to a ground, and as such would be in violation of 75.701. Further, based upon Hughes' testimony, I conclude that the violation herein to be significant and substantial. Base upon the same reasons, I conclude that the gravity of the violation was high. However, I find credible Rothermel's testimony that he inspected the connection once a day, although he could not recall when he last inspected it prior to the inspection. I thus find that the negligence herein was moderate. Taking the other statutory factors into account, I conclude a violation of \$100 is appropriate.

Citation No. 2676410

Citation No. 2676410 alleges a violation of 30 C.F.R. § 77.507 in that a disconnect box for the main mine fan ". . . was not safely installed as the box was lying on the ground exposed to rain and moisture."

Hughes testified that the box in question was in the mud and not mounted to exclude moisture. Rothermel testified that the box was 15 inches wide, 2 feet long, and 6 inches deep, and was mounted to railroad ties (8 feet by 3 inches wide by 3 inches high) in the form of cribbing of three ties. Hughes testified that because the box was not grounded, moisture could have grounded out the phases in the box, and that in the event a person would have touched the box to pull the handle, he could have been electrocuted. Hughes also indicated that the "National Electrical Code" requires the box to be vertical so that the handles can be pulled downward and the blades can come down (Tr. 427).

Section 75.507, supra, provides, in essence, that all electrical equipment shall be "permissible." Aside from the opinion of Hughes, no evidence was presented which would indicate that the fan was not permissible. Hughes made reference to an electrical code, but none was offered in evidence. I find Rothermel's testimony credible with regard to the placement of the box in question on cribbing made of railroad ties. I thus find that section 75.507 has not been violated and this Citation should be dismissed.

Citation No. 2676411

Hughes also issued Citation No. 2676411, which states that the fan motor was not provided with a "solid connection" to a grounding conductor extending to a low resistance ground field, and accordingly 30 C.F.R. § 77.701-1(c) had been violated. Hughes testified, in essence, that the fan was not provided with "a source" for return back to the original source, (Tr. 413). He said that he did not observe any grounding from the motor to the disconnect box, and that a wire which was attached from the motor to a ground rod would not have provided a return to the source. He explained that in such a situation there would have been a difference in potential. He was asked where the connection for the grounding would have run, and he stated that the ground wire "would have been connected" to the frame of the disconnect box, (Tr. 414). Rothermel indicated that the morning before or after the Citation was issued, he was out at the fan and the ground was hooked up. On cross-examination he indicated the electrical examinations are made weekly, and he would have checked the ground wire, by looking at it, at the last examination. He further indicated the ground wire, that was fastened to the motor, did not go to the quadruplex, but did go to a ground stake.

Based on Hughes's testimony, I conclude that on the day the Citation was issued, the fan did not have proper grounding, and as such, section 701-1, supra, was violated.

The Citation alleges the violation to have been significant and substantial. The only evidence bearing on this issue is Hughes' testimony that, in essence, if a person was to have contacted the fuse disconnect box that had been energized, he would have been electrocuted. He indicated that the box had "some unused opening" which would allow moisture in the box, which would make it to become moisturized, (Tr. 413). However, the Citation was issued for improper grounding for the fan. Thus, it has not been established the specific hazards, and the likelihood of any injury as a consequence of the fan not being grounded. I thus find the violation not to be significant and substantial.

For the same reasons, I find the evidence insufficient to conclude that the violation herein was more than a low level of gravity. I have taken into account Rothermel's testimony that when he examined the grounding, it was hooked up. However, he indicated that the grounding did not go to the quadruplex, which appears to be the source, but to a ground stake. I thus find Respondent to have acted with a moderate degree of negligence in the violation herein. I have also considered the remaining statutory factors and conclude that a penalty of \$75 is appropriate for the violation herein.

Citation No. 2932441

At the hearing, the Parties indicated that, in essence, Citation No. 2932441 is the same or similar to Citation No. 2676225. As such, testimony on this Citation was waived. Based on the evidence adduced and discussed in Citation No. 2676225, *infra*, I conclude that Citation No. 2932441 was properly issued and established a violation of 30 C.F.R § 50.30, and that a penalty of \$20 is appropriate.

ORDER

Accordingly, it is ORDERED that: Citation Nos. 2676133, 2676135, 2932312, 2932311, 2676409, and 2676411 be modified to delete any findings that the cited violations are significant and substantial.

It is further ORDERED that Citation Nos. 2676177, 2676405, 2676409, and, 2676410 are vacated.

It is further ORDERED that Withdrawal Orders 2676178, 2677518, and 2932225 were properly issued.

It is further ORDERED that Respondent shall pay \$5,065, within 30 days of this Decision, as Civil Penalties for the violations found herein.



Avram Weisberger
Administrative Law Judge

Distribution:

Susan M. Jordan, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Mr. Randy Rothermel, Tracey and Partners, R. D. #1, Box 33-A, Klingerstown, PA 17941 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 22 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 88-139
Petitioner	:	A. C. No. 46-01867-03739
v.	:	
	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Docket No. PENN 88-144
	:	A. C. No. 36-04281-03616
	:	
	:	Dilworth Mine
	:	

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, Department of Labor, Philadelphia, Pennsylvania, for the Secretary;
Michael R. Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Cases

In these cases the Secretary (Petitioner) seeks civil penalties for alleged violations by the Operator (Respondent) of 30 C.F.R. § 75.400. Pursuant to notice, these cases were heard in Pittsburgh, Pennsylvania, on August 23, 1988. In Docket No. WEVA 88-139, James D. Underwood, Raymond Ash, and James E. Bowman testified for Petitioner and John Weber, Robert W. Gross, and Carl Steven Casteel testified for Respondent. In Docket No. PENN 88-144, James Samuel Conrad, Jr., and Edward Daniel Yankovich, Sr. testified for Petitioner and Steven Wolfe, Walter Joseph Malesky, and John Leo Weiss testified for Respondent.

At the hearing, on Docket No. WEVA 88-139 at the conclusion of Petitioner's case Respondent made a motion to dismiss which after argument was denied. Petitioner filed its Post Trial Memorandum and Proposed Findings of Fact on November 14, 1988 and Respondent filed its Post Hearing Brief on November 9, 1988. Time was reserved for the filing of Reply Briefs but none were filed.

Stipulations

1. The Blacksville No. 1 Mine is owned and operated by Respondent, Consolidation Coal Company.
2. The Blacksville No. 1 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. This administrative law judge has jurisdiction over these proceedings.
4. The subject Order was properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.
5. The assessment of a civil penalty in this proceeding will not affect Respondent's ability to continue in business.
6. The Operator's history of previous violations in total was 478 violations over 554 inspection days; 48 of these violations were for violations of 30 C.F.R. § 75.400 (7 of which were section 104(d)(2) Orders).
7. The Operator's size is as follows:
 - a. Blacksville No. 1 Mine employees approximately 241 employees.
 - b. Daily production of Blacksville No. 1 Mine equals approximately between 6,500 and 7,000 tons. Annual production equals approximately 1,500,000 tons.
 - c. Consolidation Coal Company operates approximately 30 mines.
 - d. The annual production of all Respondent's mines is approximately 52.5 million tons.
 - e. The annual dollar volume of sales by the Respondent for 1988 will not be released by the Respondent.
 - f. E. I. DuPont de Nemours and Company is the parent company, Consolidation Coal Company is a wholly-owned subsidiary.
8. The Operator abated the cited condition immediately. The Order was terminated at 11:55 a.m. on October 23, 1988.

9. Approximately seven miners were exposed to the cited condition.

10. A comparison of the fatality and disabling injury frequency rates for the mine and for the Operator's operation overall with those of the industry are as follows:

a. Blacksville No. 1 Mine

	1986	<u>Rate</u>	F - Fatal NFDL - No Fatal Days lost NDL - No Days Lost
	0 - F	0	
	13 - NFDL	5.16	
	4 - NDL	<u>1.59</u>	
Total	<u>17</u>	<u>6.75</u>	

	1987	<u>Rate</u>
	0 - F	0
	41 - NFDL	15.34
	3 - NDL	<u>1.12</u>
Total	<u>44</u>	<u>16.46</u>

1st Quarter 1988

		<u>Rate</u>
	0 - F	11.38
	8 - NFDL	1.42
	1 - NDL	<u>0</u>
Total	<u>9</u>	<u>12.81</u>

b. Consolidation Coal Company

	1988	<u>Rate</u>
	9 - F	.09
	309 - NFDL	3.23
	142 - NDL	<u>1.49</u>
Total	<u>460</u>	<u>4.81</u>

	1987	<u>Rate</u>
	2 - F	.02
	680 - NFDL	7.20
	169 - NDL	<u>1.79</u>
Total	<u>851</u>	<u>9.01</u>

<u>1st Quarter 1988</u>	<u>Rate</u>
0 - F	0
177 - NFDL	7.94
31 - NDL	1.39
Total	<u>9.33</u>

c. Nationwide

1986	<u>Rate</u>
84 - F	.05
9,165 - NFDL	5.70
2,696 - NDL	1.68
Total	<u>7.43</u>

1987	<u>Rate</u>
58 - F	.04
11,538 - NFDL	7.81
3,867 - NDL	2.62
Total	<u>10.46</u>

<u>1st Quarter 1988</u>	<u>Rate</u>
10 - F	.03
3,102 - NFDL	8.64
983 - NDL	2.74
Total	<u>11.40</u>

11. The Parties stipulate that there had been on clean intervening inspections of the entire mine between the date of the instant violation and the previously issued order. Thus, the mine, at that time, was on a 104(d) chain. (Sic.)

12. The Parties stipulate the authenticity of their exhibits, but not to the truth or relevance of the matters asserted therein.

Findings of Fact and Conclusions of Law

I.

Order No. 2943442

James D. Underwood, an inspector for MSHA, testified that in visiting Respondent's Blacksville No. 1 Mine on the morning October 23, 1987, in the P6 Section he observed float coal dust

deposited on the roof in the third entry in the areas outby the portal bus station. He continued to walk in the area and observed coal dust further outby in this entry and also in crosscut 25 between entries 3 and 4 and crosscut 26 between entries 3 and 2. (The area he observed coal dust is shaded in red on Government Exhibit C.) Underwood described the color of the dust as "dark" and closer to black than gray. He said that the darkest area was in the crosscut 26 between the 2nd and 3rd entries. He said that after abatement with rock dust the areas in question became white in color. Underwood's testimony was corroborated by James E. Bowman an employee of Respondent, who as representative of the miners accompanied Underwood on his inspection on October 23. Bowman indicated that in the areas outlined in red on Government Exhibit C, he saw coal dust that he described as "black."

In arguing that it did not allow any coal dust to accumulate in the areas cited by Underwood, Respondent, in essence, refers to the fact that on the day prior to Underwood's inspection, MSHA Inspectors conducted an intensified Triple A Inspection, walked through the area in question, and did not issue any citations for violation for section 75.400, supra. In this connection, Raymond Ash, a MSHA supervisor, indicated that, in essence, when he walked through the area in question there were accumulations of float dust, but the accumulations "weren't that bad" (Tr. 65). He said that the whole section was rock dusted in a fashion that was "pretty well within standards" (Tr. 65). He said, in essence, to the best of his recollection there was nothing outstanding about the section, and it was not either a very bad condition or a very good condition. He further said the conditions were not bad enough to issue a citation.

John Weber, a mine escort employed by Respondent, testified that coal dust is black, and that when he observed the areas in question on October 23, along with Underwood, they were not black, but were "medium grey" in color (Tr. 102). (sic.) He indicated that the color was essentially the same as was observed the day before. Robert W. Gross, Respondent's safety supervisor, indicated that when he observed the area, on October 23, before the alleged violation was abated, the material that he observed was between light gray to medium gray in color. He said that in his opinion there was no accumulation of coal dust. Carl Steven Casteel, Respondent's section foreman, was asked whether on October 23, when he walked through the cited area if there was float dust present. He stated that he did not see anything not acceptable and said that the color of the material there was gray.

According to Gross when the area in question was initially mined it was rock dusted and rock dust is white. Gross indicated that with dampness rock dust becomes "off white," (Tr. 132) and described the area in question as damp. However, he indicated that he felt the material in question, but he did not describe what it felt like. He was asked if he recalled whether the accumulations were wet or dry, and he said "It was October, they're not going to be what we call wet, they would be damp" (TR. 136). Thus his statement that it was "damp," appears thus to be based not upon his personal knowledge, but upon his opinion, based on the time of year of the alleged violation. On the other hand, when Underwood was asked how he would classify the area, he described it as a dry area.

Accordingly, I cannot find that it had been established that the area in question was damp. Thus, I cannot find that the material in question, rock dust, was made dark by dampness.

Underwood in his testimony described the material in question as being dark and closer to black than gray. His testimony was corroborated by Bowman. Weber although describing the material in question as being medium gray conceded that the area in question although having a range of colors was not as good as the rest of the section which was white. In the same fashion although Gross indicated that the material in question was between light gray to medium gray, he described the material in the crosscut 26 between the 2nd and 3rd entries, and the material in the area out by the power center in Entry No. 3 to be a little darker than the rest of the area. Also Casteel described the material in the cited area as being gray. In contrast the material outside the cited areas was described as being a lighter gray. Based upon all of the above, I conclude that Respondent, in the cited area, had allowed some coal dust to accumulate and had not cleaned it up when cited by Underwood. As such, I find that a violation of 75.400, supra, has occurred.

II.

According to Underwood, the violation herein by Respondent resulted from its unwarrantable failure inasmuch as the cited area is the entry to the P6 Section and as such all supervisory personnel would walk through the area on a daily basis to get to the working section. As such, in essence, Underwood maintained that these personnel should have observed the condition by making an adequate inspection and should have cleaned it up. In this connection it was Underwood's opinion that the coal dust in question had accumulated when the area was originally cut, and in his opinion had been there for a week.

In the recent case of Emery Mining Corporation, 9 FMSHRC 1997 (December 1987), the Commission held that "unwarrantable failure," is more than ordinary negligence and requires "aggravated conduct." I find that Underwood did not refer to any facts to support his opinion that the violating condition had existed for a week. Indeed, he indicated on cross-examination, in essence, that the condition that he observed could develop in minutes. Also Weber was present the day prior to Underwood's inspection, when he accompanied four MSHA Inspector, who walked throughout the area and did not issue any violations for allowing any coal dust to accumulate. Ash, who was present during this examination, indicated in his opinion that the rock dusting he had observed "pretty well" met their standards and described the accumulation of coal dust as "not that bad." I thus find that Respondent did not act with more than ordinary negligence when it did not clean up a condition that was observed the day before, and not cited, by four MSHA Inspectors. According, I cannot find that the violation herein resulted from Respondent's unwarrantable failure.

III.

According to Underwood the violation herein should be considered significant and substantial, because arcing off a energized trolley wire in the area could have ignited the coal dust. Also a 7200 volt wire and power center were both in the area and according to Underwood "Anything could have happened" to them (Tr. 29), and "it could have intensified it with the float coal dust accumulation" (Tr. 24). Underwood further maintained that any ignition would be reasonably likely to cause serious injuries to the crew of seven working inby in the area. However, crosscut 26, between entries 2 and 3, described by Underwood as the darkest area in question contained neither a trolley wire nor a 7200 volt cable. Also, although Underwood, in essence, testified that the presence of the coal dust was a dangerous situation if anything would "happen" (Tr. 29) to the 7200 volt cable, this event seems unlikely due to Underwood's having conceded under cross-examination that the cable was very well insulated. Also the only location of the coal dust that Underwood testified to was on the roof whereas the cable was placed on the left rib. Also it does not appear reasonably likely that the coal dust in question would contribute to any hazard occasioned by a malfunction of the power center, as the power center and its connectors were not within the cited area, and there is no evidence as their distance to the cited area.

Nor does it appear that it was reasonably likely that the presence of coal dust would contribute to the hazard of an ignition occasioned by arcing in the trolley wire. The trolley

wire did not run at all in the most inby of the two areas cited, and ran for only a portion of the other cited area. In this latter area although the trolley wire was between 3 to 6 inches of the roof, there was an insulated guard between the wire and the roof which hung over the side of the wire and which covered, as agreed to by Underwood, the "majority" of the wire in the area (Tr. 37). According to Underwood approximately 15 feet of the wire was not guarded and arcing, which he agreed was a common occurrence, could occur in that area if there were dust or other obstructions between the arc of the vehicle and the wire. However, he indicated that he did not see any dust on the wire.

Taking all of the above into account, I conclude that it has not been established that there was a reasonably likelihood that the rock dust which had been allowed to accumulate, contributed to the hazard of an ignition or other hazard which would result in an injury of reasonably serious nature. (See, Mathies Coal Company, 6 FMSHRC 1 (January 1984). As such, I conclude that it has not been established that the violation herein was significant and substantial.

In assessing a penalty for the violation found herein, I have taken to account the factors set forth in section 110(i) of the Act as stipulated to by the Parties and adopt them. I also conclude essentially for the reason set forth above, (II., infra) that the Respondent herein acted with a low degree of negligence. Should the accumulation of coal dust herein result in an explosion or ignition, such would result in grave consequences of injury to persons. However, it has not been establish that such an event is reasonably likely to occur. As such, I find that the violation herein to be of a low level of gravity. Taking all of the above into account, I conclude that a penalty herein of \$50 is appropriate.

Docket No. PENN 88-144

Stipulations

1. Consolidation Coal Company is the owner and operator of the Dilworth Mine located in Rices Landing, Greene County, Pennsylvania.
2. Consolidation Coal Company and Dilworth Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The Administrative Law Judge has jurisdiction over this case pursuant to Section 105 of the Act.

4. In the 2 year period prior to November 25, 1987, the Dilworth Mine had an undetermined number of violations of the standard contested in this case, 30 C.F.R. § 75.400.

5. The size of the operator is reflected by the following data:

a. The Secretary has no knowledge and therefore cannot stipulate as to the number of employees employed in the Dilworth Mine.

b. The Secretary had no knowledge and therefore cannot stipulate as to the daily production of the Dilworth Mine. Annual production tonnage of the Dilworth Mine is 1,432,626.

c. The Secretary has no knowledge and therefore cannot stipulate as to the number of mines operated by the operator and the total number of miners employed by the operator.

d. The annual production tonnage of all the operator's mines is 41,221,321.

e. Information regarding the annual dollar volume of sales by the operator during 1985 will not be released by the operator.

f. DuPont E.I. De Nemours & Company is the parent company; Consolidation Coal Company is a wholly-owned subsidiary.

6. The violation was abated within a reasonable period of time; the subject area was rerock dusted.

7. Any one miner would be affected or was exposed to the hazard created by the violation.

8. The Operator's history of previous violations in total was 405 violations over 504 inspection days. Seventy-five of these violations were for violations of section 75.400.

9. The Parties stipulate the authenticity of their exhibits, but not to the truth or relevance of the matters asserted therein.

In a telephone conference call on November 30, 1988, the Parties further stipulated that: The Dilworth Mine had not had a clean intervening inspection since the issuance of the previous d(2) order at this mine, and thus was on a (d)(2) chain.

I.

Order No. 2937915

On November 25, 1987, James Samuel Conrad, Jr., a MSHA Inspector, performed a spot inspection of Respondent's Dilworth Mine pursuant to a request of one of Respondent's miners. During the course of this inspection he observed coal dust in the ribs, floor, and belt structure of the 3-D section. He said that with the cap lamp that he was wearing the coal dust appeared to be black, with a reddish tint. He explained that it gets to have such a tint if it is "real black" (Tr. 186). He explained that under the coal dust he was able to see rock dust and that the rock dust accumulated in nooks and crannies of the ribs. He said that on the belt structures he was able to brush the dust off and that at one point he measured the dust with a ruler and it was a half inch deep.

Edward Daniel Yankovich, Sr., a miner who accompanied Conrad as a walkaround, stated that the area in question was completely covered with black coal dust, including the roof, ribs, floor, and belt structure. He estimated the depth as 2 to 3 inches.

Walter Joseph Malesky, Respondent's belt foreman, who examined the area in question on November 25, 1987, in a preshift examination, at approximately 6:45 a.m., indicated that in the front-end of the belt there was an area that was starting to get dark in color. He described the color as dark gray to light black and provided his opinion that it should have been rock dusted in the next shift. Steven Wolfe, Respondent's construction boss, testified that the floor of the area in question was darker than the ribs and contained rock and coal dust which was the normal condition at the mine. He indicated that in general the color was dark gray. He also opined that when he arrived in the section on November 25, it needed rock dusting. John Leo Weiss, Respondent's assistant foreman, stated that when he walked the length of the area in question at 9:15 a.m. on November 25, he observed coal dust on the belt and material on the bottom that was dark in color. He described the ribs as having some float dust that was gray in color. He also indicated he believed the area needed to be rock dusted. Wolfe indicated that the coal dust was thin coated and not "thick" and Weiss indicated that the depth of the coal dust was between a quarter of inch to a half inch, but in most areas there was a light coating. He provided his opinion that the areas in question needed to be rock dusted. He said that the ribs were gray and not dark, the bottom was dark gray, with small spots of black on the bottom of the left rib and indicated that wetness turns the material dark.

Based upon the above, I find that at the time in question Respondent had not cleaned up coal dust in the area in question and had allowed it to accumulate. In this connection I accorded more weight to the testimony of Conrad as to the depth of the coal dust inasmuch as he measured it with a ruler. As such I find that the citation was properly issued and Respondent herein did violate 30 C.F.R. § 75.400 as alleged in the citation.

II.

According to Conrad the belt line in question has a history of coal dust. According to Wolfe it probably took a shift for this dust to develop. At approximately 6:45 a.m. on November 25, Walter Joseph Malesky, Respondent's belt foreman, in a preshift examination of the belt in question noticed that the area was starting to get dark in color and opined that it should be rock dusted in the next shift. He noted this condition in writing in the examiner's report of daily inspection for that date. Malesky indicated that he observed the coal dust as being dark gray to light black, and when asked what the depth of the material was indicated that he did not think that it was "any inches" (Tr. 274). He said that some of the material was part dry and some of it was damp, and that he made a ball of the mud which assisted him in determining that in his opinion it was not dangerous. He indicated upon cross-examination that he had the authority to stop the belt and assign men to abate the condition. He did neither, but in addition to the entry of the condition in the daily inspection report at 7:50 a.m., he informed Robert Burgh, Ken Dudics, the belt coordinator, and the Assistant Foreman Mark Watkins of the need to rock dust. Wolfe testified that he was informed at about 8:00 a.m. by Mark Watkins that the belt in question needed dusting. He indicated that he went to the bore hole to obtain the rock duster, but that this equipment had a hose that was plugged up and that it took between 25 and 30 minutes to change the equipment. The rock duster was then filled up with 12 tons of dust which took about 30 minutes and was then transported to the area in question, but that on the way it was derailed. He indicated that it took another 15 to 20 minutes from the derailing to transport the rock duster to the section.

It appears to be Petitioner's position, as articulated by Conrad, that Respondent herein was negligent to a high degree in that it was aware of the fact that the area in question needed rock dusting, but did not assign anyone to immediately correct the condition. According to Conrad, Respondent should not have relied on its abatement by using a bulk duster as this equipment

could fail, and instead should have either assigned men to distribute dust manually or to drag the area. He indicated that it could have taken two men to perform this work in approximately 10 to 15 minutes. Conrad indicated that dragging or hand dusting might have been more "expedient" than using a duster (Tr. 229). I note that according to Wolfe, bag or hand dusting is used in areas of approximately 100 feet whereas on November 25, the day of the citation he was informed that area to be dusted was approximately 300 feet. I thus find that there was not aggravated conduct in Respondent's condition to eliminate the hazard of rock dust with the use of a rock duster as opposed to assigning men to hand dust or drag. It appears that a decision as to the method to be used was a matter of judgment. As such any delays in cleaning the coal dust occasioned by the breakdown and derailment of the rock duster is clearly not evidence of aggravated conduct. Also although Malesky did not either shut off the belt or assign men to rock dust the area in question, and did not notify other management officials of the existence of this condition until approximately 1 hour after he observed it, I find that any maleficence in this regard to have been a matter of negligence rather than "aggravated conduct," or serious lack of reasonable care (Emery Mining Co., supra, c.f. U.S. Steel Corp., 6 FMSHRC 1423 (June 1984)), inasmuch as it was based solely upon an error of judgment. In this connection, I note that Malesky, in supporting his not shutting off the belt or ordering the men to hand dust, indicated that he did not believe that the condition was dangerous. In this connection he noted that part of the material was dry, but that some of it was damp. The fact that he made a ball of the material assisted him in determining that it was not dangerous. He also had indicated that when asked with regard to the depth of the material that he did not think that it was "any inches" (Tr. 274). Thus, I find that Respondent's conduct herein was not aggravated conduct, did not rise above near negligence, and thus the violation herein cannot be characterized as resulting from Respondent unwarrantable failure (see Emery Mining, supra).^{1/}

^{1/}I have considered Kitt Energy Corp. 6 FMSHRC 289 (May 1984) which is relied on by Petitioner, but do not find it appropriate to the issues herein. In Kitt, Judge Merlin found that failure of the Operator to assign sufficient men to clear up coal dust over a period of 2 weeks constituted unwarrantable failure. In the case at bar, in contrast, approximately 1 hour after knowledge of the violation, the Operator took action to completely clean up the accumulation.

III.

According to Conrad, and not contested by Respondent's witnesses, coal dust is a major contributor to explosion and to the severity of fires. He described coal dust as being very volatile. At the time of the citation the belt was running and according to Conrad a running belt could be knocked out of line by a falling rock causing the belt line to rub against various structures causing heat. He also indicated that the belt rollers could malfunction and generate heat, and that the electrical motors were of an open type and could blow up or short out. He said that all these events are potentially ignition sources which would be enhanced by the coal dust in the area. In this connection, Conrad indicated that all the dust that he touched was dry. Areas of the floor were described as having either puddles or being damp. However, according to Conrad the coal that lies on top of the water was dry. In this connection, it is noted that Wiess indicated on cross-examination that coal dust on top of water can still ignite. I note also that Yankovich indicated that he stirred the coal dust with his finger and described it as dry. In contrast Wolfe testified that there was real moist muck on the bottom of the area which contained rock and coal dust, and this condition is normal at the mine. Malesky who indicated that he made a ball of the mud described some of the area as wet, some damp, and "part of it was dry" (Tr. 273).

Based on the testimony of Conrad and Yankovich that the dust they touched was dry, I find that the area in question contained coal dust that was dry. I find, based on Conrad's measurements, that the dust was at least 1/2 inches deep in some places. In addition, I note Conrad's testimony that on the day of the citation the area in question in the belt line had two tenths of one percent of methane. Taking all these factors into account, I conclude that the coal dust in question contributed to the hazard of an ignition. According to Conrad should such an ignition or explosion occur it would be reasonably likely to result in an injury of a reasonably serious nature. In this connection he indicated that those fighting the fire, or persons working in by the section, would likely be burned or injured by having inhaled carbon monoxide. Accordingly, based upon all these factors, I conclude that the violation herein was significant and substantial. (Mathies Coal Company, supra.)

IV.

I conclude that the Respondent herein was negligent to a moderately high degree, in that Malesky did not inform any of Respondent's managers of the condition in question until approximately 1 hour after it was observed by him. I further find, as

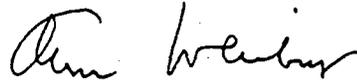
outlined above (III., infra), that the gravity of the violation herein was relatively high. Taking these factors into account as well as the remaining statutory factors in section 110(i) of the Act, I conclude that a penalty herein of \$500 is appropriate.

ORDER

It is ORDERED that Order No. 2943442 be modified to a section 104(a) Citation to reflect the fact that the violation therein was not significant and substantial.

It is further ORDERED that Order No. 2937915 be modified to a section 104(d)(1) Citation to reflect the fact that the violation therein was not the result of Respondent's unwarrantable failure.

It is further ORDERED that Respondent herein shall pay \$550, within 30 days of this decision, as a civil penalty for the violations found herein.



Avram Weisberger
Administrative Law Judge

Distribution:

Covette Rooney, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Michael R. Peelish, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 23, 1988

RANDY G. CUNNINGHAM, Complainant	:	DISCRIMINATION PROCEEDINGS
	:	
v.	:	Docket No. PENN 88-293-D
	:	PITT CD 88-23
	:	
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. PENN 88-294-D
	:	PITT CD 88-24
	:	
	:	Dilworth Mine

ORDER OF DISMISSAL

Before: Judge Merlin

On August 17, 1988, you filed with this Commission complaints of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977. On November 4, 1988, show cause orders were issued directing you to provide information regarding your complaints or show good reason for your failure to do so. These show causes were mailed to you certified mail, return receipt requested and the file contains the receipt cards indicating you received the show cause orders. You have however, not responded and complied with the show cause orders.

Accordingly, these cases are DISMISSED.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Mr. Randy G. Cunningham, 3522 Orchard Avenue, Finleyville, PA
15332 (Certified Mail)

Consolidation Coal Company, 450 Racetrack Road, Washington, PA
15301 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 23 1988

JACKIE SANDERS, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. LAKE 88-130-D
GOSSER CONSTRUCTION COMPANY, :
Respondent : VINC CD 88-09
: Jaeco Mine

ORDER OF DISMISSAL

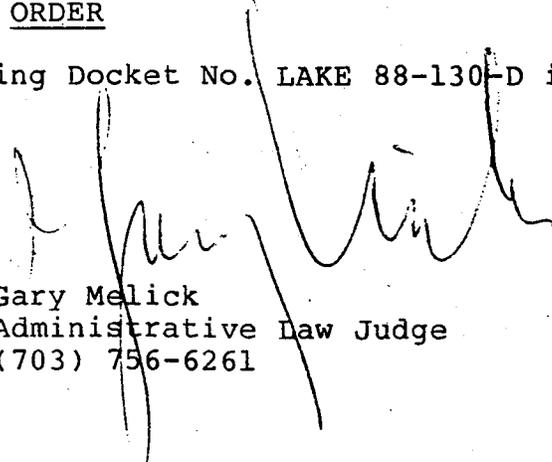
Before: Judge Melick

By notice issued October 19, 1988, hearings in the captioned proceedings were scheduled to commence on November 29, 1988, at 8:30 a.m., in Bloomington, Indiana. The Complainant however failed to appear at the scheduled time and place.

Accordingly on November 30, 1988 an Order to Show Cause was issued directing the Complainant to explain on or before December 15, 1988 why she failed to appear at the scheduled hearing. She has failed to respond to that order and accordingly this case must be dismissed.

ORDER

Discrimination Proceeding Docket No. LAKE 88-130-D is hereby dismissed.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Ms. Jackie Lee Sanders, 207 Hickory Street, Jasonville, Indiana 47438 (Certified Mail)

Ronald L. Chapman, Esq., Cotner, Andrews, Mann & Chapman, 528 North Walnut Street, P.O. Box 2478, Bloomington, Indiana 47402-2478 (Certified Mail)

nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 27 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 88-22-M
Petitioner : A.C. No. 44-02786-05514
v. :
: No. 1 Quarry and Mill
JAMES RIVER LIMESTONE :
COMPANY, INC., :
Respondent :

DECISION

Appearances: Page H. Jackson, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for the Petitioner;
Herbert A. Kelly, Plant Manager, James River
Limestone Company, Inc., Buchanan, Virginia,
for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Petitioner seeks a civil penalty assessment in the amount of \$305 for an alleged violation of mandatory safety standard 30 C.F.R. § 56.3200. The respondent filed a timely answer contesting the alleged violation, and a hearing was convened in Roanoke, Virginia. The parties filed posthearing arguments, and I have considered them in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard, (2) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty criteria found

in section 110(i) of the Act, and (3) whether the violation was "significant and substantial." Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 8-9):

1. Copies of the contested order/citation, and the subsequent modifications, exhibits G-1, G-2, and G-3, were issued by an authorized representative of the Secretary and properly served upon the respondent.
2. The presiding judge has jurisdiction in this matter.
3. The respondent's ability to continue in business will not be adversely affected by any civil penalty imposed as a result of this proceeding.
4. The respondent is a medium-size mine operator.
5. The respondent abated the violation in question in good faith by complying with the order/citation.

Discussion

The combined section 107(a)-section 104(a) Imminent Danger Order/Citation No. 2851959, issued by MSHA Inspector Charles E. Rines, cited a violation of mandatory safety standard 30 C.F.R. § 56.3005. This was subsequently modified to reflect the redesignation of the cited mandatory safety standard to the appropriate section which was in effect at the time of the violation, namely, section 56.3200 (exhibit G-3). The cited condition or practice is as follows:

This is an order of withdrawal: A drill shot on the #4 bench had shot into an underground cavern. The ground conditions around the opening appear to be very unstable. No one shall be allowed to enter this area on the #4 bench 350 ft. from the original slide area where the cavern is in the floor until a geologist had inspected the area along with an authorized representative of the Secretary of Labor and the area has been determined safe for mining operations.

Petitioner's Testimony and Evidence

MSHA Inspector Charles Rines testified that the respondent operates a limestone quarry which mines dolomite, and he described the multiple bench drilling and blasting methods used at the mine. He confirmed that he visited the mine on July 1, 1987, for the purpose of checking into the compliance for several previously issued orders of withdrawal which had been served on the respondent to prevent men from working under a slide area where unstable materials had fallen from the top of the mountain. He was accompanied by the pit superintendent Richard Gillam. After viewing the area with Mr. Gillam, Mr. Rines advised him that in view of the presence of unstable materials on the number 2 and 3 benches, the previous areas affected by the outstanding order would be extended for an additional 300 feet (Tr. 21-29).

Mr. Rines identified exhibit G-1 as a copy of the contested order/citation which he issued, and he confirmed that he issued it during the course of his inspection and observation of the area in question with Mr. Gillam. Mr. Gillam advised him that a shot had been fired into an underground cavern, exposing a hole below the number 3 bench. Mr. Rines stated that he observed an 80-D shovel working on the number 3 bench, "just to the right" of the hole. He also observed a truck pull up to within 5 feet of the hole, and then back up to the shovel where it was loaded with materials from the toe of the number 3 bench. The truck left to take the loaded material to the crusher, and Mr. Rines observed another truck drive in to position itself for loading in the same manner as the first one. Mr. Rines estimated the weight of the loaded truck at 54 tons, and the weight of the shovel at 72 tons. He estimated the distance of the shovel from the hole as 25 feet. He estimated the location of the hole as 35 feet beneath the top of the bench, and estimated the dimensions of the hole as 12 feet by 10 feet. Mr. Rines confirmed that he could not see the hole from the top of the bench, and that he had to go down

to the number 4 bench to approach and view it from a position on the loose rock (Tr. 29-39).

Mr. Rines stated that Mr. Gillam told him that the shot had been fired several days prior to the inspection, and that the holes had been drilled by Ingersoll-Rand with an experimental drill. Mr. Rines identified several photographs of the cited area and he described several cracks which he observed in the number 3 bench along the opening and bottom of the bench, and extending from the hole itself. Mr. Rines could not state the depth of the hole in question, and he identified the location of another cavern which had been shot into in the past at the face of the number 4 bench (Tr. 39-46).

Mr. Rines confirmed that after observing the ground conditions, he advised Mr. Gillam that he would have to issue an order withdrawing men from the number 3 bench. Mr. Gillam ordered the truck and shovel removed from the area, and he left the area to summon Mr. Kelly, the plant manager. Mr. Rines confirmed that he explained his reasons for issuing the order to both Mr. Gillam and Mr. Kelly (Tr. 47-48). Mr. Rines also confirmed that he marked the area affected by his withdrawal order with a can of red paint on the face of the number 3 and 4 benches (Tr. 49).

Mr. Rines confirmed that he issued the order because of the unstable ground conditions in the proximity of the hole in question. These unstable conditions consisted of visible horizontal and vertical cracks in the face of the number 3 bench and the floor of the number 4 bench, and on either side of the hole. He also observed material which had slid down toward the opening of the hole itself (Tr. 50-51).

Mr. Rines stated that he cited a violation of mandatory safety standard section 56.3200, which requires that certain action be taken when hazardous ground conditions are present which create a hazard to persons. He confirmed that the hazardous conditions consisted of the visible cracks which were present in the wall and floor of the number 3 bench, and the uncertainty of the extent of the cavern and hole in the number 4 bench. In his view, these conditions presented a hazard to the trucks and shovel operating in the proximity of the hole. He was concerned that the trucks were too close to the edge of the hole, and that the weight of the trucks may have caused the wall to give way and break off, thereby causing the trucks to fall into the void. The shovels was located approximately 55 feet from the hole, and the trucks were operating within 5 feet of the hole as they drove into the area, and within 20 feet as they left with their loads.

The cracks which he observed were closer to the trucks than to the shovel. Although the shovel was approximately 35 to 40 feet from the cracks, given the uncertainty of the length and breadth of the cavern hole under the bench where they were operating, he was concerned about the shovel as well as the trucks (Tr. 51-56).

Mr. Rines explained his gravity finding of "reasonably likely" as follows (Tr. 57):

A. Due to the number of cracks and the close proximity that the trucks were coming to those cracks in the wall, that if they had continued operating there, it's reasonably likely we could have had an accident there.

Q. Okay. And you say that the likelihood of the accident would be the ground giving way underneath the trucks?

A. Yes, sir.

Q. And you checked here that the injury was likely to be fatal. Why did you check fatal?

A. Well, if that truck -- if the ground gave way, the truck was going to fall approximately fifty-five feet (55'). And a truck going over the side of a wall, or the wall sloughing off with him, could be a fatal accident.

Q. Okay. You checked the number of persons affected as being two.

A. Yes, sir.

Q. Who would they be?

A. They would have been the shovel operator and the truck driver, himself.

Mr. Rines stated that he made a finding of "moderate" negligence because Mr. Gillam conceded that he had known about the existence of the cavern but had done nothing about it. Mr. Rines believed that once the underground cavern was detected, and given the presence of cracks, the area should have been barricaded or blocked off. Holes could also have been drilled to determine the extent of the cavern hole opening, and the top of the number 3 bench could have been bermed.

Had these measures been taken, the respondent would have been in compliance with the cited standard (Tr. 59).

On cross-examination, Mr. Rines confirmed that he did not speak with any geologists after issuing the violation. He explained that the truck in question was 5 feet from the edge of the bench above the hole which was located below the bench, and he identified the location of the hole by referring to respondent's photographic exhibit R-2 (Tr. 75). He confirmed that there was no actual hole on the flat surface of the number 3 bench haulageway where the truck was operating, and that the hole was located at the face of the number 4 bench (Tr. 76). He reiterated his concern that the area beneath the roadway where the truck was located could have given way and engulfed the truck (Tr. 77). He explained the work being performed with the truck and shovel, and indicated that material was being removed after the area was drilled and blasted (Tr. 79-82). Mr. Rines stated that he was unaware that any geologists were examining the area after he issued the violation, and that he next returned to the mine on August 22, 1988 (Tr. 85).

Charles B. Vance, MSHA supervisory mine inspector, testified that the respondent's mine has been under the enforcement jurisdiction of his office, and that he has visited the mine 15 to 20 times over the past 3 years. He confirmed that he visited the mine in July, 1987, in the company of MSHA district manager Mike Trainer, safety specialist Roger McClenta and sub-district manager Ray Austin. The purpose of the visits was to observe the ground conditions involving the cavern and slide area in question (Tr. 90). Mr. Vance confirmed that he visited the mine on July 15, 1987, to examine the cavern area. He identified a copy of a modification he issued to the citation issued by Inspector Rines to allow work to correct the hazard noted in his initial order. The modification made reference to the removal of material from the floor of the number 3 bench, and the filling of the cavern on the number 4 bench (Tr. 91). Mr. Vance stated that he had expected the respondent to blast 10 holes which had been drilled along the edge of the number 3 bench in order to fill the cavern and hole with the material blasted from above that location (Tr. 92-93).

Mr. Vance stated that he observed no equipment or work taking place when he was in the area on July 15th, and the cavern or hole was still open and unfilled, and nothing had been done to correct the cited condition. He observed several cracks "all around that area," and "in and around" the cavern (Tr. 94). He considered the ground conditions at that time as hazardous to persons working in the area because there was no

indication as to the extent of the cavern or how much weight it would take to break into it, and he believed that the rock could give way and a vehicle could go over the edge of the bench or break into the cavern (Tr. 94).

Mr. Vance confirmed that the visit by Mr. Trainer and Mr. Austin came after he issued his modification of July 15, 1987, and since that time the respondent has not requested him or anyone else in MSHA to further modify the order issued by Mr. Rines. Mr. Vance also confirmed that no further work has been done by the respondent in the affected area, and as far as he knows "it has been left alone" (Tr. 96). He confirmed that the respondent has the option of either abating the hazardous cited conditions before continuing any further work in the area, or simply leaving it alone (Tr. 96).

On cross-examination, Mr. Vance was of the opinion that the safest method for addressing the hazard in question would be to seek the aid of a geologist to survey the cavern area and then fill it with shot rock, or by blasting the material down into the hole from the drill holes which were not previously shot (Tr. 96-97). Mr. Vance confirmed that he was not with Inspector Rines when he issued his order on July 1, 1987.

Respondent's Testimony and Evidence

Herbert A. Kelly, respondent's former plant manager, testified that he is a professional geologist, and holds a degree in geology from the South Dakota School of Mines, and a master's degree in mining engineering from the South Dakota School of Mines and Technology. He stated that the cited area in question was not an active bench for quarry production at the time of the inspection conducted by Mr. Rines. Mr. Kelly explained that the Ingersoll-Rand Company had requested permission to test a drill and the respondent permitted them to do so at the area in question. The location was selected because "the wall between the No. 3 bench and the No. 4 bench was pretty ragged. We had what we call a belly rock hanging out, and it was cracked away in at least one location. And this historically had been an area of underground caverns, in this particular corner of the quarry. We had no idea that one was lurking as close as it was" (Tr. 100).

Mr. Kelly explained that after the blast holes were drilled, some of them were shot in order to recover some of the rock. When the shot was fired, the bottoms of the drill holes broke into the natural cavern under and beyond the reach of the holes. Mr. Kelly stated that the area was then

observed for a day or two by himself, and the quarry and plant superintendent, and they detected no problem in working on the number 3 bench with equipment to remove materials which had been previously shot from the bench above. The work in question "had nothing to do with this cavern shot, other than the fact that we would have to go near the top of the bench above it" (Tr. 101).

Mr. Kelly stated that it is not unusual for quarry trucks to come close to the edge of a wall, and that usually, a better berm or big rocks are used to protect equipment from rolling over the edge to the bench below. He conceded that in the instant case, "we did not have a very planned arrangement above the top of this hole" (Tr. 102). Mr. Kelly stated that he detected no cracks on the face of the number 3 bench or the wall between the number 3 and 4 benches leading into the cavern in question. He believed the ground conditions were safe for equipment to operate, and by throwing rocks down the cavern hole, he determined that the cavern was going down rather than up. He confirmed that work had been done in the cited bench area for the past 6 years without breaking into anything, and that this was the first time a cavern had been discovered in that area (Tr. 103).

Mr. Kelly stated that he had no objection to the withdrawal order at the time Mr. Rines informed him that he would issue it. Mr. Kelly explained that the cited area was not an urgent operational area, and it was simply "a side job" which was not holding up production. In weeks following the order, Mr. Kelly and another company geologist inspected the area and believed that there was no problem in continuing work on the number 3 bench. In addition, MSHA personnel from Pittsburgh, including a geologist, inspected the area and agreed that the only way to resolve the situation was to attempt to fill the cavity by drilling and blasting material from above, or trucking in material or bulldozing it in from above to fill the cavity. Mr. Kelly confirmed that the MSHA personnel did not believe there was any problem with proceeding in the manner stated in Mr. Vance's modification of July 15, namely, "to work on the No. 3 bench to fill the cavern down to the No. 4 bench" (Tr. 104).

Mr. Kelly confirmed that no work has been done to fill the cavern in question because the area is not critical, and other pending work took priority. He explained that work had started at the top of the quarry in an attempt to rectify previous ground control withdrawal orders by making benches at the very top of the quarry, and it is impossible to work safely on the benches below because of falling rocks. The

respondent intended to fill the cavern, but Mr. Kelly was unaware of any timetable for this to be done (Tr. 105). Mr. Kelly agreed that it would be unsafe to bring equipment to the number 4 bench to try and work around and too close to the cavern, but he saw no problem in the work being performed on the number 3 bench on July 1, 1987, and the work which would be permitted by Mr. Vance's modification (Tr. 106).

Mr. Kelly confirmed that the drill holes were 55 feet deep and did not reach the cavern. He estimated the thickness of the material below and between the surface of the number 3 bench roadway and the cavern area to be at least 55 feet, but agreed that he had no idea as to the parameters of the cavern and conceded that depending on the extent of the cavern, and its direction, the roadway could be undermined. He confirmed that caverns are natural occurrences in limestone mines (Tr. 108).

Mr. Kelly stated that he objected to the civil penalty assessment points for negligence and lack of good faith abatement, and he believed that the respondent had a good relationship with the inspectors and responded quickly to their requests (Tr. 109). He also stated that while he had "no quarrel" with the withdrawal order issued by Mr. Rines, he did not believe that fines and "bad marks on our record for negligence and lack of good faith" were deserved (Tr. 122). When asked whether he agreed that a hazard existed, Mr. Kelly responded "we agreed to get another look from experts on the outside. We recognize that there's a problem there with the caverns. We don't pretend to know it all, about them. And since it was not holding up our operation, we were certainly willing to wait for somebody to come in and check it out" (Tr. 122).

Mr. Kelly confirmed that he was aware of the existence of the cavern hole prior to July 1, 1987, when Mr. Rines came to the mine, and that it had been exposed from the experimental drilling which was taking place to shoot down the crack and "belly rock" which posed a hazard to a shovel and loader working below. Mr. Kelly also confirmed that he was aware of the fact that a network of caverns were present in that area of the quarry, but he was not aware that the cavern in question was so near to the area where drilling would be taking place. Previous caverns which have been exposed have been filled with rock (Tr. 124).

Mr. Kelly confirmed that his contacts with MSHA's technical personnel came after the order and modification were issued by Mr. Rines and Mr. Vance, and that he requested their

assistance in order to obtain an outside opinion. Although Mr. Kelly agreed that drilling a test hole from the number 3 bench to determine the extent of the cavern was a good idea, he stated that this was never suggested by any of the MSHA people (Tr. 116-117). During this period of time, no work was being performed on the bench and nothing further was done (Tr. 117).

On cross-examination, Mr. Kelly confirmed that there are a number of holes in the face of the pit which have not been filled in, and that at the location next to the shot hole, there was no berm which was placed there intentionally (Tr. 125). He confirmed that he walked and observed the area several times after the shots were shot through to the cavern, and saw no significant cracks which penetrated the rock to any depth. He confirmed that the equipment was moved to the cited location approximately 4 hours before the order was issued (Tr. 127). He also confirmed that in the past, there was another location where machinery and miners were working within 15 feet of a cavern which had been bridged over, and where the thickness of the pillar was about 15 feet. However, he stated that after "we worked that for a while, we backed off from it. We scared ourselves" (Tr. 128).

Inspector Vance was recalled, and he identified exhibit G-11, as a photograph of the cavern in question which he made on July 15, 1987, when he modified Mr. Rines' order, and he identified the area where work would be permitted to continue pursuant to his modification in order to fill the cavern (Tr. 133-136). Mr. Vance stated that Mr. Trainer and Mr. Austin never told him that it was safe to operate machinery on the floor of the number 3 bench in the area of the cavern, and that the matter was not discussed. In Mr. Vance's opinion, proper blasting and filling should have been done to fill the hole (Tr. 137). He believed that this could have been done from a good distance away from the hole, or from the next bench above, or from blasting the holes which had already been drilled (Tr. 138). Mr. Kelly stated that this was tried, but that the holes were blocked off and could not be opened (Tr. 138).

Petitioner's Arguments

During oral argument at the hearing, petitioner's counsel argued that the evidence establishes that a hazardous ground condition existed on July 1, 1987, and that under the circumstances, the order issued by Inspector Rines was justified and that a violation of section 56.3200 has been established. Counsel pointed out that Mr. Kelly conceded that he had no

knowledge of the extent of the cavern which had been exposed by prior drilling and blasting, and that men and equipment were working on the bench area above the location of the exposed cavern. Although Mr. Kelly further conceded that he had observed ground cracks which he believed were not significant, counsel pointed out that the cracks were not probed to determine whether they were surface or sub-surface cracks. Conceding that Mr. Kelly kept the area under observation after the cavern was exposed, since he was a trained geologist, counsel suggested that Mr. Kelly should have taken further steps to address the hazardous ground conditions, but that nothing was done other than to throw some rocks into the hole in an attempt to determine its depth and breadth (Tr. 139-144). Counsel believed that once the cavern was discovered, the respondent had an obligation to do something about it before sending men back in for normal operations (Tr. 149).

Petitioner's counsel argued further that a reasonable interpretation of section 56.3200 would lead one to conclude that the existence of surface ground cracks, coupled with an exposed cavern hole, the extent and condition of which are unknown, constituted a hazard to the truck and shovel operators working on the bench above the cavern. Counsel asserted that the respondent had a duty to at least determine the extent of the cavern or to fill it up, and that drilling to determine the extent, thickness, and integrity of the ground above the location of the cavern would have been the kind of action expected by MSHA to address the hazard. Counsel also suggested that the respondent could have called in MSHA after such drilling for a determination as to whether or not its efforts were sufficient (Tr. 147).

In its posthearing brief, petitioner's counsel reiterates his arguments made at the hearing, and concludes that the hazard presented by the cavern hole and the surrounding ground conditions where work was taking place at the time of the inspection by Inspector Rines posed a danger and risk of injury to the miners working on the number 3 bench. Conceding that the term "hazard" is not further defined by the Act or MSHA's standards, counsel cites the dictionary definitions of the term as found in Black's Law Dictionary, Pg. 647 (rev. 5th ed. 1979), and Webster's Ninth New Collegiate Dictionary, Pg. 557 (1986), which define the term as "a risk or peril, assumed or involved; a danger of risk lurking in a situation which by chance or fortuity develops into an active agency of harm; a source of danger; a chance event." Counsel asserts that these definitions are consistent with the intent and purpose of the standards found in 30 C.F.R. Part 56, namely, the "protection of life, the promotion of health and safety,

and the prevention of accidents." Counsel also points out that the rulemaking history concerning the promulgation of section 56.3200, reflects an intention that the standard have broad application and would apply wherever a fall of ground hazard is present.

Counsel asserts that the respondent violated section 56.3200, by permitting miners to operate heavy equipment in the vicinity of the cavern or hole, the extent of which was unknown, but which it knew existed beneath the area where the work was being performed. Counsel concludes that this conduct by the respondent violated the standard because any ground condition which creates a risk of injury to a miner must be taken down or supported before miners resume work in the vicinity of that ground condition.

Respondent's Arguments

In support of his belief that the cited area did not pose a hazard, Mr. Kelly relies on the fact that Inspector Vance's modification to the order issued by Inspector Rines allowed entry to the cited area for the purpose of removing materials from the floor of the number 3 bench to fill the cavern on the number 4 bench. Mr. Kelly asserted that the modification indicated to him that without doing anything else, work could safely proceed in the cited number 3 bench area to excavate materials in an attempt to fill the cavern hole below. Since this permitted excavation work was precisely what was being done on July 1, 1987, when work was stopped by the withdrawal order issued by Inspector Rines, Mr. Kelly did not believe that a hazard existed on that day (Tr. 117-118). Mr. Kelly advanced this same argument when he stated as follows in his posthearing argument filed in this case:

The respondent requests that the monetary penalty assessment, penalty points for negligence, penalty points for lack of good faith and the citation on our record with MSHA should all be rescinded. We followed the inspector's instructions promptly, courteously and explicitly when he ordered us to withdraw from the area. We had other MSHA officials visit the site as required. Two weeks later MSHA modified the withdrawal order to permit us to return to work at the same location under the same conditions. The modification of the order makes me believe that the alleged safety hazard was not serious enough to be citable in the first place.

Findings and Conclusions

Fact of Violation

The respondent is charged with an alleged violation of mandatory safety standard 30 C.F.R. § 56.3200, which provides as follows:

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

The respondent's position with respect to the existence of any hazardous ground conditions rests on Mr. Kelly's argument that the modified order issued by Inspector Vance allowed work to continue in the very same area which Inspector Rines determined was hazardous. Mr. Kelly also believed that there was sufficient ground support and stability between the two benches in question to allow the trucks and shovel to operate without posing a hazard to miners or equipment.

Although the two actions taken by the inspectors appear to be contradictory and lend some support to Mr. Kelly's argument, I take note of Mr. Vance's explanation concerning the area which he had in mind when he modified the order to allow work to proceed to address the hazardous ground conditions. I also take note of the fact that Mr. Vance's modification is qualified and conditional in that it allowed work to the limit of the area previously sprayed in red paint by Mr. Rines. Taken in context, I cannot conclude that Mr. Vance's modification per se supports a reasonable inference that the ground conditions which he and Mr. Rines believed were hazardous never existed. In my view, any determination as to whether or not any hazardous conditions were present at the time the order/citation was issued by Mr. Rines must be made on the basis of an evaluation of all of the facts and evidence available to Mr. Rines when he made his evaluation of the ground conditions and came to the conclusion that they presented a hazard to miners while they were engaged in the excavation work which was taking place at that time.

Although Inspector Rines made reference to a drill shot on the No. 4 bench in his order, he clarified this by confirming that the violation did not directly involve the number 4 bench because it was blocked off by stored materials and there was no access into the area by any equipment, and that his reference to the number 4 bench was intended to refer to a production shot on the number 4 bench if it were to be mined (Tr. 114-115). Mr. Kelly agreed that Mr. Rines was concerned that the ground on the number 3 bench could give way to the cavern below, and his belief of the existence of a hazard because of a possible vertical drop of equipment caused by the edge of the bench cracking and coming down from the weight of the equipment operating over the cavern hole (Tr. 113).

The evidence in this case reflects that Inspector Rines issued the withdrawal order/citation on July 1, 1987, after observing the exposed cavern and cracks in the floor of the number 3 bench and the face of the number 4 bench. Coupled with the uncertainty as to the extent of the cavern or hole which had been exposed by prior blasting and drilling, Mr. Rines concluded that the ground conditions where trucks and a shovel were engaged in the excavation and removal of materials were such as to create a hazard in that the weight of the equipment could have caused the floor of the number 3 bench to give way beneath the trucks and shovel. Two weeks later, on July 15, 1987, Inspector Vance viewed the same ground conditions, and he observed cracks in the floor of the number 3 bench near the shot hole, and cracks in the immediate vicinity in and around the hole. Mr. Vance also believed that the ground conditions he observed presented a hazard in that the rock and material could give way, causing a vehicle to go into the cavern.

Mr. Kelly confirmed that he had no quarrel with the withdrawal order issued by Inspector Rines. Mr. Kelly confirmed that the quarry area in question had a history of underground caverns, and that the particular location which was cited by Mr. Rines was selected for drilling and blasting because it had "bellied out" with hanging rock, was cracked in at least one location, and that the wall between the number 3 and 4 benches was "pretty ragged." Mr. Kelly conceded that these conditions posed a hazard to miners and equipment working below. He also alluded to a prior incident where equipment and miners were withdrawn from a working area over a cavern with a pillar thickness of 15 feet because "we scared ourselves." Mr. Kelly also confirmed that caverns may vary from inches wide to 100 feet wide, and he conceded that no drilling was done to determine the direction or extent of the cavern in question, and that in the event it extended back under the

number 3 bench, the roadway used by the truck and shovel could be undermined by the cavity. Although Mr. Kelly saw no problem with working on the number 3 bench, he agreed that it would be unsafe to bring in equipment to try and work around and too close to the cavern.

After careful consideration of all of the facts in this case, I conclude and find that the petitioner has established by a preponderance of all of the evidence that the ground conditions observed by Inspector Rines were hazardous and presented a risk and danger to the miners who were performing work in the cited area. Although the respondent was aware of the hazard presented by the cavern which had previously been exposed in the course of drilling and blasting to excavate and remove materials from the area, it simply kept the area under observation and took no action to fill the cavern or take down and support the rock and materials in the affected area. Under the circumstances, I conclude and find that a violation of section 56.3200, has been established, and the citation IS AFFIRMED.

Significant and Substantial Violation

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

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

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

in question will be of a reasonably serious nature.

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

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

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

I conclude and find that the hazardous ground conditions, including the unknown extent of the cavern hole beneath the bench where men and equipment were working, presented a danger of the ground giving way under the weight of the equipment. In the event this had occurred, I believe it would be reasonably likely that the miners working in the area would have suffered injuries or a reasonably serious nature. Under the circumstances, I agree with the inspector's "significant and substantial" finding, and IT IS AFFIRMED.

History of Prior Violations

An MSHA computer print-out reflects that for the period July 1, 1985 through June 30, 1987, the respondent paid civil penalty assessments in the amount of \$570 for 10 section 104(a) citations, seven of which are \$20 "single penalty" assessments. I take note of the fact that none of the prior citations are for violations of the safety standard cited in this case, or for any ground control violations.

Inspector Rines was of the opinion that the respondent's compliance record was "a little bit higher than normal" as compared to quarries of similar size. In addition, he stated that the respondent has had chronic ground control problems which have been of concern to MSHA, and that several ground control imminent danger orders have been issued, terminated, or are still outstanding at the quarry. Mr. Rines believed that the respondent's ground control practices were poor, and he confirmed that the two outstanding imminent danger orders were issued in 1984, but that no active mining was taking place in those areas. Mr. Rines explained that a previous slide caused by blasting and drilling close to the highwall resulted in some of the material sliding into the quarry, and that MSHA has been on the property periodically attempting to control the overburden so that the quarry may be made safe (Tr. 60-70).

Although petitioner's counsel stated that Inspector Rines believed that the respondent had a "poor attitude" in connection with ground control, I find no credible evidence to support any such conclusion. Further, even though the respondent may have been served with prior imminent danger orders, some of which may be outstanding, this does not per se establish a "poor attitude" with respect to ground control. Absent any facts or evidence to the contrary, I cannot conclude that the respondent has failed to comply with any MSHA orders or directives, nor can I conclude that the record in this case supports a finding that the respondent's compliance record with respect to its paid history of assessed civil penalties is such as to warrant any additional increase in the civil penalty assessment which has been made for the violation in question.

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

The parties stipulated that the respondent is a medium-size mine operator and that the civil penalty assessment made in this case will not adversely affect its ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues.

Gravity

On the basis of my findings and conclusions affirming the "significant and substantial" findings made by Inspector Rines, I conclude and find that the violation in question was serious. The unstable ground conditions presented a hazard to both the miners and equipment working in the cited bench area.

Negligence

Inspector Rines made a finding of "moderate" negligence, and he testified that "their negligence wasn't all that high. They just hadn't done anything." The evidence establishes that the respondent was aware of the cavern which had been exposed as a result of prior drilling and blasting which was done in an effort to take down part of the bench wall which had cracked and "bellied out." Although Mr. Kelly confirmed that he was aware of the cavern and had inspected it and kept it under observation prior to the inspection by Mr. Rines, no particular action was taken to fill the hole or to determine its extent, and the area was not barricaded or otherwise secured against entry. Under the circumstances, I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and the inspector's negligence finding is affirmed.

Good Faith Abatement

The record reflects that the cited conditions have not been corrected, and that the contested order is still "outstanding." The respondent has apparently opted to leave the affected area and continue its mining operations elsewhere in the quarry. The petitioner has stipulated that the respondent acted in good faith by immediately withdrawing the miners and equipment from the cited area, and I find no evidence that the respondent has been uncooperative with MSHA in attempting to address the hazardous ground conditions in question. Mr. Kelly testified that in compliance with Inspector Rines' order, the respondent requested assistance from MSHA's technical support personnel, and petitioner's counsel agreed that the unstable ground conditions in the area of the cavern presented a difficult situation in that any attempts to go back into the area to evaluate the ground conditions, including the filling of the cavern hole, would in itself present a hazard and danger (Tr. 150, 154). I find no evidence that the respondent has ever attempted to place men or equipment back to work in the area which has been withdrawn.

Petitioner's counsel agreed that the respondent withdrew its miners as soon as the order was issued and that the designated danger area has in effect been dangered or marked off and has remained so to the present. Counsel conceded that once this was done, "the violation ceased to exist," and he could offer no explanation as to why the respondent received "negative" civil penalty assessment points with respect to the issue of good faith (Tr. 109-112). Under all of the aforesaid

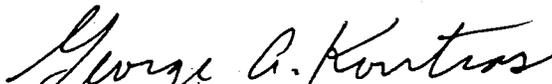
circumstances, I conclude and find that the respondent acted in good faith once the order/citation was issued, and I have taken this into account in the civil penalty assessment which I have made for the violation in question.

Civil 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 \$250 is reasonable and appropriate for the violation which has been affirmed in this case.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of \$250 for a violation of mandatory safety standard 30 C.F.R. § 56.3200, 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 proceeding is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

Page H. Jackson, Esq., Office of the Solicitor, U.S.
Department of Labor, 4015 Wilson Boulevard, Room 516,
Arlington, VA 22203 (Certified Mail)

James River Limestone Company, Inc., Drawer 617, Buchanan,
VA 24066 (Certified Mail)

Mr. H. A. Kelly, Route 3, Box 482, Buchanan, VA 24066
(Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 28 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. SE 88-50
v. : A.C. No. 40-02701-03526
: Goforth Mine
FAITH COAL COMPANY, :
Respondent :

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Philip A. Condra, Esq., Dunlap, Tennessee, for the Respondent.

Before: Judge Maurer

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et al., (the Act).

Pursuant to notice, a hearing on the merits was held in Chattanooga, Tennessee, on October 14, 1988. At the conclusion of the hearing, the parties proposed a settlement of the case. Based on the testimony adduced in the record, the petitioner proposed reducing the charged negligence factor concerning Citation No. 2808790 from "high" to "moderate" and reducing the proposed penalty for both violations at bar from \$179 to \$156. I have considered the representations and documentation submitted in this case as well as the record of trial and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, Citation Nos. 2808790 and 2808791 are affirmed, and it is ORDERED that respondent pay a penalty of \$156 within 30 days of this order.


Roy J. Maurer
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., U.S. Department of Labor, Office of the
Solicitor, 2002 Richard Jones Road, Suite B-201, Nashville, TN
37215 (Certified Mail)

Philip A. Condra, Esq., 207 Rankin Avenue South, P.O. Box 307,
Dunlap, TN 37327 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 29 1988

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 88-175-D
on behalf of	:	BARB CD 88-24
FORD ALLEN AMOS,	:	
Complainant	:	Kay Jay Mine
	:	
v.	:	
	:	
NALLY AND HAMILTON	:	
ENTERPRISES, INC.,	:	
Respondent	:	

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for the Complainant; Lloyd R. Edens, Esq., Cline & Edens, Middlesboro, Kentucky for the Respondent.

Before: Judge Melick

This case is before me upon the Complaint by the Secretary of Labor on behalf of Ford Allen Amos under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging that Mr. Amos was discharged by Nally and Hamilton Enterprises, Inc. (Nally) on February 22, 1988, in violation of section 105(c)(1) of the Act.^{1/} The Secretary seeks reinstatement, damages and interest for Mr. Amos as well as civil penalties against Respondent Nally. Nally maintains that Amos was in fact not discharged but quit on his own volition and therefore suffered no adverse action within the meaning of section 105(c)(1).

^{1/} Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any

In order to establish a prima facie violation of section 105(c)(1), the complainant must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that he suffered an adverse action that was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidaton Coal Company, 2 FMSHRC 2786 (1980) rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981).

It is not disputed that during the week before Mr. Amos' February 22, 1988, departure from the Nally Kay Jay Mine he had been "docked" 30 minutes pay for purportedly having stopped work early on several occasions. Amos' foreman, Johnny Jackson, testified that he watched Amos and fellow truck driver Wayne Roark quit early on two occasions and explained this to Amos when Amos complained of his paycheck. Amos disputed that he had quit early and the matter was still at issue at the time of a confrontation between Amos and Jackson on February 22, 1988. At this time Jackson was admittedly also angry, believing that Amos was stirring up employee dissension by spreading rumors that he would complain of his reduced pay to company owner Tommy Hamilton.

cont'd fn.1/

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.

According to Amos, on the evening of February 22, 1988, Jackson appeared at the worksite and called he and Darryl Akers off their 50 ton haulage trucks. A heated exchange followed. Amos explained what happened in the following colloquy:

We were standing there and Johnny looked at me and said "I want all this talk about going to Tommy Hamilton stopped." I said "Johnny, I can't get you to fix my truck, you won't do nothing for the truck and if you don't believe me, get up there and drive it." I said "now you come up here and cut my time for something I didn't do." That's when he said "as of right now your time is stopped." I said "what do you mean, Johnny? He said "you are fired." (Tr. 111)^{2/}

While Amos maintained at hearing that he was in fact discharged at the time of this confrontation, he nevertheless immediately returned to work driving his 50 ton haulage truck. Amos also acknowledged that Jackson saw him get back into the truck. This evidence is consistent with Jackson's testimony that after the confrontation he told Amos to go back to work. At hearing, Amos confirmed that he continued working after the confrontation in which he claims he was fired but claims he did so because he thought he could get his job back.

After continuing to work for about three hours, Amos decided to leave. He drove his pick-up truck to the mine exit where he met Matt Roark and Jackson. Amos described what happened as follows:

When I reached the shop there was Matt Roark, he was standing beside the shop and I stopped there first and hollered at Matt Roark to come over to my truck. I had a blanket in my truck which there was a guy that rides to work with me and he sat on the blanket on the way home because he was a grease man and he got oily and stuff. I said "Matt" and Matt looked at me and said "what is it?" I said "Johnny fired me." I said "I want you to give this blanket to Ronnie so he could drive in the other guy's truck." I pulled alongside Johnny. He said "what is it?" I said "you fired me." He just grinned at me. (Tr. 112).

^{2/} At hearing, co-worker Wayne Roark generally corroborated Amos' version of this confrontation.

Foreman Johnny Jackson testified that indeed he found that Amos and Wayne Roark had been quitting work early. He observed them do so on several occasions before docking their pay. When Amos received his short paycheck Jackson explained the reason for the deduction. Jackson later became concerned because he heard rumors that Amos was threatening to take his complaints to company owner Tommy Hamilton. According to Jackson this was causing turmoil among his workers and therefore, at the February 22, confrontation, he told Amos in essence that if he did not stop the rumors he would be fired. Jackson testified that he then told Amos to "get on your truck and haul rock".^{3/}

Jackson also described what happened later when Amos approached the exit gate:

At the time that he come up there, Matt got out of my pickup and walked around to the front and he asked Mr. Amos was he broke down and what was wrong. He said "no, Johnny fired me a while ago," and he pulled up and Matt was standing, you know, like at the corner of my pickup and I said "what is your problem?" He said "you fired me." I said "no, son, I didn't fire you." (Tr. 251).

After this exchange Amos left the job site and did not return. He later was paid for the additional work he performed that evening after the initial confrontation.

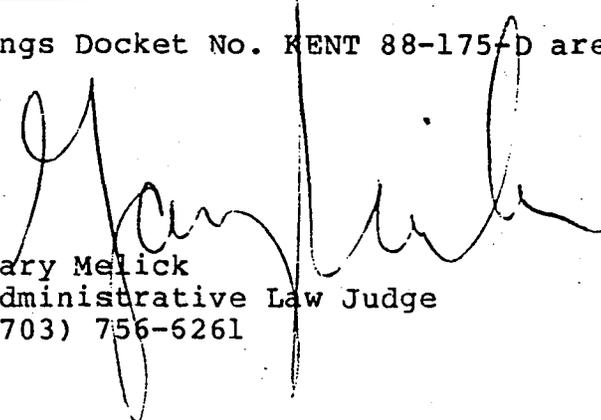
The credible evidence in this case shows clearly that after Amos claims he was "fired" he nevertheless, in the presence of the man who purportedly fired him, immediately returned to work driving his haulage truck and continued to work for another three hours before deciding to leave the job. This behavior is totally inconsistent with what would be expected from someone who has just been fired and what would be permitted by a foreman who has just fired him. While Amos testified that he continued to work because he thought he might thereby be able to retain his job, this testimony only confirms that there had never been any real termination of Amos' employment in the first place.

^{3/} Charles Jackson a company "oiler" testified that he overheard Johnny Jackson tell Amos "to get on his truck and haul rock".

It is also significant that when Amos later decided to leave the job after continuing to work for about three hours he apparently surprised the person (Johnny Jackson) who he claims had earlier fired him as he approached the exit gate because Jackson apparently asked Amos "what is it?" or "what was wrong?" Amos concedes that he then had to explain why he was leaving the job site by telling Jackson "you fired me". If Amos had indeed earlier been fired there would hardly be need to explain why he was then leaving the job site. Under the circumstances I do not find that the Complainant has met her burden proving that Amos had in fact ever been fired as he alleges or that he was subject to any adverse action within the meaning of section 105(c)(1) of the Act. Accordingly this case must be dismissed.

ORDER

Discrimination Proceedings Docket No. KENT 88-175-D are hereby dismissed.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

W. F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Lloyd R. Edens, Esq., Cline & Edens, Post Office Drawer 2220, Middlesboro, KY 40965 (Certified Mail)

nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 29 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 88-89
Petitioner : A.C. No. 11-00612-03534
v. :
: Spartan Mine
ZEIGLER COAL COMPANY, :
Respondent :

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, IL; for the
Petitioner
Brent Motchan, Esq., Zeigler Coal Company, Fairview
Heights, IL, for the Respondent.

Before: Judge Maurer

This case is before me upon a petition for assessment of
civil penalty under Section 105(d) of the Federal Mine Safety and
Health Act of 1977, 30 U.S.C. § 801, et seq., (the Act).

Pursuant to notice, a hearing on the merits was held in
St. Louis, Missouri, on October 7, 1988. At the conclusion of
the reporting inspector's testimony, the parties proposed a
settlement of the case. Based on the testimony adduced in the
record, the petitioner proposed reducing the charged negligence
from "high" to "low", withdrawing the "unwarrantable failure"
contention and reducing the proposed penalty from \$1000 to \$250.
I have considered the representations and documentation submitted
in this case as well as the record of trial and I conclude that
the proffered settlement is appropriate under the criteria
set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED,
Citation No. 3042299 is hereby modified to one issued under
Section 104(a) of the Act, and it is ORDERED that respondent pay
a penalty of \$250 within 30 days of this order.


Roy J. Maurer
Administrative Law Judge

Distribution:

**Miguel J. Carmona, Esq., Office of the Solicitor, U.S.
Department of Labor, 230 South Dearborn Street, Chicago, IL
60604 (Certified Mail)**

**Brent Motchan, Esq., Zeigler Coal Company, 331 Salem
Place, Fairview Heights, IL 62208 (Certified Mail)**

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 29 1988

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 88-281-D
ON BEHALF OF RAYMOND LONG, : HOPE 88-12
Complainant :
v. : No. 130 Mine
:
CANNELTON INDUSTRIES, INC., :
Respondent :

DECISION APPROVING SETTLEMENT
AND DISMISSING PROCEEDING

Before: Judge Broderick

On December 15 and 19, 1988, the Secretary filed a motion to approve a settlement agreed to by all parties to this proceeding. Respondent agrees to send the letter attached to the motion as Exhibit 1, to complainant Long, and to post a copy of the letter at the mine for 30 days. Respondent agrees to expunge the written warning issued to Long from his personnel file. It further agrees not to consider the incident of February 12, 1988, in any disciplinary action or personnel decision involving complainant. Respondent agrees to set up a training program for its foremen regarding the provisions of section 105(c) of the Mine Act. The program shall conform to the outline attached to the motion as Exhibit 2 and may be monitored by MSHA. It further agrees to pay a civil penalty of \$1000, and to post a copy of the motion and this order at the mine for 30 days.

This case does not involve any lost time or claim for back pay or expenses. I have considered the motion in the light of the purposes of section 105(c) of the Act, and conclude that it should be approved.

Accordingly, the motion to approve settlement is GRANTED; Respondent is ordered to carry out the terms of the settlement, and to pay the civil penalty of \$1000 within 30 days of the date of this decision. Subject to Respondent carrying out the terms of the settlement, this proceeding is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Page H. Jackson, Esq., U.S. Department of Labor, Office of
the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203
(Certified Mail)

Laura E. Beverage, Esq., Jackson & Kelly, 1600 Laidley Tower,
P.O. Box 553, Charleston, WV 25322 (Certified Mail)

Raymond Long, General Delivery, Beard's Fork, WV 25014
(Certified Mail)

William "Bolts" Willis, United Mine Workers of America,
Box 126, Pratt, WV 25162 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 30 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION, (MSHA), : Docket No. PENN 88-227
Petitioner : A. C. No. 36-06475-03501
v. :
: Iselin Preparation Plant
PENNSYLVANIA ELECTRIC COMPANY, :
Respondent :

DECISION

Appearances: Therese I. Salus, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania for the Petitioner;
Timothy N. Atherton, Esq., Pennsylvania Electric Company, Johnstown, Pennsylvania and John P. Proctor, Esq., Bishop, Cook, Purcell, Reynolds, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging the Pennsylvania Electric Company (Penelec) with two violations of regulatory standards. The general issues before me are whether Penelec violated the cited regulatory standards and, if so, whether those violations were of such a nature as could have significantly and substantially contributed to the cause and effect of a mine safety or health hazard, i.e. whether the violations were "significant and substantial". More specifically the threshold issue in this case is whether the specific areas cited in this case i.e. the head drives of conveyors 5A and 5B at Penelec's Homer City Steam Electric Generating Station, come within the Secretary's jurisdiction under the Act. If jurisdiction is established and violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. At hearing the parties submitted the case on joint stipulations of facts (Appendix A) supplemented by documentary evidence.

Section 4 of the Act provides that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." It is not disputed that the Secretary's jurisdiction in this case is accordingly to be determined by whether the head drives for the 5A and 5B conveyors at issue are part of a facility that is a "coal or other mine".

"Coal or other mine" is defined in Section 3(h)(2) as follows:

....[A]n area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom preparation facilities...

Section 3(i) defines "work of preparing the coal" as "...the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine."

The legislative history of the Act also indicates that the definition of a "mine" is to be given the broadest possible interpretation and that doubts should be resolved in favor of inclusion of a facility within its coverage. See S.Rep. No. 181, 95th Cong., 1st Sess., 1, 14, reprinted in 1977 U.S. Code Cong. Admin. News, pp 3401, 3414. Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 592 (3rd Cir. 1979). See also Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984); Harman Mining Corp., v. Federal Mine Safety and Health Review Commission, 671 F.2d 794 (4th Cir. 1981); and Cypress Industrial Minerals Co. v. Federal Mine Safety and Health Review Commission, 664 F.2d 1116 (9th Cir. 1981).

In summary, for purposes of the jurisdictional issue before me, the relevant undisputed evidence shows that among other operations, raw coal is received at the Homer City truck receiving facility where it may then be conveyed through a crusher. Eventually the raw coal is transported by

conveyors 5A and 5B (over the 5A and 5B head drives at issue) through Bin No. 2 and then to the Iselin Preparation Plant where it is broken, crushed, sized, washed, cleaned, dried and blended. The useable coal product is then directed for use in the generating station boilers to produce electrical energy.

Within this framework of evidence it is clear that at least some raw coal is transported on the 5A and 5B conveyor belts which run over the 5A and 5B head drives on its way to the Iselin Preparation Plant. At the preparation plant the coal is broken, crushed, sized, washed, cleaned, dried and blended in preparation for consumption in the Penelec generating station. These activities are all within the scope of "work of preparing coal" within the meaning of section 3(i) of the Act. It is also clear that the head drives over which the raw coal passes on its way to such preparation are "structures", "equipment", and "machinery" that is "used in or to be used in" the "work of preparing the coal". See Secretary v. Mineral Coal Sales, Inc., 7 FMSHRC 615 (1985).

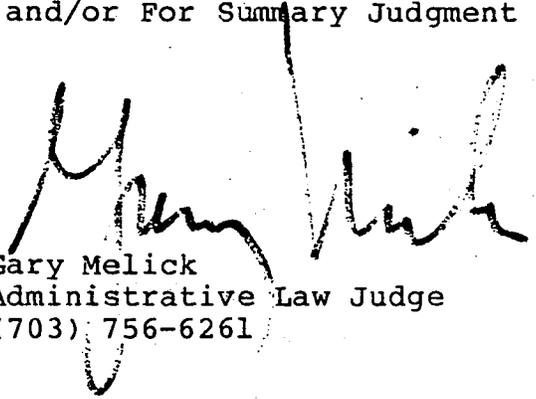
In distinguishing the Mineral Coal Sales case from the case of Secretary v. Oliver M. Elam, Jr. Company, 2 FMSHRC 1572 (1982), the Commission observed that an examination of the nature of the Mineral Siding operation reveals that, unlike the commercial loading dock in Elam in which coal was crushed merely to facilitate loading and transportation on barges, at Mineral Siding all of the above listed work activities (coal storage, mixing, crushing, sizing and loading) were performed on the coal to make it suitable for a particular use or to meet market specifications. In the instant setting a similar broad range of coal preparation activities are conducted and are directed to the particular purpose of consumption in the Penelec generating station. Under all the circumstances it is clear that the head drives of the 5A and 5B conveyor belts are indeed subject to the Secretary's jurisdiction under the Act.

In accordance with the joint stipulations, Penelec does not challenge the findings that the 5A and 5B conveyor head drives were inadequately guarded as charged in the citations and that "MSHA had otherwise satisfied its burden of proof with regard to Citations Nos. 2884282 and 2884283 and the penalties proposed therefore". I have considered the documentation and other evidence submitted in these proceedings and conclude that the evidence does indeed support the violations and the proposed penalties. In particular I find that the operator is chargeable but with little negligence. It is undisputed that Penelec was

operating on the good faith belief that the 5A and 5B conveyor head drives were subject only to the inspection jurisdiction of the Occupational Safety and Health Administration. Moreover it is undisputed that Penelec was in compliance with that administration's regulations.

ORDER

Citations No. 2884282 and 2884283 are affirmed as "significant and substantial" citations and the Pennsylvania Electric Company is directed to pay civil penalties of \$54 for each violation within 30 days of the date of this decision. In light of this decision on the merits the post-hearing Motion to Dismiss and/or For Summary Judgment filed by Respondent is denied.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution

Therese I. Salus, Esq., Office of the Solicitor, U.S.
Department of Labor, 3535 Market Street, Philadelphia, PA
19104 (Certified Mail)

Timothy N. Atherton, Esq., Pennsylvania Electric Company,
1001 Broad Street, Johnstown, PA 15907 (Certified Mail)

John P. Proctor, Esq., Bishop, Cook, Purcell, Reynolds, 1400
L Street, N.W., Washington, D.C. 20005-3502 (Certified Mail)

nt

Appendix A.

A. Procedural History

1. The Homer City Steam Electric Generating Station, Homer City, Indiana County, Pennsylvania, is operated by Penelec and owned by Penelec and the New York State Electric & Gas Corporation ("NYSEG"), each with an undivided fifty percent ownership interest.

2. On August 25, 1977, Penelec met with, discussed and reached a verbal understanding with the Mininig Enforcement and Safety Administration ("MESA"), predecessor of the Mine Safety and Health Administration ("MSHA"), regarding MESA's and the Occupational Safety and Health Administration ("OSHA")'s jurisdiction over the coal cleaning and coal handling facilities at the Homer City Station.

3. On January 7, 1988, MSHA inspector John Kopsic issued two citations to Penelec for alleged violations of 30 C.F.R. § 77.400(c) at the Homer City coal handling facility in an area known as "Conveyors 5A and 5B" (e.g., the No. 5A and 5B head drives for the belt conveyor were inadequately guarded). (See, "Coal Flow Diagram", attached hereto as Exhibit "A").

4. Notwithstanding the August 1977 understanding, MSHA has without Respondent's knowledge inspected the head drives of the 5A and 5B conveyors and did so on January 7, 1988, without prior notice to Penelec.

5. Shortly after issuance of the subject citations, Penelec requested an informal conference which was held among various Penelec and MSHA personnel on or about February 18, 1988. MSHA refused to vacate the subject citations. Richard E. Orris, Penelec's former Manager-Safety, by letter dated February 25, 1988 to Donald W. Huntley, MSHA District 2 Manager, referenced the August 1977 meeting and requested clarification from MSHA on the question of jurisdiction.

6. By letter dated April 12, 1988, Mr. Huntley informed Penelec that MSHA would be expanding its inspection activities to encompass several additional areas of the coal handling facility, including the head drives of conveyors 5A and 5B. These inspection activities would include: (1) Bin No. 1 Building, including feeders, the control room and the tails of the 5A and 5B conveyor belts; (2), Bin No. 2 Building, including motors, the plug shoot probe, control button, Conveyors 5A and 5B, and all floors; (3) Motor Control Circuit Room next to Bin No. 2 from the

Lucerne No. 6 drawoff tunnels, the No. 3 chute; conveyor, and silo, the No. 24C and 25C raw coal belts, the Grundlack crusher (not used since 1982); (4) the Pennsylvania Crusher, a truck dump, two scale houses three auger samplers, the Machine Mill drawoff tunnels, (observed in operation by Inspector Kopsic) the No. 1T, No. 2T, No. 3T and No. 4T belts, and the four raw coal truck silos and all adjoining belts.

7. Penelec's schematic "Coal Flow Diagram," attached hereto as Exhibit "B", demonstrates the movement, of coal within the Homer City coal handling facility and shows MSHA's inspection activity prior to the January 1988 inspection and as enunciated in Mr. Huntley's April 12, 1988 letter.

8. On May 16, 1988, Penelec received notification from MSHA of a proposed assessment for each violation in the amount of \$54.00.

9. On May 25, 1988, Penelec requested a formal hearing with the Mine Safety and Health Review Commission on all violations listed in the proposed assessment.

10. On June 29, 1988, Penelec received a "Petition of the Secretary of Labor for Assessment of Civil Penalty."

11. On July 28, 1988, Penelec filed an Answer to the aforesaid petition and set forth as an affirmative defense MSHA's lack of jurisdiction over Conveyors 5A and 5B and the additional areas outlined in Mr. Huntley's April 12, 1988 letter. Penelec does not challenge the Inspector's finding that the 5A and 5B conveyor head drives were inadequately guarded and that MSHA had otherwise satisfied its burden of proof with regard to Citations Nos. 2884282 and 2884283 and the penalties proposed therefore.

12. On August 3, 1988, Administrative Law Judge Gary Melick issued a pre-hearing order instructing the parties to discuss by August 22, 1988 possible settlement, witnesses, stipulation of material facts and trial dates.

13. On August 22, 1988, the parties filed a motion for extension of time until September 22, 1988 to comply with the pre-hearing order. The motion was granted by Judge Melick.

14. On August 31, 1988, Penelec filed an "Application for Temporary Relief" and on September 9, 1988, counsel for the Secretary of Labor filed an objection to the application for temporary relief.

15. On September 7, 1988, a meeting was held in Philadelphia between Penelec and MSHA representatives in order to resolve amicably the matters at issue.

16. No agreement was reached and on September 15, 1988, Judge Melick conducted a conference call with the parties and a hearing date was set for September 23, 1988, which date was rescheduled at Penelec's request to October 18, 1988 in Hollidaysburg, Pennsylvania.

B. Penelec's Operations at the Homer City Generating Station

17. The Homer City Generating Station produces electrical energy by the combustion of coal. The Generating Station has three generating units: Two (2) 600,000 kilowatt units (Units Nos. 1 and 2) placed in service in 1969 and a third 650,000 kilowatt unit (Unit No. 3) which began operating in 1977. Homer City Station burns approximately 4.5 million tons of Pennsylvania coal each year.

18. The Secretary does not claim there is jurisdiction under the Act regarding working conditions inside any of the electric generating facilities at the Homer City Station. Those conditions are regulated by the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, et seq.

19. The sulfur dioxide emission limitation requirement established by the Pennsylvania Department of Environmental Resources for Units Nos. 1 and 2 is 3.2 lbs of SO₂ per mmBtu heat input; the sulfur dioxide emission limitation requirement established by the U.S. Environmental Protection Agency for Unit No. 3 is 1.2 lbs of SO₂ per mmBtu heat input.

20. The Homer City Generating Station is supplied with coal from three sources: Helen and Helvetia (Lucerne 6, 8 and 9) mines, which are under MSHA's jurisdiction, and a truck receiving facility where coal is delivered by various outside sources. (See, Exhibits "A" and "B").

21. All coal purchases by Penelec from either the Helen or Helvetia mines or purchased from other sources and delivered at the truck receiving facility, is consumed at the generating station.

1. Coal purchased from Helen and Helvetia mines

22. Coal purchased from the Helen or Helvetia mines is delivered by conveyor belt to scales where it is weighed, sampled automatically, and title passes to Penelec and NYSEG. (See, Exhibits "A" and "B").

23. The coal from the Helvetia mines proceeds by conveyors Nos. 3 and 4 directly to Bin No. 1, where it is combined with coal from the Helen mine which also is transported to the Bin by

conveyors Nos. 1 and 2. Previously, the coal from the Helvetia mines could proceed via a Grundlack crusher (still in place) that was used for experimental purposes from 1977 until 1983. At Bin No. 1, the coal from the Helen and Helvetia mines is sampled again and then placed on conveyors 5A and 5B which transport the coal to Bin No. 2.

24. Though, after the coal is sampled, there exists the capability to divert the coal from Bin No.2 directly to the generating station, because the Helen Helvetia coal generally does not comply with EPA standards, this is rarely done. Rather, most of the coal travels from Bin No. 2 to the coal cleaning plant owned by Penelec and NYSEG and operated by the Iselin Preparation Company, a subsidiary of Rochester and Pittsburgh Coal Company. (See, Exhibits "A" and "B").

25. The coal cleaning plant, which breaks, crushes, sizes, washes, cleans, dries and blends the coal, was constructed in 1977 to provide medium sulfur compliance coal for Units Nos. 1 and 2 and low sulfur compliance coal for Unit No. 3. The Iselin Coal Preparation Plant has been inspected by MSHA since 1977.

2. Coal purchases and delivered by truck

26. When coal is delivered to the Homer City truck receiving facility, it is weighed, auger sampled and title passes to Penelec and NYSEG, after which the coal is dumped into one of four hoppers. (See Exhibit "A").

27. From the truck hoppers, the trucked coal (.6% sulfur or 1.6% sulfur or "raw" coal) is separately transported by conveyor, through the Pennsylvania Crusher, where, unless the coal is frozen or clumped together, as it was during Mr. Kopic's January 1988 inspection, the coal ordinarily bypasses the crushing mechanism. From the Pennsylvania Crusher, the coal continues on conveyor 2T to a bypass chute. From the bypass chute, the trucked coal is transported by conveyors Nos. 3T and 4T to a distribution point on top of the truck coal silos. (See, Exhibits "A" and "B").

28. From the distribution point, the low sulfur coal (0.6% sulfur) is transported by conveyor 7T to clean coal silos for direct use in Unit No. 3.

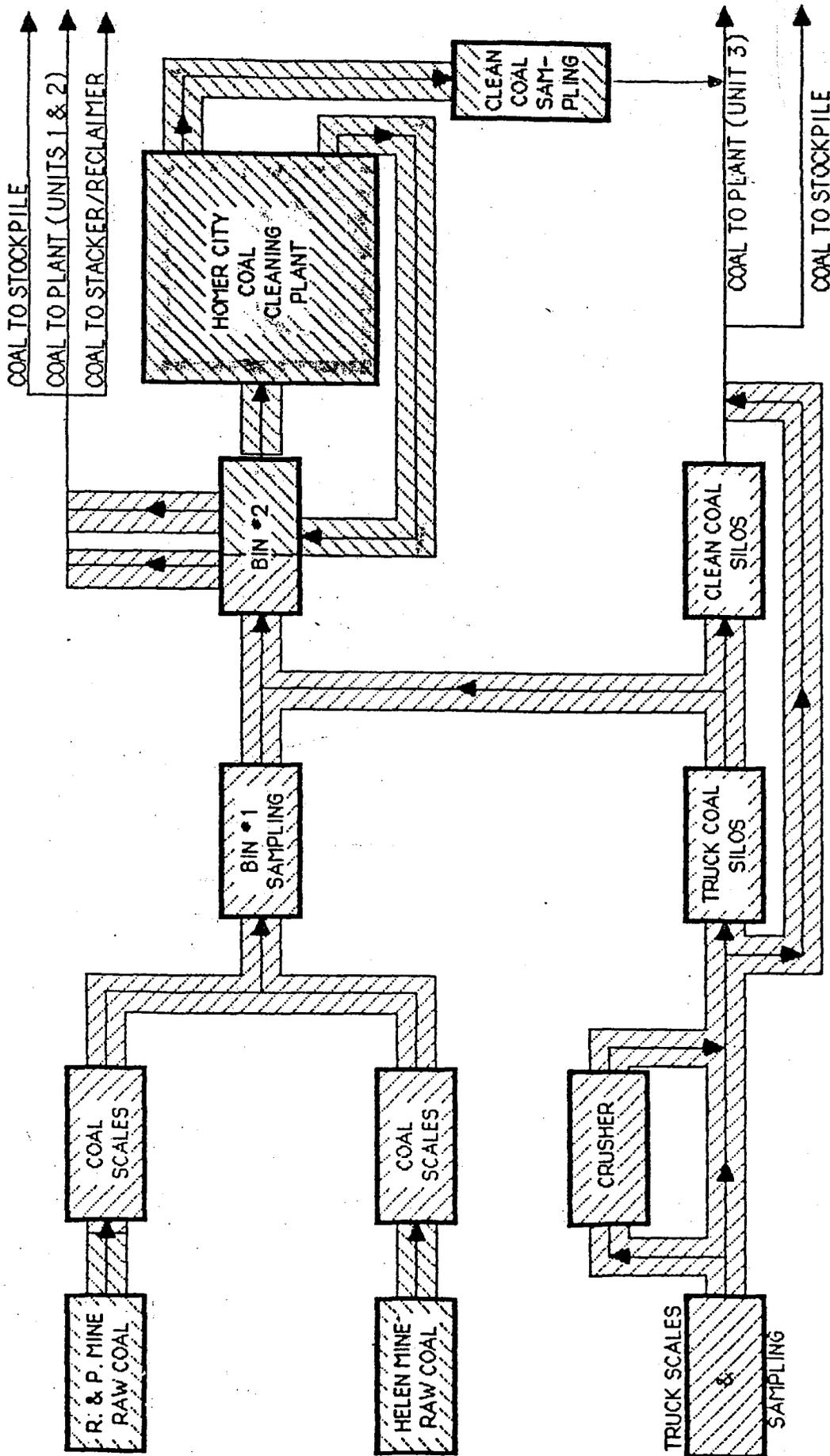
29. Medium sulfur coal (1.6% sulfur--which Respondent purchases periodically but has not done since January 1988), on the other hand, is distributed into any of the four (4) truck coal silos and then by conveyor 6T to a point immediately outside Bin No. 1 onto conveyors 5A and 5B for transport to Bin No. 2. From Bin No. 2, the medium sulfur coal proceeds by conveyor for use in Units Nos. 1 and 2.

30. Run of mine or "raw" coal follows the same path as the medium sulfur coal (1.6% sulfur) except that at Bin No. 2, the "raw" coal is diverted and transported by conveyor 1C to the coal cleaning plant (See Exhibits "A" and "B").

3. Coal from the coal cleaning plant:

31. The coal cleaning plant produces three products: (a) 15-20% of the total feed is refuse and is transported via truck by Iselin personnel to a refuse storage area; (b) 15-20% of the total feed is Unit No. 3 product and is delivered to the clean coal silos via Conveyor 17C or to the clean coal stockpile via Conveyor 21; and (c) the remaining 60% of the feed is Units Nos. 1 and 2 product and is delivered by Conveyor 8C back to the top of Bin No. 2 where it is distributed to the stockpile via Conveyor 6 or through Feeders 7A and 7B onto Conveyor 7 to the stacker reclaimer.

32. The stacker reclaimer either directs the coal to an active stockpile for later reclamation or passes the coal directly to the generating station boilers.



HOMER CITY STATION COAL FLOW DIAGRAM

MSHA INSPECTION ACTIVITY
SINCE 1977

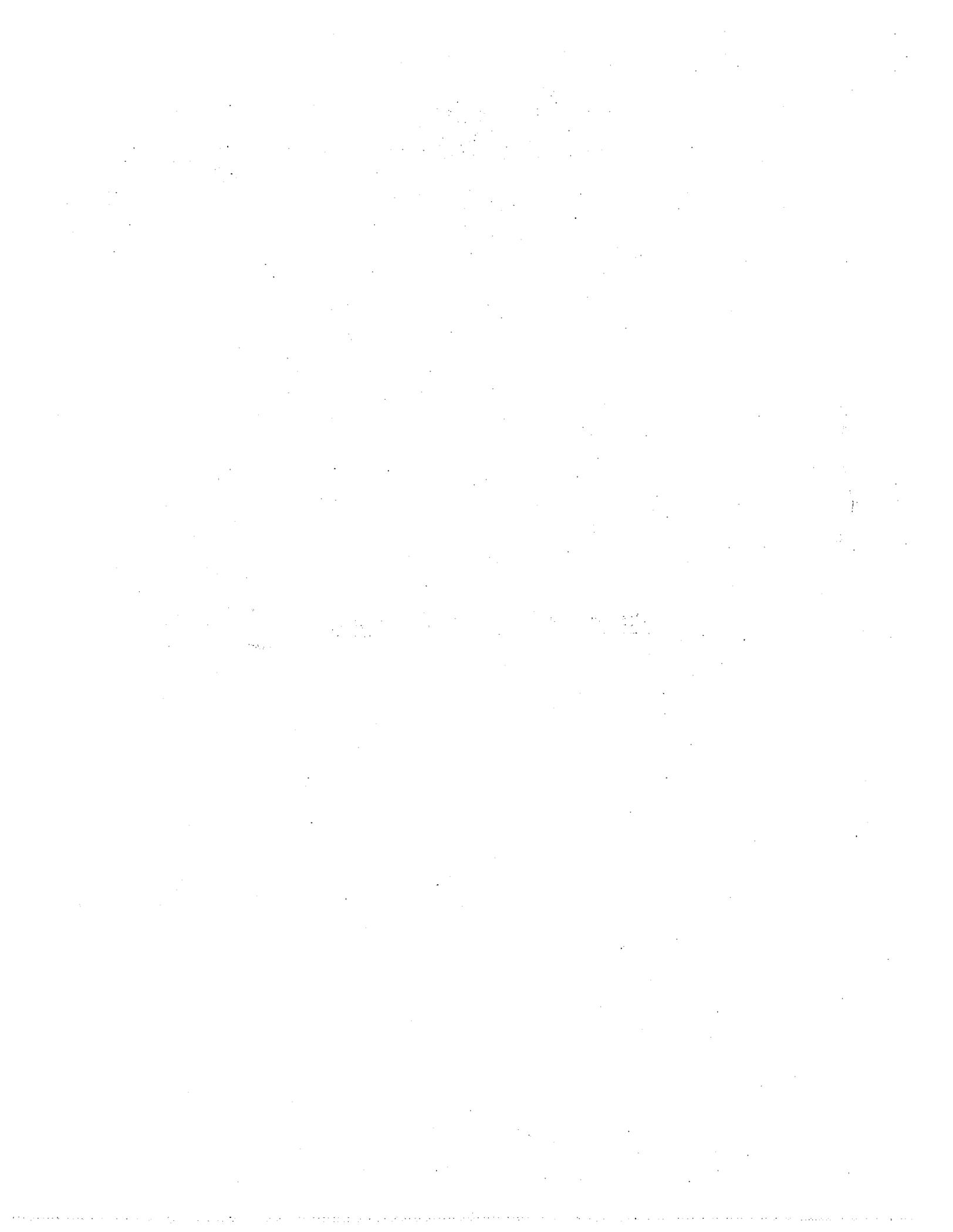
ADDITIONAL AREAS OF INSPECTION
ACTIVITY PURSUANT TO D. HUNTLEY'S
LETTER OF APRIL 12, 1988

EXHIBIT B

9/19/88

B. L. DORE

ADMINISTRATIVE LAW JUDGE ORDERS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

November 10, 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 88-231
Petitioner : A.C. No. 05-00301-03549
 :
v. : Dutch Creek No. 1 Mine
 :
MID-CONTINENT RESOURCES, INC., :
Respondent :

ORDER

1. Respondent has served on petitioner certain interrogatories and requests for production of documents.

2. Petitioner responded thereto and a number of objections have been posted by the petitioner. The parties orally argued to their respective positions in a conference call on November 9, 1988.

On respondent's motion to compel, I find the following issues:

Interrogatory No. 8 poses the following question to which respondent filed the following answer.

8. As to each of the foregoing orders, list by name, address, place of employment and occupation, each person the issuing MSHA inspector contacted in the course of the issuing inspector's investigation prior to the issuance of each of said orders.

Answer No. 8. Order No. 3223449 - George Prewitt.

Order No. 2832627 - David Powell

The identity of any miner who discussed this citation with the inspector will be protected as confidential and disclosure of any identity is hereby objected to.

Discussion

Commission Rule 59, 29 C.F.R. § 2700.59, provides as follows:

§ 2700.59 Name of miner witnesses and informants.

A Judge shall not, until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the Judge to testify or whom a party expects to summon or call as a witness. A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.

The judge is bound by the foregoing Commission Rule. Accordingly, respondent's motion to compel discovery as to the identity of any such miner is denied. However, petitioner is directed to state whether any miners are to be called as witnesses and to state the number of such witnesses without disclosing their identity.

Respondent's motion to compel, as modified herein, is granted.

Interrogatory No. 9 poses the following question to which respondent filed the following answer:

9. As to each of the foregoing orders, please identify what fact(s) or data, if any, relied upon by the issuing inspector, elicited during the pre-order or pre-citation investigation, was provided by what person(s), if any, named responsive to Interrogatory No. 8.

Answer No. 9. Response to Number 8 above is hereby incorporated.

Discussion

Facts relied upon do not identify any miner that may be involved. Respondent's motion to compel is granted.

Interrogatory No. 10 poses the following question to which respondent filed the following answer:

10. As to each of the foregoing orders, please identify the name and address of each person petitioner expects to call as a witness at the hearing in this matter, and with respect to each person:

a. State the subject matter about which the person is expected to testify:

b. State the substance of the facts or the expected testimony about which the person is expected to testify:

c. State the substance of the opinions, if any, to which the person is expected to testify:

d. Summarize the grounds for each opinion.

Answer No. 10. The Secretary has not yet determined what witnesses will be called to testify, but will state that Phil Gibson and Lee Smith may be called to testify in this matter.

Discussion

The parties have agreed that, except for the identity of minor witnesses, petitioner will answer Interrogatory 10 by November 22, 1988.

Accordingly, respondent's motion to compel is granted.

Interrogatory No. 11 poses the following question to which respondent filed the following answer.

11. As to each of the foregoing orders, please identify and describe each exhibit which petitioner intends to mark and offer as an exhibit in evidence at the hearing on the foregoing citations or orders.

Answer No. 11. The Secretary will mark and introduce the MSHA History of Assessed Violations. At this time, the Secretary has not determined what, if any, other exhibits will be used.

Discussion

The same agreement and ruling is entered herein as provided above as to Interrogatory No. 10.

Interrogatory No. 13 poses the following question to which respondent filed the following answer.

13. Please state, if not in writing and subject to one of the following requests for production, the enforcement policy or policies affecting Mid-Continent Resources, Inc. as determined and put in effect by each of the following persons: J.L. Spicer, Ron Schell, John W. Barton, William A. Holgate, and/or J.M. DeMichiei.

Answer No. 13. All formal policies are placed in writing by MSHA. All other policies are protected by the deliberative-process privilege and objection is hereby made to this request.

Discussion

The claim of privilege asserted by petitioner is sustained and respondent's motion to compel is denied.

Request for Production of Document No. 17 asks for the following to which respondent responded as follows:

17. As to each of the foregoing orders, please provide legible copies of any and all documents which petitioner intends to mark and offer as exhibits to be received in evidence in the trial of this matter.

Response No. 17. The Secretary has not yet determined what evidence will be introduced.

Discussion

Petitioner has agreed to produce all such document's by November 22, 1988. Petitioner will further submit a final update by November 25, 1988.

Accordingly, respondent's motion to compel is granted.

Request for Production of Document No. 18 asks for the following to which respondent responded as follows:

18. Any and all notes of memoranda concerning enforcement at Mid-Continent Resources, Inc.'s operations in Coal Basin, Colorado.

Response No. 18. Objections, this request is burdensome and requests documents that are confidential.

Discussion

This request is overly broad. The thrust is directed at Mid-Continent's assertions that the Secretary has abused his prosecutorial discretion. This issue has been partially heard and is pending before the undersigned Judge in WEST 89-3-R. If the Commission has jurisdiction to review an alleged abuse of discretion by the Secretary (an issue not yet determined but pending before the undersigned Judge) then requests of this type should be presented, argued and briefed in WEST 89-3-R. In sum, an orderly record requires that all of these issues be presented in one case.

Petitioner's objections are sustained and respondent's motion to compel is denied.

Request for Production of Document No. 19 asks for the following to which respondent responded as follows:

19. Any and all memoranda or memorial of enforcement policies affecting Mid-Continent Resources, Inc. developed or promulgated by J.L. Spicer, Ron Schell, John W. Barton, William A. Holgate, and/or John M. DeMichiei.

Response No. 19. Objection, this request is burdensome and calls for documents that are confidential.

Discussion

The same ruling is made herein as to the Request for Production involved in Request No. 18.

Request for Production of Document No. 20 asks for the following to which respondent responded as follows:

20. Any and all notes or memoranda other than the informant's name made from telephone calls or personal contacts by MSHA personnel with Mid-Continent (other than management) personnel regarding Mid-Continent (other than management) personnel regarding Mid-Continent's operations and/or alleged violations.

Response No. 20. No documents exist regarding these violations and objection is made as the request calls for confidential information.

Discussion

Petitioner has agreed to comply with this request and respondent accepts the limitation that the request be limited to Docket No. WEST 88-230 and WEST 88-231.

Accordingly, respondent's motion to compel, as modified, is granted.

Request for Production of Document No. 21 asks for the following to which respondent responded as follows:

21. Any and all notes or memoranda pertinent to the criteria, review, and processing of special assessment violations.

Response No. 21. Objection, this request is overbroad, burdensome, and calls for privileged material.

Discussion

Controlling case law establishes that a mine operator, prior to a hearing, may raise the issue that in proposing a penalty the Secretary failed to comply with his Part 100 penalty regulations. Youghiogeny and Ohio Coal Company, 9 FMSHRC 673, 679-680 (1987).

Accordingly, respondent's motion to compel is granted.

Request for Production of Document No. 22 asks for the following to which respondent responded as follows:

22. Any and all notes or memoranda received by MSHA from the U.S. Department of Labor Inspector General, the General Accounting Office, or any other federal or state investigative agency concerning complaints and/or mining methods or practices conducted at Mid-Continent Resources, Inc.

Response No. 22. Objection, this request is overbroad, burdensome, and calls for privileged material.

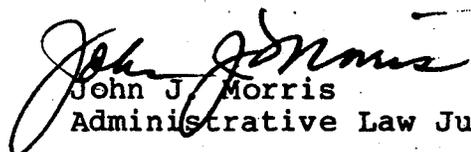
Discussion

The same ruling is entered herein as in Request No. 18.

ORDER

For the reasons stated above and for additional reasons agreed to in the conference call, the undersigned enters the following order:

1. The above rulings are confirmed.
2. The rulings herein are controlling as to the same issues pending in WEST 88-230.
3. Petitioner has been ordered to answer interrogatories and requests herein within certain time frames. Respondent is likewise ordered to answer petitioner's interrogatories and requests within the same time frames.


John J. Morris
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294

Edward Mulhall, Jr., Esq., Delaney & Balcomb, 818 Colorado Avenue, P.O. Drawer 790, Glenwood Springs, CO 81602

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

December 22, 1988

MID-CONTINENT RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 89-3-R
v.	:	Order No. 3077666; 9/23/88
	:	
SECRETARY OF LABOR,	:	Dutch Creek Mine
MINE SAFETY AND HEALTH	:	Mine ID 05-00301
ADMINISTRATION (MSHA),	:	
Respondent	:	

ORDER

This contest proceedings arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., ("the Act").

Mid-Continent Resources, Inc. (Mid-Continent) has contested a 104(d)(2) order issued under the Act. The Order, No. 3077666, alleges Mid-Continent violated 30 C.F.R. § 75.1704. 1/

1/ The regulation provides as follows:

§ 75.1704 Escapeways

[Statutory Provisions]

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

The order alleged the following condition:

The intake air escapeway was not maintained in a safe travelable condition. Part of the escapeway has heavy roof problems, however, it is supported by truss bolts, resin bolts, some 6" x 6" timber and 3 cribs. The bottom has heaved for approximately 800 feet causing problems in traveling or moving disabled persons quickly to the surface in the event of an emergency. The travelway needs to be cleaned with equipment to make it safe.

In addition to its contest of Order No. 3077666 Mid-Continent further alleged that the order is part of a persuasive on-going policy of abuse against Mid-Continent by the Secretary through MSHA's District Manager. Said alleged abuse, implemented by MSHA's supervisors and inspectors, seeks to subject Mid-Continent to shutdowns of its major mining units whenever possible, and whether properly or not. Mid-Continent further asserts that the order issued by MSHA was arbitrary, capricious and improper.

When Mid-Continent filed its notice of contest it further requested an expedited hearing.

The motion for an expedited hearing was granted and a two day hearing, commencing October 12, 1988, was held in Glenwood Springs, Colorado.

At the hearing both parties presented evidence concerning Order No. 3077666. The evidentiary record has been closed on that phase of the case (Tr. 442-443). At the hearing Mid-Continent, over the Secretary's objection, also presented evidence in support of its view that the Secretary abused her statutory discretion in enforcing the Act at Mid-Continent's mine.

At the close of Mid-Continent's evidence the Secretary orally moved the judge to dismiss all issues involving the alleged abuse of discretion by the Secretary.

The issue of an alleged abuse of discretion was initially raised in this expedited hearing. Accordingly, after the entry of an order on the issue of jurisdiction the judge indicated he would grant the Secretary time to consider whether she would stand on her motion to dismiss or seek an evidentiary hearing to present her evidence on that issue (Tr. 444).

On October 17, 1988 the judge sua sponte directed the parties to file briefs addressing the issue of whether the Commission has jurisdiction to consider an alleged abuse of discretion. Such briefs were filed.

Issue

The issue presented here is whether the Commission has jurisdiction to review the alleged abuse of discretion by the Secretary in enforcing the Mine Safety Act at Mid-Continent's Mine in the 12 months ending September 30, 1988.

Mid-Continent asserts the Commission not only has such jurisdiction but a corresponding duty to consider allegations of Secretarial or agency abuse. Further, Mid-Continent argues that Commission has review and oversight authority over any misfeasance, malfeasance or abuse if the Commission determines such conditions exist. Finally, it is contended that the Commission has wide jurisdictional latitude and authority to fashion "other appropriate relief" for such conditions.

Discussion

It is a fundamental principle that, as an administrative agency created by statute, the Commission cannot exceed the jurisdictional authority granted to it by Congress. See e.g., Civil Aeronautics Board v. Delta Airlines, 367 U.S. 316, 322 (1961); Lehigh & New England R.R. v. ICC, 540 F.2d 71, 78 (3rd Cir. 1976); National Petroleum Refiners Assoc. v. FTC, 482 F.2d 672, 674 (D.C. Cir. 1973). The Commission is an independent adjudicative agency created by section 113 of the Mine Act, 30 U.S.C. § 823, to provide trial-type proceedings and administrative appellate review in cases arising under the Act. Several provisions of the Mine Act grant subject matter jurisdiction to the Commission by establishing specific enforcement and contest proceedings and other forms of action over which the Commission judicially presides: e.g., section 105(d), 30 U.S.C. § 815(d), provides for the contest of citations or orders, or the contest of civil penalties proposed for such violations; section 105(b)(2), 30 U.S.C. § 815(b)(2), provides for applications for temporary relief from orders issued pursuant to section 104; section 107(e), 30 U.S.C. § 817(e), provides for contests of imminent danger orders of withdrawal; section 105(c), 30 U.S.C. § 815(c), provides for complaints of discrimination; and section 111, 30 U.S.C. § 821, provides for complaints for compensation. Specific provisions, such as these, delineate the scope of the Commission's jurisdiction.

In view of the arguments advanced by Mid-Continent it is necessary to consider the statutory provisions in detail together with the legislative history of the Act.

Section 105(d) of the Act, 30 U.S.C. § 823(d)(1) provides as follows:

(d) If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and 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 on findings of fact, affirming, modifying, or vacating the Secretary's citation, order or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedures prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104. [Emphasis added by Mid-Continent].

The portions of section 105(d) emphasized by Mid-Continent in no way enlarge the Commission's jurisdiction. The hearing the Commission must afford relates to the specific matters set forth in section 105(d) and elsewhere in the Act. As stated, the Commission shall issue an order as to the citations, orders or proposed penalties. It may also direct "other appropriate relief" but this relief involves such specific citations, orders or proposed penalties. It is a fundamental rule of statutory construction that adjudication of an issue must start with the plain language of the statute. Rubin v. United States, 449 U.S. 424, 430 (1981); International Union, UMWA v. Federal Mine Safety and Health Review Commission, 840, F.2d 77, 81 (D.C. Cir. 1988). I believe the statute is clear.

Mid-Continent urges the Commission to interpret its authority under section 105(d) as broadly as it has interpreted section 105(c)(2). In support of such a broad view Mid-Continent cites Northern Coal Co., 4 FMSHRC 126, 142; Glen Munsey v. Smitty Baker Coal Co., Inc., 2 FMSHRC 3463, 3464 (1980) and NLRB v. Rutter-Rex Mfg., Co., 396 U.S. 258, 263 (1969). In addition,

Mid-Continent claims the legislative history removes any doubts on these points:

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

S. Rep. No. 95-181, above, 37, reprinted in Leg. Hist. 625. [Emphasis added by Mid-Continent]

Mid-Continent's arguments are misdirected. Section 105(d) sets forth some but not all of the situations where the Commission has jurisdiction. The expression "other appropriate relief" in Section 105(c) deals with the fashioning of remedies. It does not follow that the authority to fashion such remedies can also be used to encompass Mid-Continent's allegations.

The cases cited by Mid-Continent are not inopposite these views.

In urging a broad construction of the statutory expression of "other appropriate relief" Mid-Continent also relies on Climax Molybdenum Co., 2 FMSHRC 2748, 2751-52 (1980), aff'd sub nom. Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447, 452 (10th Cir. 1983); Youghiogheny & Ohio Coal Co., 7 FMSHRC 200, 203 (1985) as well as Kaiser Coal Corporation 9 FMSHRC 1165 (1988).

I agree the Commission may grant declaratory relief in appropriate circumstances. However, such appropriate relief must necessarily relate to the contested order or citation. But Mid-Continent cannot fuse the contest of an order with its claims of agency abuse. It is clear that declaratory relief cannot be a vehicle to enlarge jurisdiction. Colorado Westmoreland, 10 FMSHRC 1236 (1988).

Section 113(d)(1) of the Act, 30 U.S.C. § 823(d)(1) provides as follows:

(d)(1) An administrative law judge appointed by the Commission to hear matters under this Act shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the

chief administrative law judge of the Commission or by the Commission, and shall make a decision which constitutes his final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2). An administrative law judge shall not be assigned to prepare a recommended decision under this Act.

The foregoing section of the Act merely addresses the province of the Commission's administrative law judges. This section adds nothing to the Commission's jurisdiction.

Section 113(d)(2)(A)(ii) of the Act, 30 U.S.C. § 823(d)(2)-(A)(ii), provides as follows:

(ii) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

- (I) A finding or conclusion of material fact is not supported by substantial evidence.
- (II) A necessary legal conclusion is erroneous.
- (III) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.
- (IV) A substantial question of law, policy or discretion is involved.
- (V) A prejudicial error of procedure was committed.

The foregoing section and (A)(i) thereof mandates the standards for the Commission's review of administrative law judges decisions under the Act.

This section does not increase to Commission's jurisdiction. There are many substantial questions of law, policy or discretion involved in the various orders, citations and penalties arising under the Act. A review of the many Commission decisions discloses such issues.

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

[Emphasis added by Mid-Continent]

Mid-Continent argues that this provision of the Mine Act clearly shows that one of the purposes of the Act and the Commission's oversight of MSHA is to ensure that oppressive enforcement does not place an operator at the risk of being put out of business by the instant order and MSHA's alleged abuse of discretion.

I reject Mid-Continent's argument. The cited portion of Section 110(i) is clearly interwoven with the assessment of civil penalties. It does not form a separate basis to confer jurisdiction.

Legislative History

Mid-Continent cites extensive portions of the legislative history of the Act and observes that the reasons for creating the Commission are contained in the legislative history. For example:

The Committee's oversight of the enforcement and administration of the mine safety laws has demonstrated that the Department of the Interior has been seriously deficient in past years in its enforcement and administrative responsibilities under these statutes. S. 717 is designed and drafted to correct these deficiencies and make the enforcement of the mine safety laws more responsible to the demonstrated needs of our nation's miners and the mining industry.

[Emphasis added by Mid-Continent]

And, explaining the function of an independent Commission: The bill provides a right to contest orders and proposed penalties before the Commission.

The Committee realizes that alternatives to the establishment of a new independent reviewing body exist. For example, under the present Coal Act, review of contested matters is an internal function of the Secretary of the Interior who has established a Board of Mine Operations Appeals to separate his prosecutorial and investigative functions from his adjudicatory functions.

The Committee also recognizes that there are organizational and administrative justifications for avoiding the establishment of new administrative agencies. However, the Committee believes that the considerations favoring a completely independent adjudicatory authority outweigh these arguments.

The Committee believes that an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program.

[Emphasis added by Mid-Continent]

S. Rep. No. 95-181, Committee on Human Resources on S. 7187, Federal Mine Safety and Health Act of 1977, as amended, at 8-9, 47, 95th Cong., 1st Sess. (1977).

In reporting the conference changes to what became the 1977 Mine Act, the House characterized the functions of the Commission as follows:

The conference substitute provides for an independent Federal Mine Safety and Health Review Commission. This Commission is assigned all administrative review responsibilities and is also authorized to assess civil penalties. The objective in establishing this Commission is to separate the administrative review functions from the enforcement functions, which are retained as functions of the Secretary. This separation is important in providing administrative adjudication which preserves due process and installs confidence in the program. This separation is also important because it obviates the need for de-novo review of matters in the courts, which has been a source of great delay.

[Emphasis added by Mid-Continent]

123 Cong. Rec. H 11644 (daily ed. October 27, 1977)
(Remarks of Rep. Gaydos).

Mid-Continent argues that the legislative history of the Mine Act also shows that it was a consistent intention of the Congress that the Commission be created as a check on possible abuses of enforcement discretion by the Secretary. As the Senate Committee explained its plan a full year before the Act was enacted:

THE MINE SAFETY AND HEALTH REVIEW COMMISSION

Organization of the Commission

The bill provides to an operator the right to contest any citation, order or penalty before the Commission, which is established under section 114 [sic] of the Act. The

Committee believes that an independent Commission is essential to provide impartial adjudication of these matters and protect the constitutional rights of operators.

Although the Commission is patterned after the Occupational Safety and Health Review Commission, the Committee believes that the heavy caseload of that commission and the peculiar technical matters involved with mine health and safety problems warrant the establishment of an independent Commission.

[Emphasis added by Mid-Continent]

S. Rep. 94-1198, Committee on Labor and Public Welfare, Federal Mine Safety and Health Amendments Act of 1976, at 40, 94th Cong., 2nd Sess. (1976).

No doubt the Congress has oversight authority over the administration of the Act. However, a fair reading of the legislative history indicates that Congress did not consider any abuse of discretion by the Secretary in the enforcement of the Mine Act.

If it had considered that facet Congress might have vested jurisdiction with the Commission. But, as previously observed, the Commission's jurisdiction is limited.

Mid-Continent finally and simply asserts there is no other forum except the Commission. It declares the legislative history contemplates that the Commission, and of necessity its administrative law judges, have the duty to protect the constitutional rights of operators. In support of its position Mid-Continent cites the legislative history as well as American Coal Co. v. U.S. Department of Labor, 639 F.2d 659, 660-62 (10th Cir. 1981); Louisville & Nashville RR Co. v. Donovan, 713 F.2d 1243, 1245-46 (6th Cir. 1983) and Bituminous Coal Operators' Ass'n v. Marshall, 82 F.R.D. 350, 352 (D.C. 1979).

The cited cases are not in opposite the views expressed in this order. In American Coal it was ruled the District Court lacked subject matter jurisdiction. Specifically, the Court held that an order issued by an MSHA inspector pursuant to section 103(k) was subject to review by the Commission even though the section contains no specific reference to such review. In American Coal the appellate Court specifically relied on that portion of the legislative history that an operator "may appeal to the Commission the issuance of a closure order. . ." 639 F.2d at 661. [A 103(k) order can often result in a mine closure].

In Louisville and National RR, involving black lung benefits, the appellate Court ruled the District Court lacked subject matter jurisdiction where there existed a special statutory review procedure, 713 F.2d at 1243.

Bituminous Coal Operators Ass'n supports the Secretary and not Mid-Continent. As the Court noted the review of orders and citations arising under the Act are vested in the Commission, 82 F.R.D. at 352.

Mid-Continent is not without a remedy. With respect to the orders (or citations) issued during the period of the alleged abuse of discretion each must stand or fall on its own merits. If the order is held valid on the facts presented then no abuse of discretion existed with respect to that order. If, on the other hand, the order is vacated any abuse of discretion that may be involved is cured with respect to that order.

In sum, the Mine Act enabling statutes do not grant the Commission authority to determine the appropriate level of enforcement at a particular mine.

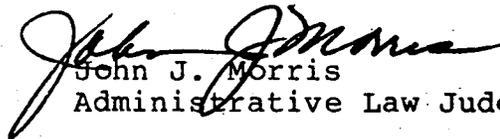
For the reasons expressed herein I enter the following:

ORDER

1. The motion of the Secretary to dismiss contestant's broad allegations of alleged abuse in the enforcement of the Act at Mid-Continent's mine is granted.

2. If contestant desires to preserve this issue in pending and future cases it is directed to prepare and submit an offer of proof in relation thereof in such other cases.

3. The parties are granted 30 days to file such post-trial briefs as they desire as to Order No. 3077666 concerning the alleged violation of 30 C.F.R. § 75.1704.


John J. Morris
Administrative Law Judge

Distribution:

Edward Mulhall, Jr., Esq., Delaney & Balcomb, Drawer 790,
Glenwood Springs, CO 81602

James H. Barkley, Esq., Office of the Solicitor, U.S. Department
of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO
80294

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 23, 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 87-8
Petitioner : A.C. No. 44-05185-03544
v. :
 : Mine No. 1
ADKINS COAL CORPORATION, :
Respondent :
 :

ORDER

On August 4, 1988, Petitioner filed a Motion to Permit Discovery, requesting an order permitting the initiation of discovery, pursuant to 29 C.F.R. § 2700.55(a), inasmuch as the Motion was filed beyond 20 days after the filing of the Petition for Assessment of Civil Penalty.

On August 25, 1988, a Stay Order was issued, pursuant to Respondent's Motion for Continuance filed on August 11, 1988, which was not opposed by Petitioner, pending the filing of a 110(c) action against certain individuals concerning the same subject matter as the above case. In a conference initiated by the undersigned with Counsel for both Parties on December 8, 1988, it was indicated that a request for hearing with regard to the 110(c) action had been filed. On December 15, 1988, Respondent submitted a statement in response to Petitioner's First Request for Production of Documents which had been filed along with Respondent's Motion on August 4, 1988.

In its Motion, Petitioner alleged that the discovery sought is relevant, reasonably calculated to lead to the discovery of admissible evidence, within the knowledge and custody of the Respondent, and will assist Petitioner in the preparation for trial.

Petitioner's First Request for Production of Documents seeks discovery of documents contained in "the personal notebook maintained by the mine foreman." Respondent argues that the notebook is to be considered an attorney work product, inasmuch as it ". . . was maintained by the mine foreman on the advise and pursuant to instruction by Counsel." (sic).

Based upon the representations in Petitioner's Motion, which have not been challenged by Respondent in its statement filed on December 15, 1988, I find that good cause has been established, and discovery may be permitted. 29 C.F.R. § 2700.55(c), in essence, provides that discovery includes relevant material that is not privileged, and which is either admissible or appears reasonably calculated to lead to the discovery of permissible evidence. In order to eliminate surprise and allow the Parties to prepare for trial, in general, the rules of discovery should be broadly applied (See Hickman v. Taylor, 329 U. S. 495 (1947)). Although Respondent maintains that the notebook in question should be considered an attorney work product, as it was maintained by the mine foreman on the advice and pursuant to instructions by Counsel, Respondent has not alleged that the notebook in question was maintained in preparation for trial (c.f. Rule 26(b), Federal Rules of Civil Procedure). Clearly, any notebook kept, even on the advice of Counsel, in the regular course of the business would be outside the "work product" protection (See cases cited in Moore's Federal Practice at 26-354, 355). Further, inasmuch, as the notebook in question appears to be in the exclusive control of Respondent, it would appear that Petitioner would suffer undue hardship should discovery not be allowed (Rule 26(b)(3), supra).

Accordingly, it is ORDERED that Petitioner's Motion to permit discovery is GRANTED and Petitioner's First Request for Production of Documents is allowed.


Avram Weisberger
Administrative Law Judge
(703) 756-6210

Distribution:

Charles Jackson, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Charlie R. Jessee, Esq., Compton & Jessee, P.C., 180 East Main Street, Abingdon, VA 24210 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 27 1988

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 89-31-D
ON BEHALF OF	:	
DAVID S. HAYNES	:	MORG CD 88-18
Applicant	:	
v.	:	Mine No. 6
	:	
DECONDOR COAL COMPANY, INC.,	:	
Respondent	:	
	:	

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Mary K. Spencer, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia;
David Morrison, Esq., Harry P. Waddell, Esq.,
Steptoe & Johnson, Clarksburg, West Virginia.

Before: Judge Weisberger

I.

On November 2, 1988, the Secretary, on behalf of David S. Haynes, filed an Application for Temporary Reinstatement, alleging, in essence, that the complaint of discharge filed by Haynes was not frivolous. On November 14, 1988, Respondent filed a statement alleging that there was reasonable cause for the discharge of the Applicant, and alleging further that the Applicant cannot be temporarily reinstated to his former position ". . . as the job is no longer available." In its Statement, Respondent also requested a hearing.

On November 15, 1988, the undersigned arranged a telephone conference call between Counsel for Applicant and Respondent's President in order to arrange a hearing date. At that time Respondent advised that it would be represented by Counsel. On November 17, 1988, in a conference telephone call with the undersigned and Counsel for both Parties, it was agreed that the Parties would confer for the purpose of discussing settlement, and in the event that no settlement would be reached, the matter was set for hearing on December 7, 1988, in Clarksburg, West Virginia. The matter was not settled, and was subsequently heard on December 7, 1988. At the hearing, the Applicant waived

his right to have a hearing within 10 days following receipt by the Chief Judge of the Request for Hearing. At the hearing, David Stanley Haynes, the Applicant, testified on his own behalf, and Jack Duane Hovatter, Johnny Paul Williams, and James Edward Martin testified for Respondent. At the conclusion of the hearing, Counsel for Applicant indicated she desired to file a Post Hearing Brief and the Applicant waived his right to have an Order issued in this matter within 5 days following the close of the hearing. It was ordered that Briefs were to be filed by Express Mail on December 16, 1988. Briefs were filed on December 19, 1988.

II.

The Applicant had filed a Complaint of Discrimination dated August 1, 1988, alleging, in essence, that on July 19, 1988, as shift foreman, he removed his men from working in the area designated by John Williams, the mine foreman, on the ground that the conditions therein were hazardous. The complaint further alleges that on July 20, 1988, Haynes explained to Williams that, in essence, he did not cut in the area as instructed, due to the nature of the conditions therein, and Williams in turn fired him.

Haynes, in essence, testified that he was employed by Respondent from May 14, 1988 to July 20, 1988, as the second shift (afternoon) foreman and miner helper. It was the testimony of Haynes that prior to commencing the shift on July 19, 1988, Williams told him, in essence, to set a water pump in the 3R back cut area as there was a lot of water which had accumulated, and then to mine the area as many times as he could. Haynes indicated that in the process of loading coal, the shuttle car cable, which he described as being in poor shape, was in mud and water and kept knocking out the power on the outside. He said that the pump was not working inasmuch as there was much mud in the dip, and it kept clogging up. He said that he was concerned about the danger to one of the miners of accidental electrocution. He indicated that such an accident could occur if a miner would come in contact with a transformer during the time the power was knocked out, and then remain in contact when the power was turned back on. Accordingly, Haynes stopped mining in the area and removed his men. He said that at the end of his shift he left a note for Williams to repair the cable and also indicated that the power kept knocking out.

Haynes indicated that at the beginning of the day shift the following day, Williams called him and asked him why he did not cut the 3R back cut, and Haynes explained that he tried, but that the power kept knocking out, and he was concerned that someone would get hurt, so he took the men out. Haynes said that in response Williams told him that he was finished and to get his clothes.

Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (The Act), in essence, provides that if the Secretary finds that a complaint of discrimination ". . . was not frivolously brought," the Commission upon application of the Secretary, ". . . shall order the immediate reinstatement of the miner" 29 C.F.R. § 2700.44(c) provides, in essence, that at a hearing concerning an application for temporary reinstatement, the burden of proof is on the Secretary to establish that the complaint "is not frivolously brought."

It is the position of the Respondent that the Applicant cannot prevail in any action alleging a violation of section 105(c) of the Act, inasmuch as he failed to communicate to management his concern about hazardous working conditions on July 19, 1988. In this connection it is noted that Haynes did not communicate to any of his superiors on July 19, 1988, any of his safety concerns. Respondent thus argues that since Applicant cannot ultimately prevail in any section 105(c) action, it must be found that it has not been established that the complaint was not frivolously brought. I do not find merit to Respondent's argument. The legislative history of the Federal Mine Safety and Health Act of 1977, indicates that the language creating the right of a miner to be reinstated temporarily where his complaint of discrimination was not "frivolously brought," was first inserted in the Senate's version (S.717, 95th Congress, 1st Session 1977). The Report on the Senate Bill from the Committee on Human Resources (S. Rep. No. 95-181, 95th Cong., 1st Sess. (1977), in explaining the provisions of the Bill, indicates that the Secretary shall seek an Order of the Commission for temporary reinstatement when it determines that the complaint ". . . appears to have merit" (Reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978)). [Hereinafter cited as 1977 Legislative History.] There is no further discussion in the legislative history of the Act of the meaning Congress intended to place on the term "was not frivolously brought." Clearly Congress intended this term to encompass its usual accepted meaning. In this connection, I note that Webster's New Collegiate Dictionary (1979 edition) defines frivolous as "1: of little weight or importance" The testimony of Haynes, not rebutted by Respondent, tends to establish that the complaint was brought to protest his being fired after he took action based on his perception of various safety hazards. I do find that in order to prevail, Applicant must establish no more than proving that his complaint is not of little weight or importance. Congress in enacting section 105(c)(2), supra, did not choose to use the term "substantial likelihood" of prevailing, which it used in section 105(b)(2)(B) as a precondition to the granting of

temporary relief from modification of an Order issued under section 104(c). Hence, Applicant does not have the burden of establishing here a likelihood of prevailing in any section 105(c) action. Respondent thus cannot defeat Applicant's case by establishing that he would not prevail in a 105(c) action.

Also, inasmuch as the scope of the hearing was limited, pursuant to 29 C.F.R § 2700.44(c), to the issue of whether the complaint was frivolously brought, it is possible that the issue of notice to Respondent of the hazardous conditions, was not fully litigated. Nonetheless, I observed the demeanor of both witnesses and found Haynes more credible in his testimony that, in the note to Williams, that he left at the end of the shift on July 19, 1988, he informed the latter to repair the cable, and also stated that the power kept knocking out. Also, Williams indicated that Haynes had told him in the telephone call Williams made to him on the morning of July 20, that the power was going out and the cable of the buggy was smoking. For all these reasons, I conclude that the Applicant has established that the complaint herein was "not frivolously brought."

III.

Pursuant to section 105(c)(2), supra, once it has been established that a complaint has not been frivolously brought, the "immediate reinstatement" of the miner shall be ordered pending final order on the complaint. It is Respondent's position that had Haynes not been fired on July 20, he would have been part of an economic lay off on July 30, 1988, and thus should not be reinstated, as it would put him in a better position than he would have been in had he not been discharged. In this connection, Jack Duane Hovatter, Respondent's superintendent and its secretary/treasurer, who owns the company with his two brothers, indicated that, in general, the Respondent was losing money in 1988. He said that in the second quarter of 1988 it lost \$39,000, and in the third quarter of 1988 it made a profit of \$10. Accordingly, in approximately March 1988, the midnight shift was eliminated, and two employees were laid off. He said that for about a year he and his brothers talked about eliminating the afternoon shift. Hovatter said that about July 1, 1988, it was decided to end that shift by July 30, 1988. He indicated that the lay off was accelerated to July 20, 1988, when Haynes, a shift foreman was fired and it was determined to be impractical to hire another shift foreman for less than 2 weeks until the contemplated lay off on July 31. Accordingly, on July 20, 1988, the afternoon shift was eliminated, and four employees were laid off and never recalled. The remaining five employees of the shift were transferred to the day shift. He indicated that Vernon Stone was transferred and not laid off because he was a miner operator, and his transfer allowed Williams, who had been working as a miner

operator on the day shift, to concentrate on his duties as a shift foreman. He also said that Danny Stone was transferred as he was a certified electrician, and there was only one electrician on the day shift and thus he could serve as a backup. Also, he said that Roger Haskill was transferred because he had experience running a bolter for 9 or 10 months. He also indicated that Charles Lucas was transferred because he had experience as a buggy operator, miner helper, and bolter operator, so he could replace other miners operating such equipment if they were absent from work. Further, he indicated that Gary Gerdridas was transferred as he was an EMT (Emergency Medical Technician), and inasmuch as the day section now had more than seven employees an EMT was required. It was his testimony, in essence, that Haynes would have been laid off July 31, and not transferred to the day section as he did not have any experience to qualify him for a position with the day shift. In this connection, he noted that the day shift already had a foreman, and he was not aware of Haynes' other work experience aside from the fact that he knew that he ran a miner for 1 day. I find Hovatter's testimony credible and conclude had Haynes not been fired on July 20, 1988, he would have been laid off on July 31, 1988, along with other members of his shift, and not reassigned to the day shift.

Based upon a review of the legislative history of the Act, it appears it was the intent of Congress in providing for temporary reinstatement where a complaint of discrimination is not frivolously brought, to protect miners from the adverse and chilling effect of loss of employment while discrimination charges are being investigated. (1977 Legislative History at 625, 1330, 1362.) Inasmuch as Haynes' job was eliminated due to a lay off necessitated by business reasons, I agree with Respondent that to have Haynes reinstated to his former job would put him in a better position than he would have been in had he not been fired. To grant such a benefit would be a windfall to Haynes and would clearly go beyond Congressional intent. However, I find the testimony of Haynes credible that he was hired originally as a miner's helper, and on a daily basis spelled the miner's operator at lunch time. I also find credible Haynes' testimony elicited upon cross-examination that from 1970 to 1975 he operated a roof bolter, shuttle car, and miner operator at another mine. Thus, I find that section 105(c)(2), supra, and section 2700.44, supra, will be effectuated by requiring Respondent to reinstate Haynes immediately, once it has a position available as shift foreman, roof bolter, miner operator, or shuttle car operator.

ORDER

It is hereby ORDERED that Respondent reinstate Applicant, immediately upon the availability of a position as either shift foreman, roof bolter, miner operator, or shuttle car operator. It is further ORDERED that the reinstatement shall remain in effect pending a final order by the Commission upon Applicant's Complaint of Discrimination.



Avram Weisberger
Administrative Law Judge

Distribution:

Mary K. Spencer, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

David Morrison, Esq., Steptoe & Johnson, P. O. Box 2190, Clarksburg, WV 26302 (Certified Mail)

dcp

