COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

DECEMBER 1990

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

ASARCO, Inc. v. Secretary of Labor, MSHA, Docket No. SE 89-24-RM, etc. (Judge Fauver, October 25, 1990)

Secretary of Labor, MSHA v. Shamrock Coal Company, Inc., Docket No. KENT 90-137, 142. (Judge Weisberger, October 26, 1990)

Secretary of Labor, MSHA v. Bethel Fuels, Inc., Docket No. WEVA 90-228. (Default Decision of Chief Judge Merlin on November 6, 1990)

There were no cases filed in which review was denied.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 4, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINIASTRATION (MSHA)	:	
v.	:	Docket No. WEVA 90-228
BETHEL FUELS INCORPORATED	:	

BEFORE: Backley, Acting Chairman; Doyle, Holen and Nelson, Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on November 6, 1990, finding Bethel Fuels Incorporated ("Bethel") in default for failure to respond to a show cause order. The judge assessed a civil penalty of $600. For the reasons that follow, we vacate the default order and remand the case for further proceedings.

On November 15, 1990, the Commission received a letter from the Department of Labor's Regional Solicitor's Office in Arlington, Virginia, forwarding an attached letter from Bethel that was received in the Solicitor's office on August 28, 1990. Bethel's letter, dated August 14, 1990, and addressed to the Solicitor's Office in Arlington, Virginia, contains a short and plain statement of the reasons why Bethel disagrees with the civil penalty proposed by the Secretary of Labor in this case.

The judge's jurisdiction over the case terminated when his decision was issued. 29 C.F.R. § 2700.65(c). Under the circumstances presented, we deem Bethel's letter, forwarded by the Solicitor's Office, as a timely petition for discretionary review of the judge's default order. E.g., Flippy Coal Co., Inc., 12 FMSHRC 391 (March 1990). The petition is granted.

The record discloses that on November 8, 1989, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Bethel alleging a violation of 30 C.F.R. § 75.202(a) for its alleged failure to support adequately or otherwise control mine roof. Upon preliminary notification by MSHA of the civil penalty proposed for the alleged violation, Bethel filed a "Blue Card" request for a hearing before this independent Commission. Counsel for the Secretary certified that on July 18, 1990, the Secretary's penalty proposal was mailed to Bethel. As noted, on August 28, 1990, Bethel served on the Secretary's counsel a document

constituting an answer to the penalty proposal. The answer, however, was not filed with the Commission. Under the Commission's rules of procedure, the party against whom a penalty is sought must file an answer with the Commission within 30 days after service of the penalty proposal. 29 C.F.R. § 2700.5(b) & .28. When no answer to the penalty proposal was filed with the Commission, the judge, on September 7, 1990, issued a show cause order directing Bethel to file an answer within 30 days or show good reason for the failure to do so. When Bethel failed to respond to the show cause order, the judge issued an order of default on November 6, 1990.

Bethel appears to be a small company proceeding without benefit of counsel. In conformance with the standards set forth in Fed. R. Civ. P. 60(b)(1), the Commission has previously afforded such a party relief from default upon a showing of inadvertence, mistake, or excusable neglect. E.g., Amber Coal Co., 11 FMSHRC 131, 132 (February 1989). Here, Bethel may have confused the roles of the Commission and the Department of Labor in this adjudicatory proceeding. In light of these considerations, we conclude that Bethel should have the opportunity to present its position to the judge, who shall determine whether final relief from the default order is warranted. See, e.g., Patriot Coal Company, 9 FMSHRC 382, 383 (March 1987).

Accordingly, we vacate the judge's default order and remand this matter for further proceedings. Bethel is reminded to file with the Commission, and to serve the opposing party, with copies of all its filings and correspondence in this matter. 29 C.F.R. §§ 2700.5(b) & 7.

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 4, 1990

JOSEPH G. DELISIO	:	
	:	
v.	:	Docket No. PENN 89-8-D
	:	
MATHIES COAL COMPANY	:	

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

DECISION

BY THE COMMISSION:

This proceeding involves a discrimination complaint brought by Joseph Delisio pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act" or "Act"). The issue presented is whether Mathies Coal Company ("Mathies") discriminated against Delisio in violation of section 105(c)(1) of the Mine Act by not paying Delisio, an hourly employee, wages that he lost as a result of testifying as a witness under subpoena by the Secretary of Labor in a contest proceeding involving Mathies, while paying the salaries of its management officials whom it had subpoenaed as witnesses in the same proceeding. [1] Commission

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[1] Section 105(c)(1) of the Mine Act provides in pertinent part:

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

Administrative Law Judge William Fauver concluded that Mathies discriminated against Delisio by not paying Delisio his wages for that day while paying the salaries of its management employee witnesses. 11 FMSHRC 2352 (November 1989)(ALJ). The judge awarded Delisio back pay, plus interest, and litigation expenses, including reasonable attorney's fees. 11 FMSHRC 2628 (December 1989)(ALJ). We granted Mathies' petition for discretionary review and permitted the American Mining Congress ("AMC") and the National Coal Association ("NCA"), proceeding jointly, and Pennsylvania Coal Association to participate on review as amici curiae. We hold that, under the circumstances of this case, Mathies' treatment of Delisio did not violate the discrimination provisions of the Mine Act. Accordingly, we reverse the judge's decision.

Complainant Joseph Delisio is employed as a mine examiner by Mathies at the Mathies Mine, an underground coal mine in Pennsylvania. [2] In his job as a mine examiner, Delisio, an hourly employee, conducts on-shift and pre-shift examinations. Delisio also serves as chairman of the local United Mine Workers of America ("UMWA") safety committee and is a representative of miners for purposes of the Mine Act.

On July 21, 1988, in Mathies Coal Company, Docket No. PENN 88-36-R, Commission Administrative Law Judge Roy J. Maurer held a hearing in connection with Mathies' contest of a citation and a withdrawal order issued to it by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The Secretary subpoenaed Delisio to testify as part of the Secretary's case against Mathies, and Delisio testified at the hearing. The citation and order were ultimately upheld by the judge, based, in part, on Delisio's testimony. Mathies Coal Co., 11 FMSHRC 90 (January 1989) (ALJ). [3]

> testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1).

[2] The parties stipulated the facts and submitted the case for decision without an evidentiary hearing. This narrative of facts is based on the parties' stipulation of facts, the parties' pleadings, and the record and judge's decision in Mathies Coal Company, Docket No. PENN 88-36-R, the contest proceeding that gave rise to the subpoenas, including Delisio's.

[3] The citation involved in Docket No. PENN 88-36-R alleged a violation of 30 C.F.R. § 50.20 for failure by Mathies to report an accident. Delisio reported the alleged violation to MSHA and requested an inspection under section 103(g) of the Mine Act, 30 U.S.C. § 813(g). The withdrawal order cited a violation of 30 C.F.R. § 75.400 for accumulation of float coal dust in four locations. Delisio was the miners' representative who accompanied the MSHA inspector, Francis Wehr, on the inspection that resulted in the issuance of the order.

Attendance at the contest hearing caused Delisio to miss his normally scheduled working hours for the day, and Delisio did not perform any work for Mathies that day. The UMWA's collective bargaining agreement does not contain any provision requiring Mathies to compensate employees for wages lost because of attendance at judicial hearings, and Mathies did not pay Delisio for the day he spent testifying. Delisio did receive a $30.00 witness fee paid by the Secretary. Delisio's usual wages for the day in question would have been $126.52. The UMWA local union ultimately paid Delisio the difference between his usual wages and the $30 witness fee. The witnesses called to testify by Mathies on its behalf were salaried management employees who received their regular salaries for the day spent testifying.

Delisio subsequently filed a discrimination complaint with the Secretary, alleging that Mathies' failure to pay him the difference between his usual wages and the $30 witness fee, while paying the salaries of its management witnesses, constituted unlawful discrimination under the Mine Act. After completing her investigation of the complaint pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), the Secretary notified Delisio of her determination that no violation of section 105(c)(1) of the Act had occurred. Delisio thereupon filed his own discrimination complaint with the Commission pursuant to section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3), and the matter proceeded to hearing before Judge Fauver.

In his decision, the judge concluded that section 105(c)(1) of the Mine Act prohibits a mine operator from withholding wages from a miner witness who testifies against the operator at a Commission hearing while compensating other employee witnesses who testify on behalf of the operator. 11 FMSHRC at 2356.

In reaching this conclusion, the judge discussed decisions by the National Labor Relations Board ("NLRB") under the National Labor Relations Act, 29 U.S.C. § 151 et seq. (1988)("NLRA"), concerning allegations of employer discrimination against employees testifying at NLRB hearings, including Electronic Research Co., 187 NLRB 733 (1971) ("Electronic Research I"), Electronic Research Co., 190 NLRB 778 (1971) ("Electronic Research II"), and General Electric Company, 230 NLRB 683 (1977). 11 FMSHRC 2355-56. In general, the NLRB does not deem unlawful, under the NLRA, the practice of an employer paying the wages of its employee witnesses while not paying the lost wages of employees called by other parties. General Electric, supra, 230 NLRB at 684-86; Electronic Research II, supra. On the other hand, if an employer distinguishes between its employees "in their employment

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In upholding the float dust violation, the judge relied in significant part on Delisio's testimony. 11 FMSHRC at 96. The judge also concurred with the opinions of the MSHA inspector who issued the order and Delisio, that the violative conditions in two of the cited locations were "significant and substantial" ("S&S"). 11 FMSHRC at 97-98. Finally, the judge relied in part on Delisio's testimony that the two S&S violations were also the result of Mathies' "unwarrantable failure" to comply with the standard. 11 FMSHRC at 99. The judge accordingly affirmed the withdrawal order. 11 FMSHRC at 100.

relationship" on the basis of whether they were summoned by it or the opposition as, for example, in granting or denying perfect attendance awards, it violates the NLRA. General Electric, 230 NLRB at 686; Electronic Research I, supra. Rather than following the NLRB approach, however, the judge relied on the dissent in General Electric of then Chairman Fanning, which argued that the employer's denial of wages to opposition witness employees "was disparate treatment based on whether the testimony was on behalf of or against [the employer's] interest" (230 NLRB at 686) and therefore constituted discrimination within the meaning of the NLRA. 11 FMSHRC at 2356.

In determining that Mathies violated section 105(c)(1) of the Mine Act, the judge stated:

> The distinction relied upon by the majority opinion in General Electric -- between (1) discrimination as to a perfect attendance award or the use of vacation time and (2) discrimination as to wages -- appears to me to [be] artificial and in any event distinguishable from Mine Act cases. The broad protection of § 105(c) of the Mine Act prohibits "any manner" of discrimination.
>
> ... Because of Respondent's discriminatory treatment of witnesses in a Mine Act proceeding, i.e., refusing to pay wages to Complainant who was an opposition witness but paying the wages of the witnesses who appeared on its behalf, no further examination of discriminatory motive is necessary.

11 FMSHRC at 2356.

On review, Mathies and amici take the position that Delisio failed to establish a prima facie case of discrimination because he did not show any adverse action against him. Mathies and amici argue that Delisio, while testifying pursuant to the Secretary's subpoena, was not working for Mathies and that, therefore, its failure to pay Delisio his wages did not involve his employment relationship. Conversely, Mathies and amici argue that Mathies' witnesses were performing their job duties for their employer in testifying at the hearing.

Mathies and amici also state that Congress knew how to establish specific compensation for miners involved in safety and health tasks and duties under the Mine Act. They argue that neither section 105(c)(1) nor any other provision of the Mine Act requires an operator to compensate witnesses subpoenaed by adverse parties merely because it compensates its own witnesses. Mathies specifically points out that section 113(e) of the Mine Act, 30 U.S.C. § 823(e), provides only that "witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States...." Mathies and amici additionally rely on the NLRB's decision in General Electric as compelling. Moreover, the amici argue that the Commission's Rules provide only that each side pay for its own witness

fees and mileage. The AMC and NCA also contend that nothing in common law or federal law requires a party to subsidize the opposing party's witnesses or provide compensation outside the employment relationship confines.

Delisio argues that the judge's decision should be affirmed, because section 105(c) prohibits a person from discriminating "in any manner" against miners who have exercised their statutory rights under the Mine Act. Delisio asserts that he established a prima facie case, because his testimony in support of MSHA's enforcement action constituted protected activity and he suffered adverse action when he was deprived of wages that he otherwise would have received. Accordingly, in Delisio's view, Mathies discriminated against him in violation of section 105(c)(1) when it refused to pay him for time spent testifying in the proceeding while at the same time paying its other employees who testified on its behalf in the same enforcement action. Delisio argues that Mathies, having elected to pay the salaries of some of its employees, was required to treat all of its employees alike, on the basis that the activities of the employees -- testifying about the conditions present when MSHA issued the challenged citation and closure order -- were identical.

The question raised is whether Mathies discriminated against Delisio, in violation of section 105(c)(1) of the Mine Act, when it refused to pay wages to Delisio, who had been subpoenaed by the Secretary, for time spent testifying in support of the Secretary's case against Mathies, while at the same time paying the salaries of its managerial employees, who testified on its behalf in the same proceeding.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1989), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984)(specifically approving the Commission's Pasula-Robinette test).

It is undisputed that Delisio, in testifying in the earlier Mine Act proceeding, engaged in protected activity. Section 105(c)(1) provides: "No person shall ... discriminate against ... any miner ... because such miner ... has testified ... in any ... proceeding [under or related to the Mine Act]...." However, we conclude that Delisio did not show that Mathies took an adverse action against him or, even assuming that an adverse action had occurred, that it was discriminatorily motivated. Hence, we conclude that Delisio did not establish the second element of a prima facie case. We find the judge's conclusion to the contrary unsupported by the evidence and legally erroneous.

A showing that an adverse action was taken is part of the second element of a prima facie case of unlawful discrimination under section

105(c) of the Mine Act. Generally, "an adverse action is an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." Secretary on behalf of Jenkins v. Hecla Day Mines Corp., 6 FMSHRC 1842, 1847-48 (August 1984). However, an "adverse action under ... section 105(c) of the Mine Act is not simply any operator action that a miner does not like." Secretary on behalf of Price & Vacha v. Jim Walter Resources, Inc., 12 FMSHRC 1521, 1533 (August 1990), citing Jenkins, supra, 6 FMSHRC at 1848 n.2. Moreover, as emphasized in Price & Vacha, "Not every classification or difference in the treatment of employees ... amounts to illegal 'discrimination,' especially where there is sufficient lawful reason for the challenged distinction." 12 FMSHRC at 1532.

Did Mathies refuse to pay Delisio's wages for time spent testifying in behalf of another party, in and of itself, constitute a discriminatory adverse action under the facts of this case? At common law, witnesses are not entitled to compensation. The right to witness fees is purely statutory. 97 C.J.S., Witnesses, § 35 at 421; 81 Am Jur. 2d, Witnesses, § 23 at 47. Under the American legal system, parties have traditionally paid only their own witnesses and witness fees may be taxed against the other party only if allowed by legislative enactment. 20 C.J.S., Costs, § 221 at 466. Absent such legislation, a litigant on one side is not required to subsidize the fees or compensation of the other side's witnesses. Here, Mathies' conduct mirrors this established system that, absent legislation providing otherwise, litigants bear their own costs, including the payment of compensation to witnesses. We perceive no statutory mandate under the Mine Act supporting the kind of compensation sought by Delisio here.

With respect to witness fees, section 113(e) of the Mine Act provides:

> In connection with hearings before the Commission or its administrative law judges under this [Act], the Commission and its administrative law judges may compel the attendance and testimony of witnesses and the production of books, papers, or documents, or objects, and order testimony to be taken by deposition at any stage of the proceedings before them. Any person may be compelled to appear and depose and produce similar documentary or physical evidence, in the same manner as witnesses may be compelled to appear and produce evidence before the Commission and its administrative law judges. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States and at depositions ordered by such courts.

30 U.S.C. § 823(e). Section 113(e) thus incorporates by reference the practice of the courts of the United States in terms of the amount of fees paid to witnesses. 28 U.S.C. § 1821(b) provides that, absent explicit statutory authority or contractual authorization to the contrary, a witness fee of $30/day applies in the courts of the United States.

Implementating section 113(e) of the Act, Commission Procedural Rule 58(b), 29 C.F.R. § 2700.58(b)(1990), provides:

> Fees payable to witnesses. Witnesses subpoenaed by any party shall be paid the same fees and mileage as are paid for like service in the district courts of the United States. The witness fees and mileage shall be paid by the party at whose request the witness appears, or by the Commission if a witness is subpoenaed on its own motion or the motion of a judge. This paragraph does not apply to Government employees who are called as witnesses by the Government.

Therefore, under our Rule 58(b), witness fees must be paid by the party at whose request the witness appears. This, of course, parallels the general practice of the American litigation system, under which each party pays its own witnesses. Accordingly, in accordance with Rule 58(b), Delisio was paid $30 by the Secretary for the day he testified at the hearing, based on the level authorized by 28 U.S.C. § 1821(b).

Section 113(e) of the Mine Act, in conjunction with Rule 58(b), essentially authorizes a per diem fee paid to a witness by the party calling the witness, but creates no additional statutory entitlement to compensation for wages or salaries. Neither the Mine Act nor its legislative history suggests any intention to provide for operator-paid compensation for miners testifying in Mine Act proceedings. Indeed, Congress established a number of specific operator-paid compensation provisions for miners under the Mine Act. Congress required walkaround pay for one miner representative during the physical inspection of the mine and pre- or post-inspection conferences (30 U.S.C. § 813(f)), provided for compensation where a miner is withdrawn because he has not received requisite safety training (30 U.S.C. § 814(g)(2)), established a graduated scheme of miner compensation where a mine is closed under various withdrawal orders issued under the Act (30 U.S.C. § 821), and mandated compensation for miners for required training (30 U.S.C. § 825(b)). Congress did not provide for operator-paid compensation for miners testifying in Mine Act proceedings, instead providing under section 113(e) only for per diem witness fees. While we are not implying an expressio unius est exclusio alterius construction here (see, e.g., Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493, 1502 (November 1988), aff'd, 895 F.2d 773 (D.C. Cir. 1990), cert. denied, October 1, 1990)(No. 90-77)), this legislative silence involving the question before the Commission dictates cautious judicial review of Delisio's position (see, e.g., Rushton Mining Co., 11 FMSHRC 759, 764 (May 1989), and authority cited).

Our concern with the Mine Act's silence on the subject is further accentuated by 5 U.S.C. § 6322(a)(1988). That provision generally provides that federal employees are entitled to leave without loss of pay when testifying as witnesses on behalf of any party in connection with any judicial proceeding in which a government is a party. Essentially, Congress has provided for full compensation by the United States for its employees

testifying in such proceedings, regardless of the party for whom such employees may be testifying. Delisio's position is essentially analogous to the statutory policy embedded in 5 U.S.C. § 6322(a). However, there is no comparable provision imposing similar compensation obligations on operators under the Mine Act.

Here, Delisio was subpoenaed by the Secretary of Labor and paid a standard witness fee by the Secretary in accordance with Rule 58(b). Although Delisio was scheduled to work at Mathies' mine on the date of the hearing, he did not report for work to Mathies and did not perform any work on that day for Mathies. Mathies did not compensate Delisio for that day. As a general matter, Delisio was not paid by Mathies simply because he did not work for Mathies on the day of the hearing. Consequently, Mathies' failure to compensate Delisio was not, in itself, adverse action directed at his employment relationship. Delisio's right to a witness fee payment under section 113(e) of the Mine Act is not a term or condition of his employment relationship with Mathies and he was subpoenaed as a witness by another party, the Secretary.

Delisio and the judge would tie a conclusion of discrimination to the fact that Mathies paid its managerial witnesses their salaries for the day they spent at the hearing. In the judge's view, this was "disparate treatment" that was inherently discriminatory. We are not persuaded. It is undisputed that these witnesses (1) were Mathies' own witnesses and (2) were salaried management safety representatives at the mine. According to Mathies, their managerial positions required testifying, as might be necessary, from time to time. Although the judge made no finding on this point, Delisio has not controverted it. There is no evidence in the record that these employees' salaries were dependent on their testifying in support of Mathies' position and there is no indication that the witnesses would have had their salaries withheld had they testified adversely to Mathies. Under these circumstances, we cannot view Delisio, an hourly employee subpoenaed by the Secretary, as "similarly situated" to the managerial witnesses subpoenaed by Mathies to testify as a part of their job duties. As previously indicated: "Not every classification or difference in the treatment of employees ... amounts to illegal 'discrimination,' especially where there is sufficient lawful reason for the challenged distinction." Price & Vacha, supra, 12 FMSHRC at 1532. We therefore find that a "sufficient lawful reason" and a reasonable basis for the difference in treatment Mathies accorded Delisio has been demonstrated on the record.

We also place considerable weight on the NLRB's decision in General Electric, supra. Like the Mine Act, the NLRA contains a provision protecting employees from discrimination for participating in judicial proceedings under the statute.[4] The Commission has recognized in several

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[4] Section 8(a)(4) of the NLRA provides:

> It shall be an unfair labor practice for an employer -- (4) to discharge or otherwise discriminate against an employee because he has filed charges or

contexts that settled cases decided under the NLRA -- upon which much of the Mine Act's antiretaliation provisions are modeled -- provide guidance on resolution of discrimination issues under the Mine Act. See, e.g., Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 231 (February 1984), aff'd, 766 F.2d 469 (11th Cir. 1985), and authority cited.

In General Electric, the employer paid an hourly employee his normal wages for having testified on its behalf at an unfair labor practice hearing, but refused to pay another hourly employee, who testified on behalf of the NLRB's General Counsel at the same hearing, the difference between the statutory witness fee that he received from the NLRB and his normal wage. The NLRB distinguished "between those situations where the employer's actions were directed at the employment relationship" (Electronic Research I, supra) and those where they are not, "as in the witness fee situation" (Electronic Research II, supra). 230 NLRB at 685. [5] The NLRB noted that in "the latter instance, the obligation to pay witness fees is imposed by statute or fiat and not by the employment relationship." Id. The NLRB pointed to its witness rule at 29 C.F.R. § 102.32, which, (like the Commission's Rule 58(b)), provides that witness fees shall be paid by the party at whose request the witness appears. Id.

The NLRB reasoned:

> But there is no prohibition against a party paying its witnesses more than the minimum, or more than another party will pay their witnesses, nor should any adverse inferences be drawn against the party paying the higher amount merely from that fact. In this regard, we deem as reasonable a party's use of employee wages as the measure for determining the fee to be paid its witness. Indeed, many parties, recognizing that an individual's employer is not obligated to pay him wages for time away from work testifying as a witness for them, use actual loss of earnings as a criteria for settling the witness fees they will pay.

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given testimony under this [Act]....

[5] In Electronic Research I, the NLRB concluded that it was a violation of section 8(a)(4) of the NLRA, supra, to deny a perfect attendance award to an employee who was absent from work because he was testifying against the employer in a Board hearing, while awarding the perfect attendance award to those employees who appeared at the same hearing at the employer's request. See General Electric, 230 NLRB at 684. In Electronic Research II, the NLRB held that it was not a violation for an employer to pay the wages of the employees whom it called to testify, while at the same time refusing to pay the employees whom had been subpoenaed by the union. See General Electric, 230 NLRB at 684. In that case, the NLRB stated that "to order the [employer] to pay the employees for time lost from work in testifying against it is to require a litigant in effect to subsidize its opponent." Id.

> Furthermore, the obligation exists only between the party and its witnesses; it does not extend to witnesses called by others. It follows, then, that the witness fee paid by one party is not, nor should it be, the concern or affair of another party. In short, no party stands as the guarantor for equal payment to all witnesses summoned by all parties to the proceeding. A fortiori, an employer, as here, -- or a union in a case not involving an employer as a party -- is not as a general proposition obligated to pay opposition witnesses anything in connection with witness fees. Consequently, we conclude that an employer is not discriminating with respect to the employment relationship by not paying an employee called as a witness against it the difference between what such witness would have earned had he worked and what the party calling him as a witness is willing to pay. Nor do we believe that the failure of the employer to pay such difference to employees testifying against it is otherwise per se discriminatory.... As we have previously stated, to hold that an employer must pay this difference would result in making employer liability dependent on what others are willing to pay, something we are unwilling to do.

230 NLRB at 685.

The NLRB further noted that while the disparity in compensation created by a party paying its witnesses more than another party may result in a monetary disadvantage to the latter, "that is not the fault of the higher paying party or within its immediate control. Nor is such a disparity due to actions aimed at the employment relationship." 230 NLRB at 685-86. We agree substantially with the reasoning of General Electric.

Like the NLRB in General Electric, supra, 230 NLRB at 685, we also note that the question of whether an employer is required, in general, to pay an employee for time not worked or, specifically, for time spent testifying, has been reserved to the employment mechanisms and prerogatives of the private sector. Delisio did not perform work for Mathies on the day of the hearing. Lying behind Delisio's complaint of discrimination is an underlying claim of a right: a right to be paid by his employer for time during which he did not work but rather was testifying as an opposition witness in litigation involving his employer. The subject of recognizing any such employment benefit is amenable to collective bargaining or to other private employment agreement. As we have emphasized in related contexts, the Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act. See Price & Vacha, 12 FMSHRC at 1532, citing Price & Vacha, 9 FMSHRC at 1307. See also Mullins v.

Beth-Elkhorn Coal Corp., 9 FMSHRC 891, 899 (May 1987), citing Loc. U. No. 781, Dist. 17, UMWA v. Eastern Assoc. Coal Corp., 3 FMSHRC 1175, 1179 (May 1981).

We conclude as a matter of law that an operator's policy of not paying an employee for time spent testifying as another party's witness, while paying employees who testify as its own witnesses, does not, by itself and without more, amount to an adverse action under the Mine Act. In other words, we do not view such a policy as aimed adversely or discriminatorily at the employment relationship per se. Rather, in the words of General Electric, it stems "from different obligations, considerations, and motives...." See 230 NLRB at 686. If the record in this case contained evidence of specific retaliatory motivation or discriminatory intent, another question would be presented. The record in this case, however, reveals no evidence of retaliatory motive or discriminatory intent. [6]

In sum, the record contains no evidence of an adverse action cognizable under the Mine Act. To the extent that the judge equated the mere fact of different compensation of the employee-witnesses with unlawful discrimination, we conclude that he erred as a matter of law. Accordingly, and for the foregoing reasons, we hold that Delisio failed to establish a prima facie case of discrimination prohibited under the Mine Act. [7]

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[6] Delisio also relies on Carpenter v. Miller, 325 S.E. 2d 123 (WV 1984), a decision by the West Virginia Supreme Court of Appeals. Although the West Virginia statutory antidiscrimination provision is, as pertinent, similar to section 105(c)(1) of the Mine Act, the relevant state statutory witness fee provision provides that all subpoenas are issued by the Director of the Department of Mines and "[a]ny witness so ... subpoenaed ... shall be paid out of the state treasury upon a requisition upon the state auditor." 325 S.E. 2d at 126. The court reasoned that the legislature must therefore have intended that miners receive no reduction in compensation due to absence from employment when testifying in the mine proceedings. The West Virginia court's decision is bottomed on a subpoena provision unlike that involved in the Mine Act. The Commission is not bound by state court decisions interpreting state statutory schemes and we are not persuaded that the court's reasoning applies in the Mine Act context.

[7] Two days prior to the scheduled Commission meeting in this case, the Commission received Mathies' first request for oral argument. The motion is untimely. This case was thoroughly briefed by all concerned, and the Commission would not have found oral argument particularly helpful in any event. Accordingly, the motion is denied.

For the foregoing reasons, we reverse the judge's decision, vacate his award of back pay, interest, and costs, and dismiss Delisio's discrimination complaint. [8]

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

[8] Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three Commissioners to exercise the powers of the Commission in this matter.

Commissioner Holen assumed office after this case had been briefed and shortly before it was considered at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. Commissioner Holen elects not to participate in this case.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 26, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. SE 88-82-RM
	:	SE 88-83-RM
ASARCO, INC.	:	SE 89-67-M

Before: Backley, Acting Chairman; Doyle, Holen 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. (1988) ("Mine Act"), and concerns a discovery dispute between the Secretary of Labor and ASARCO, Inc. ("Asarco"). On November 21, 1989, Commission Administrative Law Judge Avram Weisberger granted Asarco's motion to dismiss these proceedings because the Secretary refused to comply with his order requiring her to produce certain documents for inspection by Asarco. ASARCO, Inc., 11 FMSHRC 2351 (November 1989)(ALJ). For the reasons that follow, we vacate the judge's order and remand this matter for further consideration consistent with this decision.

I.

Factual and Procedural Background

Asarco operates the Immel Mine, an underground zinc mine located in Knox County, Tennessee. A fatal accident occurred at the Immel Mine on July 15, 1988, when an electrician contacted an energized 4,160-volt terminal located inside a transfer switch cabinet. An electrical apprentice assisting him escaped serious injury. Following an investigation, Don B. Craig, a supervisory inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued Asarco two citations alleging violations of 30 C.F.R. §§ 57.12017 & .12019 because the top terminals in the cabinet were not de-energized and because suitable clearance was not provided when the electrician was cleaning the terminals and insulators. Asarco contested the citations.

On March 9, 1989, during the course of pretrial discovery, Asarco served the Secretary with a request for production of documents in accordance with Commission Procedural Rules 55 and 57, 29 C.F.R. §§ 2700.55 and 2700.57. The request for production contained nine requests for documents related to MSHA's investigation of the accident, including its "special investigation," documents related to MSHA's special assessment procedures, and other documents. In accordance with Commission Procedural Rule 57, Asarco asked that MSHA's answer be provided within 15 days. MSHA did not respond to the request.

On April 21, 1989, Asarco filed a motion for an order to compel production of the documents sought in its March 9 request. Asarco asserted that the Secretary had failed to respond to the request for production except to notify Asarco orally that it would not comply with some of the requests on the basis of an "investigatory privilege." In order to facilitate production, Asarco agreed to limit its request for production to documents prepared during the past two years and, with respect to one request, to documents exchanged between specifically listed MSHA officials. Asarco also agreed to enter into a "protective order" to protect the identities of confidential informants.

On May 12, 1989, the Secretary filed responses and objections to Asarco's request for production. The Secretary objected to the requests for a number of reasons. As pertinent to this review proceeding, she asserted that answering certain requests would (1) reveal the identity of miners or violate Commission Procedural Rule 59, 29 C.F.R. § 2700.59, [1] and (2) disclose protected work product of the Secretary's employees.

On June 6, 1989, Asarco filed another motion to compel production of documents. As relevant here, it asserted that the government cannot proceed affirmatively against Asarco and, under the guise of privilege, suppress evidence useful to its defense. It asserted that it was entitled to exculpatory information in the Secretary's possession. Second, Asarco maintained that the Secretary misunderstood the privileges that she asserted. It maintained that the Secretary could not simply state that documents contained privileged matters but must submit the documents in question to the administrative law judge for in camera inspection. Asarco argued that the Secretary's claim of confidentiality was too generalized to meet her burden of showing that the documents were protected from discovery.

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[1] 29 C.F.R. § 2700.59 provides:

> 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.

On July 12, 1989, Judge Weisberger issued an order responding to Asarco's motions to compel. The judge concluded that the information sought in the requests for production was relevant to the proceeding. The judge ordered the Secretary to respond to each of the requests for production within 10 days of the order. The judge held that the Secretary was not to disclose, until two days before the hearing, the name of any miner who was expected to be a witness or the name of any informant who was a miner.

On July 31, 1989, the Secretary filed responses to the request for production. In her responses, the Secretary stated that the documents were being produced under protest and that she preserved for appeal all previously made objections.

On August 11, 1989, Asarco filed another motion to compel production of documents, alleging that the Secretary's response to the judge's order compelling production was incomplete. As relevant here, Asarco alleged that the Secretary improperly excised voluminous amounts of material from the documents produced. Asarco maintained that the Secretary improperly asserted "work product," "attorney/client privilege" or "miner/informant privilege" throughout the documents produced. In response to Asarco's motion to compel, the Secretary argued that she had properly excised privileged material from the documents produced, in part, to protect the identity of miner-informants. The Secretary requested the judge to view the documents in camera, if necessary, to resolve the matter.

By order dated September 1, 1989, the judge directed the Secretary to file with him the disputed documents for in camera examination with respect to the claimed privileges. In reviewing these documents, the judge did not consult with the attorneys for the parties and did not request additional information.

In an order dated September 22, 1989, the judge issued his rulings with respect to the excised portions of the documents. The judge discussed each document that contained excised material and set forth his determination as to what portion of each was protected by a privilege. The documents provided by the Secretary are contained in two files: File A (Civil Penalty Investigation File) and File B (Special Investigation File). The judge assigned exhibit letters to each contested document. In a number of instances, the judge held that portions of the documents that the Secretary wished to withhold from Asarco should be produced.

The judge's rulings with respect to the six documents that are the subject of this review proceeding are as follows:

I - FILE A

. . .

2. Exhibit B (Special Assessment Review, August 10, 1988) - An informer is not identified, and the entire statement is thus not to be excised.

9. Exhibit I (Continuation Sheet) - Taking into account the significance of the excised statement, and the circumstances of this case, the excised portion is subject to discovery.

II - FILE B

. . .

3. Exhibit E - The statements by a miner (employed by Respondent) in response to detailed questioning by an MSHA Special Investigator are detailed, extensive, and hence significant and relevant to the issues of the instant proceedings. There is no evidence that there exists herein any possibility of harassment or retaliation against the informer. I find accordingly that Respondent's need for the information in this exhibit outweighs the Petitioner's need to maintain this privilege (see, Bright Coal Co., Inc. 6 FMSHRC 2520 at 2526 (1984)). Accordingly, this exhibit is subject to discovery.

4. Exhibit F - The disposition of Exhibit F is the same as Exhibit E, based on the same rationale.

5. Exhibit G - The disposition of Exhibit G is the same as Exhibit E, based on the same rationale.

. . .

7. Exhibit K - The excised statements on pages 3 and 4 are contained in statements Dan Craig made in an interview with Robert Everett. Neither of these persons ha[s] been identified as attorneys. Accordingly, the statement of Craig are not within the scope of the attorney work product, or attorney/client privilege, and are discoverable. However, the last line of page 3 and the first 3 lines of page 4 are to be deleted, as they contain references to the work processes of a solicitor, and they are not relevant to the case at bar. Accordingly they are privileged.

Order of September 22, 1989.

The judge ordered the Secretary to serve Asarco with copies of these documents within three days. For reasons that are not clear, the judge attached to his order copies of some of the disputed documents that are not before the Commission on review. Thus, Asarco was provided with unexcised copies of some of the contested documents before the Secretary was given the opportunity to determine how she wished to respond to the judge's order.

In response to the judge's order of September 22, the Secretary stated that she would "respectfully decline" to produce unexcised copies of six of the documents that the judge ordered her to produce and moved to seal the documents that she had provided to the judge. She also protested the judge's action in unilaterally providing certain other documents without the

Secretary's knowledge or consent. Asarco subsequently filed motions to cancel the trial, impose sanctions, dismiss the penalty proceedings and vacate the citations. Asarco argued that the judge was correct in ordering the Secretary to provide the contested documents, and that its case has been prejudiced by the Secretary's continued failure to comply with its discovery requests.

On October 16, 1989, the judge denied the Secretary's motion to seal the documents. He stated that he was "most concerned" about the Secretary's failure to comply with his order of September 22. He denied Asarco's motions to dismiss the cases and again ordered the Secretary to produce the disputed documents.

On October 23, 1989, the Secretary stated that because she believed that the judge's order was issued in error, she had no choice but to decline to produce the "identifying documents" in order to obtain review by the Commission. On November 21, 1989, the judge dismissed the proceeding against Asarco based on the Secretary's continued refusal to comply with his discovery order of September 22. 11 FMSHRC 2351 (November 1989)(ALJ).

The Commission granted the Secretary's subsequent petition for discretionary review. The Secretary asserts that the informant's privilege applies to all or part of each of the six documents on review. She asserts that the attorney-client privilege and the work product privilege apply to part of Exhibit K.

II.
Disposition of Issues

A. Informant's Privilege

The Secretary argues that each of the passages withheld from Asarco in the six documents are protected by the informant's privilege and are not subject to discovery. She relies on Commission Procedural Rule 59, and Bright Coal Co., 6 FMSHRC 2520 (November 1984), to support her position. She maintains that although the Secretary has the burden of proving facts necessary to support the existence of the informant's privilege, she satisfied this burden. She argues that once the privilege is established, the burden of proving facts necessary to show that the information sought is essential to a fair determination of the case rests with the party seeking disclosure. She alleges that Asarco has failed to meet this burden with respect to each document.

Asarco argues that the judge's determinations, set forth above, involved a balancing of interests and careful consideration of the relevant facts. It maintains that his findings in this regard should be affirmed because they are supported by substantial evidence. It argues that the Commission should not reweigh the factors the judge considered in reaching his decision. According to Asarco, the judge determined that the materials sought were relevant and discoverable after he carefully balanced the needs of each party. Asarco contends that because a judge is provided with considerable discretion when determining what is privileged, Judge Weisberger's orders compelling production should not be disturbed because he did not abuse this discretion.

In Bright, the Commission set forth in considerable detail the procedures to be followed if the Secretary asserts the informant's privilege. In that case, the Commission recognized the well established, but qualified, right of the government to withhold from disclosure information concerning possible violations of the law reported to government enforcement officials. Bright, 6 FMSHRC at 2522; see also, e.g., Roviaro v. United States, 353 U.S. 53, 59 (1957). The Commission held that this general privilege is applicable to the furnishing of information to government officials concerning possible violations of the Mine Act. 6 FMSHRC at 2524. The Commission concluded that an informant is "a person who has furnished information to a government official relating to or assisting in the government's investigation of a possible violation of law, including a possible violation of the Mine Act." 6 FMSHRC at 2525.

In Bright, the Commission set forth the procedural framework that Commission administrative law judges should use in analyzing whether an informant's identity should be withheld. If the judge concludes that the information sought is relevant and, therefore, discoverable, he must determine whether the information is privileged. The Commission stated that the burden of proving facts necessary to support the existence of the privilege rests with the government. 6 FMSHRC at 2523. The Commission stated:

> Recognizing that the informer's privilege is qualified, if the judge concludes that the privilege is applicable, he should next conduct a balancing test to determine whether the respondents' need for the information is greater than the Secretary's need to maintain the privilege to protect the public interest. Drawing the proper balance concerning the need for disclosure will depend upon the particular circumstances of this case, taking into account the violation charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. Among the relevant factors to be considered are the possibility for retaliation or harassment, and whether the information is available from sources other than the government.
>
> The burden of proving facts necessary to show that the information is essential to a fair determination rests with the party seeking disclosure. Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d [303] at 307 [(5th Cir. 1972)]. In this regard a demonstrated, specific need for material may prevail over a generalized assertion of privilege. Black v. Sheraton Corp. of America, 564 F.2d [531] at 545 [(D.C. Cir. 1977)]. Some of the factors bearing upon the issue of need include whether the Secretary is in sole control of the requested material or whether the material which respondents seek is already within their control, and whether respondents had other avenues available from which to obtain the substantial equivalent of the requested

material. Where the disclosure of the identity of an informer is essential to a fair determination of the case, the privilege must yield or the case may be dismissed. Roviaro, 353 U.S. at 59.

6 FMSHRC at 2526.

On review the Secretary does not contend that the information contained in the contested portions of the six documents is not relevant, but argues that such information is protected by the informant's privilege. Each of the six documents is discussed below.

1. Exhibit B

With respect to Exhibit B, the judge ruled that "[a]n informer is not identified, and the entire statement is thus not excised." Order of September 22, 1989, p.1. It appears that the judge held that the privilege is not applicable to the relevant passage in Exhibit B because it does not contain the name of the informant.

It is well established that "where the disclosure of the contents of a communication will tend not to reveal the identity of an informer, the contents are not privileged." Roviaro, 353 U.S. at 60. If, on the other hand, the content of a communication would tend to reveal the identity of the informant, the contents are privileged. Westinghouse Electric Corp. v. City of Burlington, 351 F.2d 762, 768 (D.C. Cir. 1965); Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303, 306 (5th Cir. 1972). See also Annotation, Application, in Federal Civil Action, of Governmental Privilege of Nondisclosure of Identity of Informer, 8 A.L.R. Fed. 6, 27-28 (1971). The Secretary argues that because the universe of persons in this case with knowledge of the facts is small, release of the statement would reveal the identity of the informant notwithstanding the fact that the informant's name is not actually contained in the document. Asarco maintains that the judge's finding of fact that release of the statement would not reveal the identity of the informant must be upheld unless it is not supported by substantial evidence.

As stated above, there can be no dispute that an informant's statement is protected by the privilege if it would tend to reveal his identity. As the above authorities make clear, whether an informant is identified by name is not the sole basis for making that determination. The judge was required to determine whether release of the entire document, including the disputed passage, would tend to reveal the identity of the informant. We believe that he failed to do so and, accordingly, committed error.

Accordingly, we vacate the judge's order of September 22, 1989, with respect to Exhibit B of File A and remand the issue for further consideration by the judge. The judge should determine whether release of the statement attributed to an unidentified informant would tend to reveal the informant's identity, taking into consideration the factual context of this case. If the judge determines that release of the statement would tend to reveal the identity of the informant, the judge must then determine whether Asarco's need

for the information outweighs the Secretary's need to maintain the privilege, taking into account the factors set forth in Bright, quoted above, and as discussed further below.

2. Exhibit I

With respect to Exhibit I, the judge ruled that "[t]aking into account the significance of the excised statement, and the circumstances of this case, the excised portion is subject to discovery." Order dated September 22, 1989, p. 2. It appears that the judge may have used the Bright balancing test and concluded that Asarco's need for the information outweighed the Secretary's need to maintain the privilege. It is difficult to determine, however, what specific factors the judge balanced in reaching his conclusion.

The Secretary argues that she was not in sole control of the information sought by Asarco in this exhibit because the same information would be available to Asarco by taking the depositions of the small number of persons with knowledge of the facts of this case. She maintains that, as a result, Asarco failed to meet its burden of demonstrating a specific need for the document. Asarco maintains that the judge properly balanced the competing interests of the parties and that the Secretary is asking the Commission to examine the document de novo to determine whether the contested passage in the document should have been provided to Asarco. It maintains that the Commission should not reweigh the judge's determinations but should determine whether the judge abused his discretion.

We generally agree with Asarco that the Commission cannot merely substitute its judgment for that of the administrative law judge in this context. The Commission is required, however, to determine whether the judge correctly interpreted the law or abused his discretion and whether substantial evidence supports his factual findings. Cf. Knox County Stone Co., 3 FMSHRC 2478, 2480 (November 1981) (articulating similar standard of review of a judge's disposition of a settlement).

In Bright, the Commission held that the burden of proving that the information in the documents sought is essential to a fair determination of the issues rests with the party seeking disclosure. 6 FMSHRC at 2526; see also Hodgson, 459 F.2d at 307. The Commission stated that important factors to be considered when evaluating whether the documents sought are essential include "whether the Secretary is in sole control of the requested material or whether the material which respondents seek is already within their control, and whether respondents had other avenues available from which to obtain the substantial equivalent of the requested material." 6 FMSHRC at 2526 (emphasis added). We cannot determine from review of the text of the judge's September 22, 1989, order if he considered whether the information contained in the disputed document could also be obtained from another source. The order also does not explain how the judge determined that Asarco's need for the information was greater than the Secretary's need to maintain the privilege to protect the public interest. Specifically, the order does not set forth the basis for the judge's conclusion that Asarco's need for the document was essential to a fair determination of the issues in the case. The judge simply stated that the excised statement in the document was

"significant."

Given the strong policy embodied in the Mine Act to protect the identity of informants, as explained in Bright, the fact that the judge did not set forth the basis for his conclusion that Asarco demonstrated that the document was essential to a fair determination of the issues, and the fact that the judge apparently did not consider whether Asarco could have obtained substantially similar information by other means, we vacate the judge's order of September 22, 1989, with respect to Exhibit I of File A. We remand this issue to the judge for further consideration. One of the factors that the judge should consider in balancing the interests of the parties should be whether Asarco could obtain substantially similar information from other sources. The judge should determine whether the information excised by the Secretary is essential to a fair determination of the issues and he should clearly articulate the basis for his conclusion.

3. Exhibits E, F & G

The judge held that Exhibits E, F & G of File B, which are detailed statements of miners, are "significant and relevant to the issues." Order of September 22, 1990, p.2. He further stated that the record contains no evidence of "any possibility of harassment or retaliation against the informer[s]." Id. He concluded that Asarco's need for the information in these exhibits outweighed the Secretary's need to maintain the privilege.

As with Exhibit I, discussed above, the judge apparently did not consider whether the information in these statements could be obtained through depositions or by other means. The order does not set forth the basis for the judge's conclusion that Asarco's need for the information was essential to a fair determination of the issues. We also do not find a full articulation of the basis for his conclusion that Asarco's need for the information outweighed the Secretary's need to maintain the privilege.

Although under a Bright analysis the judge may consider the "possibility for retaliation or harassment," the Secretary is not required to present evidence that harassment or retaliation is likely or possible in the case being considered. The informant's privilege protects generally and broadly against possible retaliation and applies regardless of whether a particular operator would actually retaliate against an informant. "The purpose for allowing the informer's privilege ... is to make retaliation impossible, thus obviating the deterrent force of sanctions for retaliation." Wirtz v. Continental Finance & Loan Co., 326 F.2d 561, 564 (5th Cir. 1964). It appears that the judge put great weight on the lack of "evidence" that retaliation or harassment was possible. The judge did not take any evidence on this issue and it is doubtful whether the Secretary could produce such evidence in any particular case, even if she were given the opportunity.

Based on the foregoing, we vacate the judge's order compelling the Secretary to produce Exhibits E, F and G of File B and remand the issue for further consideration by the judge. On remand the judge should consider whether Asarco could obtain substantially similar information from other sources and whether these documents are essential to a fair determination of

the issues. Finally, the judge should weigh the factors set forth in Bright and clearly articulate the basis for his conclusion.

4. Exhibit K

The judge did not decide whether the relevant material in Exhibit K is, as the Secretary contends, protected by the informant's privilege. His ruling with respect to this exhibit relates exclusively to consideration of other privileges, as discussed below. The Secretary maintains that the judge's failure to rule indicates that he determined that the subject statements should not be provided. We cannot make that assumption on the existing record, and remand this issue to the judge for his reconsideration in accordance with this decision and Bright.

B. Work Product Rule

The passages of Exhibit K that the Secretary contends are protected by the work product rule are notes that MSHA Special Investigator Robert Everett made while interviewing MSHA Supervisory Inspector Craig concerning Craig's conversation about this case with an attorney of the Secretary's Solicitor's office. The Secretary argues that since the writing discloses the thoughts of an attorney, the contested passages are protected by the work product rule, notwithstanding the fact that the writing was by the hand of the "client." Asarco maintains that since the document was not prepared by an attorney, it falls outside of the scope of the work product rule. Asarco also asserts that this rule does not apply because the Secretary does not allege that the contested passages contain the impressions or personal recollections prepared or formed by an attorney for his own use in prosecuting his client's case.

The work product rule has its modern origins in the case of Hickman v. Taylor, 329 U.S. 495 (1947), and in Rule 26(b)(3) of the Federal Rules of Civil Procedure. ("Fed. R. Civ. P"). [2] Unlike the attorney-client privilege, discussed below, the work product rule does not solely protect confidential communications between attorney and client and is best described

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[2] Fed. R. Civ. P. 26(b)(3) provides in pertinent part:

> ... [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

as a qualified immunity against discovery. In order to be protected by this immunity under Fed. R. Civ. P. 26(b)(3), the material sought in discovery must be:

1. "documents and tangible things;"

2. "prepared in anticipation of litigation or for trial;" and

3. "by or for another party or by or for that party's representative."

See generally 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024, pp. 196-97 (1970); 6 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice ¶26.64 (2d ed. 1989).

It is not required that the document be prepared by or for an attorney. Wright & Miller, supra, § 2024, pp. 207-09; Moore, supra, ¶26.64[2]; U.S. v. Chatham City Corp., 72 F.R.D. 640, 642-43 (S.D. Ga. 1976). If materials meet the tests set forth above, they are subject to discovery "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). If the court orders that the materials be produced because the required showing has been made, the court is then required to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Id.

Commission Procedural Rule 55(c), 29 C.F.R. § 2700.55(c), provides, as pertinent here, that parties may obtain discovery of any relevant matter that is not privileged. The Commission is guided, "so far as practicable" and as is "appropriate," by the Federal Rules of Civil Procedure on procedural questions not regulated by the Mine Act or its rules. 29 C.F.R. § 2700.1(b). In applying Fed. R. Civ. P. 26(b)(3) to the contested passages of Exhibit K, the material in dispute is clearly a document. In addition it was prepared by a party to this litigation or by its representative, MSHA Special Investigator R.L. Everett. As stated above, it is not necessary that the document be prepared by or for an attorney.

The key issue is whether Exhibit K was prepared in anticipation of litigation. If, in light of the nature of a document and the factual situation in the particular case, the document can fairly be said to have been prepared because of the prospect of litigation, then the document is covered by the privilege. Wright & Miller, supra, § 2024, p. 198-99. If, on the other hand, litigation is contemplated but the document was prepared in the ordinary course of business rather than for the purposes of litigation, it is not protected. Id. In addition, particular litigation must be contemplated at the time the document is prepared in order for the document to be protected. Finally, documents prepared for one case have the same protection in a second case, if the two cases are closely related. Wright & Miller,

supra, § 2024, p. 201.

The record appears to us to reveal that the disputed portions of the special investigator's notes were prepared in anticipation of litigation. A major function of an MSHA special investigation is to determine whether litigation should be commenced under section 110(c) or (d) of the Mine Act. 30 U.S.C. § 820(c) & (d). A special investigator does not know at the outset of his investigation whether charges will be filed in that particular case. Nevertheless, the purpose of his investigation is to allow the Secretary to determine whether a case should be filed.

It is our understanding that no charges have been brought as a result of Everett's special investigation. Nevertheless, this civil penalty case, brought under section 110(a), 30 U.S.C. § 820(a), is closely related litigation and it further appears that it could fairly be said that the document was prepared in anticipation of that litigation. See Kent Corp. v. NLRB, 530 F.2d 612, 623-24 (5th Cir. 1976), cert. denied, 429 U.S. 920 (1976) (investigative reports of NLRB regional office are prepared in anticipation of litigation even though at time reports were prepared there had been no determination that charges had substance); Chatham, 72 F.R.D. at 642-43 (notes of interviews conducted by FBI agents constitute materials prepared in anticipation of civil rights litigation).

Thus, it would appear that the excised portions of Craig's statements contained in Exhibit K meet the relevant immunity tests described above. We, therefore, vacate that part of the judge's order of September 22, 1989, that held that the excised portions of the statements of Craig in Exhibit K are not within the scope of the work product rule. However, the judge may have considered relevant factors or nuances not fully reflected in his prior order. Accordingly, we remand this issue to the judge for further consideration consistent with this decision. In accordance with Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b), the judge should use Fed. R. Civ. P. 26(b)(3) as a guide in analyzing this issue.

C. Attorney-Client Privilege

In his consideration of Exhibit K, the judge summarily concluded that the statements of Craig were not within the protection of the work product rule or the attorney-client privilege. Inasmuch as we are remanding the work product rule issue, we also remand the attorney-client privilege issue. We note in passing that the attorney-client privilege generally protects communications made by the client in confidence to his attorney and does not protect an attorney's mental impressions, conclusions, opinions or legal theories. Wright & Miller, § 2017, pp. 132-33; Hickman v. Taylor, 329 U.S. at 508.

III.

Conclusion

The procedure to be followed by a judge, as set forth in Bright, bears repeating:

> If, on the one hand, the judge concludes that the Secretary's need to preserve the identity of his informers should prevail, he should deny the amended motion to compel production of documents, seal the material previously withheld as part of the record for use on any appeal, and proceed to decide the case on the merits without resort to the sanctions previously imposed due to the Secretary's nondisclosure of the statements. If, on the other hand, the judge concludes that the respondents' need for this information is essential for a fair determination of the case, and that the privilege must yield, he should order the Secretary to disclose the information. The judge may, at his discretion, conduct a limited hearing to afford the parties an opportunity to develop additional evidence based upon the disclosure. He should then proceed to decide the case solely on the basis of the supplemented record. Should the Secretary resist the judge's order to disclose, dismissal of the proceeding is the appropriate sanction with further review available in accordance with section 113(d)(2) of the Mine Act. 30 U.S.C. § 823(d)(2). In any event, the judge's decision must be supported by findings of fact and conclusions of law, and be grounded in the body of case law developed by the Commission in the areas of work refusal and discriminatory discharge.

6 FMSHRC at 2526. Under no circumstances should the judge transmit the disputed documents to the party requesting them if he determines that a privilege should yield. Instead, he should order the party asserting the privilege to produce the material. If that party refuses to do so, dismissal or other sanctions may be appropriate.

For the reasons set forth above, we vacate the judge's order of November 21, 1989, dismissing these proceedings. We vacate that portion of the judge's order of September 22, 1989, directing the Secretary to produce the excised portions of the six disputed documents and we remand this matter to the judge for further proceedings consistent with this decision. [3]

Richard V. Backley, Acting Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

[3] We note that this case concerns Asarco's requests for documents during the discovery phase of this proceeding. We need not, and do not, decide in this case whether Asarco would be entitled, at the time of trial, to a document that is otherwise protected by the informant's privilege, if the Secretary calls that informant as a witness in the proceeding.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 5 1990

JOHN S. GUIDO, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 90-64-D
	:	MSHA Case No. MORG CD 90-02
SOUTHERN OHIO COAL COMPANY, Respondent	:	Martinka No. 1 Mine

DECISION

Appearances: Daniel V. Lane, Esq., Salem, West Virginia, for the Complainant;
Joseph M. Price, Esq., Robinson & McElwee, Charleston, West Virginia, for the Respondent.

Before: Judge Fauver

Complainant brought this action under § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. He contends that, following a mine accident in which he was injured on May 7, 1989, [1] he requested an MSHA investigation under § 103(g) of the Act and Respondent discriminated against him because of his § 103(g) request to MSHA. He alleges three acts of discrimination: (1) cutting off his workmen's compensation, (2) putting him in step three of the employer's absentee control program, and (3) making derogatory statements about Complainant in Respondent's conference with MSHA concerning the May 7, 1989, incident.

The case was heard in Morgantown, West Virginia, on September 6, 1990.

DISCUSSION

Under the Act, a complaining miner has the burden to prove that he engaged in a protected activity, and that the adverse action complained of was motivated in any part by that activity. Boich v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 1984).

---

[1] Complainant reported to his employer that he was injured when a conveyor belt was started without warning.

For the reasons shown below, I find that the reliable evidence does not sustain Complainant's allegations of discrimination.

After Complainant requested MSHA to investigate the May 7, 1989, accident under § 103(g) of the Act, MSHA investigated, and issued a citation for activating the conveyor belt without adequate warning. Respondent challenged the citation as to its "gravity" findings. At a conference between MSHA and Respondent, concerning the citation, Respondent contended that Complainant did not have a witness to his alleged injury and was not a reliable witness himself. During the conference, Respondent's accident prevention officer, Wesley Dobbs, stated or implied to MSHA that Complainant had some 40 accidents or injuries in the past and was not "much account" as a worker or a witness. I find that Respondent's remarks about Complainant as a worker and as a witness were part of a settlement discussion, and were not discriminatory because of Complainant's § 103(g) request. It was part of Respondent's factual contention for requesting MSHA to reduce the degree of gravity alleged in the citation. Complainant testified that he had heard that Respondent's representative, Wesley Dobbs, used profanity in his description of Complainant to MSHA. However, the evidence does not sustain this hearsay.

The reliable evidence does not show that Complainant's workers' compensation was cut off. He was paid in full under workers' compensation. Although there was some delay in making some of the payments, the evidence does not show that the delays were discriminatory.

Finally, the evidence shows that at the time of the accident Complainant was already in step three of the employer's absentee control program. Respondent did not change his status or take adverse action against him under this program after his § 103(g) request for an investigation.

On balance, I find that Complainant has not met his burden of proof to show a violation of § 105(c) of the Act.

ORDER

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 6 1990

BLUE DIAMOND COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 89-258-R Order No. 3370844; 8/16/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. KENT 90-68-R Order No. 3372825; 12/11/89
	:	Docket No. KENT 90-79-R Order No. 3372824: 12/11/89
	:	Docket No. KENT 90-80-R Order No. 3372827; 12/12/89
	:	Docket No. KENT 90-81-R Order No. 3372371; 12/12/89
	:	Scotia Mine
	:	Mine ID 15-02055
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 90-67 A.C. No. 15-02055-03658
v.	:	Docket No. KENT 90-170 A.C. No. 15-02055-03669
BLUE DIAMOND COAL COMPANY, Respondent	:	Scotia Mine

DECISION

Appearances: Randall S. May, Esq., Barret, Haynes, May, Carter & Roark, P.S.C., Hazard, Kentucky, for the Contestant/Respondent;
Joseph B. Luckett, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant, Blue Diamond Coal Company (Blue Diamond), has filed notices of contest challenging the issuance of section 104(d)(1) Order No. 3370844 (Docket No. KENT 89-258-R), section 104(d)(2) Order Nos. 3372825, 3372824, and 3372827 (Docket Nos. KENT 90-68-R, -79-R, and -80-R, respectively) and section 107(a) Order No. 3372371 (Docket No. KENT 90-81-R) at its Scotia Mine. The Secretary of Labor (Secretary) has filed a petition seeking civil penalties in the total amount of $4000 for the violations charged in the above four contested "d" orders. No penalty was assessed, of course, for the section 107(a) order.

Pursuant to notice, these cases were heard in London, Kentucky on May 30, 1990 (Docket Nos. KENT 89-258-R and KENT 90-67) and August 7, 1990 (the other five). They are consolidated here for purposes of decision as they are related matters, particularly with respect to the applicability of the "d" chain.

At the hearing on August 7, 1990, Blue Diamond moved to withdraw its application for review in Docket No. KENT 90-81-R. There was no objection heard from the Secretary and thus I approved that withdrawal on the record. That proceeding is therefore dismissed without further consideration. The section 107(a) order will, of course, be affirmed.

STIPULATIONS

The parties have agreed to the following five stipulations, which I accept (Gov't Ex. No. 1):

1. The operator produced approximately 1,315,000 tons of coal at the Scotia Mine in 1989.

2. The operator employed approximately 300 workers at the Scotia Mine during the final quarter of 1989.

3. The civil penalty assessment will not affect the operator's ability to continue in business.

4. The operator has another mine of approximately the same size as the Scotia Mine.

5. The presiding administrative law judge has jurisdiction to hear and decide this case.

I. Docket No. KENT 89-258-R; Order No. 3370844

On August 16, 1989, Order No. 3370844 was issued pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of

1977, 30 U.S.C. § 801 et seq. (the Act) and alleges a violation of the regulatory standard at 30 C.F.R. § 75.220(a)(1) and charges as follows (Government Ex. No. 4):

> The approved roof control plan for the mine, revised 05-23-89, which requires that if travel is blocked from the longwall section to the tailgate entry, the miners will be notified and re-instructed regarding escape procedures in the event of an emergency, and location and availability of self-contained self-rescue devices, is not being complied with in the MMV, 040-0 longwall shear section. Access to the tailgate entry is blocked as a result of the longwall face conveyor being off center. The tailgate is located approximately 5 feet outby the solid coal rib line, and as mining progresses the crushed coal and other material is being left behind preventing access to the tailgate entry. According to the Section Foreman, Bill Vann, the miners have not been notified and instructed as required by the roof control plan.

The crux of the matter is that the inspector states that passage from the longwall face area to the tailgate entry was blocked. He maintains that coal was "stacked in" from the floor to the roof. There was no access into the tailgate entry, except a small opening up near the face of the wall, about 12 by 14 inches.

The fact that a tailgate entry is blocked does not in and of itself violate the regulations. The alleged violation herein is a failure to comply with the roof control plan. More specifically, a provision of the plan requires that where travel out of the section through the tailgate side of the longwall section is prevented by a ground failure, the operator must take several steps. Among them are to notify the affected miners that the travelway is blocked and re-instruct these miners regarding escapeways, escape procedures and the availability and location of self-contained self-rescue devices. The complete list is contained on page 15, item 6 of Government Ex. No. 2.

This case turns on the condition precedent to the above roof control plan provision. Did the operator have a duty to perform these functions? Was the tailgate entry blocked? The answer depends on the assignment of credibility to the various witnesses. The Secretary's witnesses state it was definitely blocked. The operator's witnesses state just as definitely that it was not.

Inspector Davis, who wrote the order, of course testified to the effect that with the exception of the small opening alluded to earlier, the tailgate entry was blocked and travel out into the tailgate entry was therefore precluded. However, his

testimony is weakened somewhat by his own admission that he made this observation from a distance of approximately fifteen feet away, at shield 141. There are 144 longwall shields, each five feet wide, to hold up the roof across the face area.

Photographs of the area in question introduced by Blue Diamond through the testimony of Mr. Childers, who was and is the longwall coordinator, depict the impossibility of seeing the clearance the company says was there from too far away. Mr. Childers testified using one of these photos at Tr. 147:

> A. Okay. This photograph here is inside the shield line looking out into the tailgate entry.
>
> MR. LUCKETT: And that is marked BD Exhibit 5.
>
> (BY MR. MAY) So for the judge's edification, Mr. Childers, if one were 15 feet back up in here, this pretty clearly shows the view how one would not be able to determine access into the tailgate entry if you didn't go any further?
>
> A. If you didn't go any further to look at, you couldn't, because the way the shields are, the shield range--they start out here, and they're about 6 inches thick. They go right on down to maybe a foot thick at the back ends of 'em. If they have any material at all on top of them, they are lower than the roof line. And when the shear cuts out and piles the coal up, if you look--just stand back there and look straight down like you're looking out into the tail entry, you'll just see a pile of coal. If you don't go to the end of the shields, you can't see over the top of the coal that's been piled up.

Mr. Tommy Engle, a field office supervisor and a former underground coal mine inspector, also testified on behalf of the Secretary. He also, like Inspector Davis, was on the subject longwall section on August 16, 1989. He states that coal had accumulated in the area of the tailgate entry to the point it had totally blocked passage into the tailgate entry. The coal was packed from the mine floor to against the roof, with a slight opening near the roof at the end of the longwall face. This opening was approximately twelve by twelve inches. This testimony is perfectly congruent with that of Inspector Davis.

There is some discrepancy in Mr. Engle's testimony, however, as to <u>where</u> he made this observation from. At trial, he emphatically stated that he went up to the last shield, up to the accumulation and even tried to push his way through the accumulation. However, his deposition testimony, given on May 2, 1990, was to the effect that he stopped 14 feet from the area

where MSHA alleges the tailgate entry was blocked, stood there for three or four minutes evaluating whether he could see over the top of the accumulation and then turned around and went back towards the headgate entry. It was while he was there in that position that he determined that the coal was stacked to the roof and the travelway was totally blocked off (Engle Deposition Tr. 6-7). Therefore, I find Mr. Engle's trial testimony on this point to be impeached by his prior inconsistent statement.

Mr. Billy Vann, a longwall production foreman, testified that he took a spad measurement and a methane reading out in the tailgate entry at approximately 1:45 a.m. on August 16, 1989. At that time he had between 2 and 3 feet of clearance between the loose coal and the roof going into the tailgate entry. Mr. Vann was again at the tailgate exit area at approximately 6:00 a.m. At that time, only one pass or cut-out of coal had been done by the longwall. Vann stated that at this time the tailgate entry was not blocked and was accessible, there still being approximately 2 to 3 feet of clearance.

The subject order was issued at 8:35 a.m. and Vann testified that he informed Inspector Davis at 8:45 a.m. that the tailgate entry was not blocked in his opinion but that Davis said he thought it was and turned and asked Supervisor Engle his opinion. Engle stated that he felt the same way as Davis even though all of this conversation took place at approximately 8:45 a.m. in the headgate entry area and Engle had not even been to the tailgate entry area yet. He didn't go there until approximately 9:15 a.m.

Mr. Vann also opined that if one merely stopped at shield 141 and looked as Inspector Davis did, the bottom of the shield would have been just about even with the loose coal and the clearance would not have been visible from there.

James S. Owens was a repairman on the longwall section on August 16, 1989. He, along with fellow repairman, Rex Conley, did repair work in the tailgate exit area until approximately 4:00 a.m. that morning. They both saw Bill Vann go over into the tailgate entry to take his measurements and methane check that morning. They testified to the effect that Vann had no trouble going into the tailgate entry and that it was not blocked. They also both indicated that they likewise would have had no difficulty getting in the tailgate entry if there had been any need.

Donald Walker was the tailgate shear operator on the longwall on August 16, 1989. Walker testified that one pass or cut-out was made by the longwall the entire third shift and he was right at the tailgate entry area at approximately 6:00 a.m., after the one cut-out or pass had been made. At this time and until 8:00 a.m., Walker stated the tailgate entry was never

blocked and that it was accessible without the necessity of shoveling.

Ricky Campbell was the headgate shear operator on the longwall on August 16, 1989, working the third shift. Campbell first went to the tailgate exit side of the longwall at approximately 6:00 a.m. At that time one pass or cut-out had been done and Campbell stated he could see that the tailgate entry was not blocked and he could have gotten over into the entry.

Sam Foutch was a shield puller working the day shift (7:00 a.m. to 5:00 p.m.) on August 16, 1989. Foutch explained that a shield puller advances the shields on the longwall as the pan advances. On August 16, Foutch worked on pulling shields 96 to the end of the tailgate, or shield 144. He was performing this work at approximately 9:00 a.m., around shield 144 next to the tailgate entry, and he states that the tailgate entry was not blocked at this time. This is some 25 minutes after the order was written. In fact, Foutch stated that he shoveled loose coal and rock off the pontoons of the shields over into the tailgate entry and thus, he knows the tailgate entry could not have been blocked. This witness also stated he saw Bob Childers go over into the tailgate entry at approximately 9:00 a.m. to get a measurement to see how the longwall was running.

Doyle Cornett was a production foreman on the longwall face August 16, 1989, working the day shift. Cornett first got to the section around 8:00 a.m, accompanied by Inspector Davis. He reaffirmed that Davis only went as far as shield 141 and did not go on down to the last shield by the tailgate entry which would have been 15 to 18 feet away in his estimation. Cornett also opined that one could not see behind the shields into the tailgate entry from that position.

James Robert (Bob) Childers was the longwall coordinator on August 16, 1989, working the day shift. Childers was accompanied underground at approximately 7:15 a.m., by Inspector Davis and Supervisor Engle. He stayed at the headgate area of the longwall with Engle while Davis and Doyle Cornett travelled toward the tailgate exit area at approximately 8:00 a.m. Between 8:45 a.m and 9:00 a.m., Childers went to the tailgate exit area himself after the order had been issued. Childers explained that he went to check the tailgate entry himself because he had been told that Inspector Davis didn't go all the way to the end of it. He stated that his own examination revealed that the tailgate entry was not blocked and was accessible and he even went out into the entry himself through a 2 foot by 2 foot clearance.

While heading back toward the headgate area after his examination he ran into Engle coming down the panline. Together they went back toward the tailgate entry. Engle stopped at

shield 141 according to Childers and never went further. Childers stated that Engle never was out of his sight during this time and that Engle did not go to the tailgate entry and try to push his way through as Engle has testified to.

Before leaving the stand, Childers also reiterated the almost universally held position that one would not be able to determine if the tailgate entry was blocked or not from shield 141 or 15 feet away because of the obstructed view and line of sight.

Based on my thorough review of this trial record once again, I find the evidence to be simply overwhelming in favor of Blue Diamond's position on the ultimate factual issue. I likewise make the credibility choices in their favor and I find as a fact that the tailgate entry was not blocked; it was at the time the order was issued, open and passable, accessible to the affected miners.

It therefore follows that Blue Diamond did not violate 30 C.F.R. § 75.220 (a)(1) as charged and Order No. 3370844 will accordingly be vacated.

II. Docket Nos. KENT 90-68-R, -79-R AND -80-R; Order Nos. 3372825, 3372824 and 3372827

All three of these orders were issued pursuant to section 104(d)(2) of the Act. However, because I informed the parties that I was going to vacate section 104(d)(1) Order No. 3370844, the Secretary, at the hearing on August 7, 1990 moved to convert Order No. 3372824 to a section 104(d)(1) Citation, Order No. 3372825 to a 104(d)(1) Order and Order No. 3372827 would remain a (d)(2) Order. This would have the effect of re-starting the "d" chain on December 11, 1989.

Order No. 3372824 alleges a violation of the mandatory standard found at 30 C.F.R. § 75.400 and charges as follows (Government Exhibit No. 3):

> Loose coal and fine dry coal dust have been permitted to accumulate 3" to 9" inches in depth, (as measured with a standard measuring tape) in the Nos 2, 3 and 4 entries of the MMV 032-0 beginning at the section loading point and extending inby for a distance of approximately 180 feet. The accumulations are intermittent and the coal has been crushed and pulverized by the 105C Joy Shuttle Cars during haulage operations.

Inspector Davis was again the inspector who found this violation and he testified to the effect that he observed

accumulations of loose coal and fine, dry coal dust in the roadways from rib to rib in Nos. 2, 3 and 4 entries. He measured these accumulations and found them to be 3 to 9 inches in depth beginning at the section loading point and extending inby for a distance of approximately 180 feet. These black accumulations were intermittent and were pulverized by the shuttle cars traveling in the roadways.

He also testified that the danger presented by these accumulations is a mine fire or a mine explosion. Furthermore, where you have accumulations of combustible materials, there is always the possibility that you will have a methane ignition in the face area and these accumulations would cause the ignition to probably spread or propagate into other areas of the mine, depending how fine, dry and pulverized the accumulations are. There was a lot of electrical equipment on the section at the time as well. A power center was located just 30 feet from the accumulations. He felt that serious injuries were reasonably likely to occur to the section crew such as smoke inhalation in the event of a mine fire, which occurrence he also believed to be reasonably likely. He further opined that if you had a methane ignition which propagated into a mine dust explosion, then it could be fatal. Therefore, he believed the violation was "significant and substantial".

He also marked the negligence as "high". He felt this was an "unwarrantable" violation as well as "S & S". He estimated the accumulations had been there for at least two production shifts based on the pulverized condition of the accumulations and their depth. However, when directly asked on cross-examination, he had to admit that he did not know how long the accumulations had been in the roadways.

Inspector Carlos Smith corroborated Davis' factual testimony regarding the description of the accumulations, estimating the depth as between 8-10 inches of loose, pulverized coal. But he likewise couldn't say for sure how long these accumulations had existed, but he estimated that they had been there for a shift or two.

There is no doubt that a violation of 30 C.F.R. § 75.400 existed as the inspectors described it. Furthermore, I also believe the violation was "significant and substantial" (S & S).

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 (August 1985), the Commission stated further as follows:

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

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).

In this regard, I fully credit the unrebutted and essentially unopposed testimony of Inspector Davis on the issues of gravity, seriousness and S & S.

In several relatively recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission has further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company,

9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

> We stated that whereas negligence is conduct that is "inadvertent, " "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable". Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

Although I find the allegation at bar to be an S & S violation of the mandatory standard charged, I cannot go along with the inspector's alleged finding of "unwarrantability." His finding is based almost solely, if not entirely on the measured depth of the accumulations. He himself admits he doesn't know how long they were there. That is the government's only evidence on the issue of negligence and unwarrantability. I find that to be insufficient to sustain the Secretary's burden of proof on this point. Accordingly, the proposed section 104(d)(1) Citation, nee 104(d)(2) Order No. 3372824, will be modified to and affirmed as an S & S section 104(a) citation.

If Order No. 3372824 cannot be converted into a "d" citation and becomes an "a" citation, as it has, then proposed Order Nos. 3372825 and 3372827, being non-S & S allegations to begin with also become section 104(a) citations, wherein the only issues are the fact of violation and the civil penalty to be assessed, if any violation(s) is/are found.

Order No. 3372825 alleges a non-S & S violation of the mandatory standard found at 30 C.F.R. § 75.316 and charges as follows (Government Exhibit No. 5):

> The approved ventilation system and methane and dust control plan for the mine, which requires that the line of permanent stopping separating the intake and return aircourses shall be maintained up to and including the 3rd connecting crosscut outby the faces, is not being complied with in the MMV 032-0 working section. The line of permanent stopping separating the Nos. 1 and 2, intake and return aircourse entries is only being maintained up to and including the fourth connecting crosscut outby the faces. The quantity of air passing through the last open crosscut outby the faces is 42,826 cfm. The maximum amount of CH4 detected was 0.2%.

Inspector Davis testified that he observed a violation of the approved ventilation plan for the mine which requires that they (the operator) maintain the line of permanent stopping separating the intake and return air courses up to and including the third connecting crosscut outby the working faces. The line of permanent stopping providing this separation in the affected section he found was only being maintained up to and including the fourth connecting crosscut outby the faces.

The foregoing establishes a non-S & S violation to my satisfaction and after modification, section 104(a) Citation No. 3372825 will be affirmed as modified.

Order No. 3372827 alleges a non-S & S violation of the mandatory standard found at 30 C.F.R. § 75.1105 and charges as follows (Government Ex. No. 7):

> An energized 480 Volt A.C. battery charger located adjacent to the return aircourse stopping line at a point approximately 20 feet inby station spad No. 15325, is being used to recharge the batteries on an Eimco coal scoop in the MMV 032-0 working section, and the battery charger is not being ventilated into the return aircourse. The newly constructed permanent type stopping located between the battery charger and the return aircourse, is not provided with a ventilation regulator, (opening) to permit direction of the air current.

Inspector Davis once again testified on behalf of the Secretary. On December 12, 1989, he found that a new stopping had been constructed in the third connecting crosscut outby the working faces to correct the previously discussed violation. However, they (the operator) had an energized battery charging station immediately in front of the stopping and had not provided a means in the stopping or a regulator to direct the air current directly into the return.

The cited regulation requires that battery charger stations be ventilated directly into the return air course. Instead, the inspector found that the air was going to the return aircourse in a roundabout way. The air was not going across the charger. There was nothing to direct it across the charger and there was no regulator in the stopping to provide a low pressure drop across the charging station, which would have been necessary in order to ventilate this charging station directly to the return aircourse.

The foregoing testimony establishes a non-S&S violation of the cited standard and after modification to a section 104(a) citation, Citation No. 3372827 will be affirmed as modified.

With regard to the civil penalty assessments herein, I am not bound by MSHA proposed civil penalty assessments, and once a penalty is contested and Commission jurisdiction attaches, my determination of the amount of the penalty is de novo, based upon the statutory penalty criteria and the record developed in the adjudication of the case. See: Sellersburg Stone Company, 5 FMSHRC 287 (March 1983), aff'd., 736 F.2d 1147 (7th Cir. 1984); United States Steel Mining Co., Inc., 6 FMSHRC 1148 (May 1984).

On the basis of the foregoing findings and conclusions, and taking into account the six statutory civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate in the circumstances of this case:

Citation No.	Date	30 C.F.R. Section	Assessment
3372824	12/11/89	75.400	$400
3372825	12/11/89	75.316	$150
3372827	12/12/89	75.1105	$100

III. Docket No. KENT 90-81-R; Order No. 3372371

Order No. 3372371 was issued pursuant to section 107(a) of the Act. Contestant filed an application for review. However, at the hearing on August 7, 1990, counsel for Blue Diamond stated on the record at Tr. 100-101 that: "[M]y client has informed me that the recommendations made pursuant to that order... were good ones and that they are complying with that." Therefore, he sought permission to withdraw their application for review. There was no objection and the request was granted. The order will be affirmed.

ORDER

Based on the above findings of fact and conclusions of law, **IT IS ORDERED:**

1. Order No. 3370844, contested in Docket No. KENT 89-258-R, **IS VACATED.**

2. Order No. 3372824, contested in Docket No. KENT 90-79-R properly charged a violation of 30 C.F.R. § 75.400 and properly found that the violation was significant and substantial. However, the contested order improperly concluded that the violation resulted from Consol's unwarrantable failure to comply with the mandatory safety standard involved. Therefore, the violation was not properly cited in a section 104(d)(2) order or

as later proposed, a section 104(d)(1) citation. Accordingly, Order No. 3372824, **IS HEREBY MODIFIED** to a § 104(a) citation, **AND AFFIRMED.**

3. Modified Citation No. 3372825, contested in Docket No. KENT 90-68-R, **IS AFFIRMED** as a non-S&S violation of 30 C.F.R. § 75.316.

4. Modified Citation No. 3372827, contested in Docket No. KENT 90-80-R, **IS AFFIRMED** as a non-S&S violation of 30 C.F.R. § 75.1105.

5. Order No. 3372371, contested in Docket No. KENT 90-81-R, **IS AFFIRMED.**

6. The Blue Diamond Coal Company **IS HEREBY ORDERED TO PAY** a civil penalty of $650 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

Distribution:

Randall Scott May, Esq., 113 Lovern Street, P.O. Drawer 1017, Hazard, KY 41701 (Certified Mail)

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

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 10 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 90-228 A. C. No. 46-06647-03552
v.	:	No. 1 Deep
BETHEL FUELS INCORPORATED, Respondent	:	

ORDER VACATING DEFAULT
ORDER OF ASSIGNMENT

Before: Judge Merlin

This case is now before me pursuant to Order of the Commission dated December 4, 1990.

It appears from the file that the operator served a timely answer to the penalty proposal on the Solicitor, but failed to do so with the Commission. Bearing in mind the Commission's repeated admonition that default is a harsh remedy and since the operator appears pro se, I conclude that relief from default is warranted. Amber Coal Co., 11 FMSHRC 131 (February 1989). See also unpublished decisions, Hickory Coal Company, Docket No. PENN 90-49, June 19, 1990 (Chief Administrative Law Judge Merlin); Bentley Coal Company, Docket No. WEVA 90-36, June 19, 1990 (Chief Administrative Law Merlin) (copies attached).

Accordingly, it is **ORDERED** that the default dated November 6, 1990, be and is hereby **VACATED.**

It is further **ORDERED** that this case be assigned to Administrative Law Judge George A. Koutras.

All future communications regarding this case should be addressed to Judge Koutras at the following address:

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Two Skyline Place, Suite 1000
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6232

Paul Merlin
Chief Administrative Law Judge

Attachments

Distribution:

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

Mr. Charles Myers, Superintendent, Bethel Fuels, Inc., Route 7, Box 510, Morgantown, WV 26505 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

DEC 13 1990

FEATHERLITE BUILDING PRODUCTS CORPORATION,	:	CONTEST PROCEEDINGS
Contestant	:	Docket No. CENT 88-113-RM
	:	Cit./Order No. 3063548; 5/19/88
v.	:	
	:	Docket No. CENT 88-114-RM
SECRETARY OF LABOR,	:	Citation No. 3063549; 5/20/88
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 88-115-RM
Respondent	:	Citation No. 3063550; 5/20/88
	:	
	:	Laura Todd Pit and Plant
	:	Mine ID 41-00267
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 89-36-M
Petitioner	:	A.C. No. 41-00267-05520
	:	
v.	:	Laura Todd Pit and Plant
	:	
FEATHERLITE BUILDING PRODUCTS	:	
CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Steven R. McCown, Esq., Jenkins & Gilchrist, Dallas, Texas, for Contestant/Respondent; Mary E. Witherow, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Respondent/Petitioner.

Before: Judge Cetti

Statement of the Proceedings

These consolidated proceedings concern Notices of Contest filed by the Contestant, Featherlite Building Products Corporation (herein Featherlite), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), challenging the three captioned citations issued by the Federal Mine Safety and Health Administration (MSHA). The civil penalty proceedings concern proposals for assessments of civil penalties filed by MSHA seeking assessments against Featherlite for the alleged violations charged in the above-mentioned citations.

Following its investigation of a fatal massive fall-of-ground accident at the Laura Todd Pit, MSHA issued to Respondent Featherlite a number of citation/orders, some of which were accepted by Featherlite. The three citation/orders contested herein by Featherlite are as follows:

Citation/Order No. 3063548 in Docket CENT 88-113-RM alleges a violation of 30 C.F.R. § 56.3131 under Sections 107(a) and 104(a) of the Act, with a proposed penalty of $5000.

Citation No. 3063549 in Docket No. CENT 88-114, as amended, alleges a violation of 30 C.F.R. § 56.3401 under Section 104(d)(1) of the Act, with a proposed penalty of $1000.

Citation No. 3063550 in Docket No. CENT 88-115-RM alleges a violation of 30 C.F.R. § 56.3200 under Section 104(d)(1) of the Act with a proposed penalty of $5000.

Respondent timely contested each of the three alleged violations pursuant to 29 C.F.R. §2700.20(c). The Secretary filed timely answers pursuant to 29 C.F.R. § 2700.20(d). Later, the Secretary filed her complaint proposing the above-mentioned penalties, respectively, for each of the three alleged violations. Respondent filed a timely answer and the Contest Proceedings and the Penalty Proceeding were consolidated for hearing and decision.

Respondent's Answer does not deny jurisdictional facts alleged by the complaint, as permitted by 29 C.F.R. 2700.5. The Secretary correctly asserts that jurisdiction over this proceeding is proper and that the violations of the Act took place in or involve a mine which has products which enter commerce or has operations or products which affect commerce.

After notice to the parties, the matter came on for hearing on the merits before me at Dallas, Texas. Oral and documentary evidence was introduced, post-hearing briefs were filed, and the matters were submitted for decision. I have considered the arguments made on the record during the hearing in my adjudication of these matters and the post-hearing briefs filed by the parties.

ISSUES

1. Whether Featherlite violated 30 C.F.R. § 56.3131 as charged in Citation No. 3063548.

2. Whether Featherlite violated 30 C.F.R. § 56.3401 as charged in amended Citation No. 3063549 under 104(d)(1) of the Act.

3. Whether Featherlite violated 30 C.F.R. § 56.3200 as charged in Citation No. 3063550 under 104(d)(1) of the Act.

4. Whether MSHA is estopped from asserting that Featherlite has responsibility for compliance with the provisions of 30 C.F.R. §§ 56.3131, 56.3200, or 56.3401 at the Laura Todd Pit, which was leased by Featherlite.

5. The appropriate civil penalties, if any, to be assessed taking into consideration the statutory civil penalty criteria in section 110(i) of the Act.

STIPULATIONS

At the hearing, the parties entered the following stipulations, which I accept:

1. The correct name of the legal entity that is the contestant in the above-captioned contest cases, as well as respondent in penalty Docket No. Cent 89-36-M, is "Featherlite Building Products Corporation."

2. There was a timely abatement of all violations by the permanent closure of the Laura Todd Mine.

3. The proposed civil penalties will not affect the ability of Featherlite to continue in business.

The hearings on these consolidated matters were delayed as a result of Fifth Amendment constitutional objections by Featherlite and an independent counsel for certain individuals, who were said to be essential witnesses for Featherlite.

After MSHA completed its criminal investigation of the accident and advised that no criminal penalties would be pursued, the matter was set for hearing in Dallas, Texas. At the consolidated hearing on these matters, testimony was taken from the following witnesses:

1. M. HAROLD ROBERTSON, MSHA Inspector

2. WILLIAM WILCOX, MSHA Mining Engineer (now retired)

3. JERRY DAVIDSON, MSHA's expert in geological studies and mining techniques

4. BOB CARROLL, owner of B.C. Construction Company

5. EDWIN LUMMUS, former Featherlite Plant Manager

6. MAX HENSON, Supervisor B.C. Construction Company

Background Facts

Featherlite, at a plant in Ranger near Dallas, Texas, produces a synthetic aggregate that is used in the construction of buildings and highways. In producing the synthetic aggregate, Featherlite used shale rock mined at the Laura Todd Pit which is located approximately 1.5 miles from Featherlite's plant. Featherlite leased the Laura Todd Pit and contracted with an independent contractor, B.C. Construction Company ("B.C."), to perform the mining operations at the pit. (Government Exhibit 2). B.C. and Featherlite's contract provided that B.C. was responsible for mining the shale, loading the shale on the trucks, and delivering the shale to Featherlite's plant in Ranger, Texas. Featherlite, however, retained responsibility for stripping the overburden in the mining areas at the pit and for quality control.

The Accident

The accident which gave rise to the investigation and the issuance of the three citations may be succinctly stated as follows: A 64-year old contractor shovel operator, with 15 years experience at the Laura Todd Pit, was fatally injured when the power shovel he was operating was covered by a massive fall of ground. Truck operation problems were occurring at the pit due to an accumulation of mud and water. The shovel was moved to another nearby location at the pit where the trucks could operate without getting stuck. This move placed the shovel adjacent to a near-vertical, unstable portion of the highwall with the unprotected operator's cab on the highbank side close to the toe. After loading a truck, the victim moved the shovel back about four to five feet and stopped. At this time, the highwall failed and engulfed the cab of the shovel and the operator.

Following an attempted rescue operation, Federal Mine Inspector William Wilcox and other MSHA personnel investigated the accident. The investigation report received in evidence as Secretary's Exhibit No. 2 states:

> Grady Lee Daughty, an employee of B.C. Construction, was fatally injured at approximately 1:50 p.m. on May 18, 1988, when the power shovel he was operating was covered by a massive fall-of-ground from a 60-foot highwall at the mine site leased and operated by the Featherlite Building Products Corporation.

Docket No. CENT 88-113-RM

Citation No. 3063548

Federal Coal Mine Safety and Health Inspector W.R. Wilcox, after his investigation and inspection of Featherlite's Laura Todd Pit and Plant charged Featherlite with the violation of 30 C.F.R. § 56.3131, which provides as follows:

> § 56.3131 Pit or quarry wall perimeter.
>
> In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

Inspector Wilcox, in Citation Order No. 3063548, described the alleged violative condition as follows:

> "The mine operator (Featherlite) was responsible for the location of the areas to be mined, the stripping of the overburden to facilitate mining of the underlying desirable shales and to insure that the overburden - loose and unconsolidated material - would be stable and not constitute a safety hazard where the contractor mined the shale and transported it from the mine-site. The overburden portion of the highwall which fell onto the contractor's power shovel and resulted in the death of the shovel operator had not been sloped to a natural angle of repose, benched or in other manner stabilized. This order is to prevent the entry of any person into the affected area unless the proposed procedures involved have been approved by MSHA in advance. This includes the recovery of any equipment, the stabilization of the high wall or the backfilling of the uncompleted shale mining cut."

On the day of the massive fall-of-ground accident, employees of B.C. Construction were in the "west" cut, which was approximately 80

feet wide digging east. Max Henson, B.C. Construction supervisor, testified that he had been at the site on the day of the accident. Henson stated he supervised the employees of B.C. that worked at the Laura Todd Pitt. B.C. had been working in this "west" cut for a couple of months. Prior to that time, they had been in the "east" cut digging west, but had to move due to excessive water-soaked conditions. The two cuts were separated by 25 feet of material which was to be removed. Mr. Henson testified that the decision to move from the "east" to the "west" cut was discussed with Mr. Parsons the plant manager of Featherlite. Henson stated he never "made any decisions such as to move anybody anywhere without consulting someone first." Parsons told him, "Okay, let's move." Henson stated that Jack Beardon, Featherlite's scraper operator had stated on the morning of the accident that his plan at the pit was to "get the mud and water pushed out of" the east side of the cut "and get it covered up, and cut through and use that as a road to get to the west side of the west pit." Prior to that time, Henson believed they were going to take the shale out of the west pit. Henson observed sloughing on the south wall while in the east cut.

The south wall was the wall involved in the fatal fall-of-ground accident. This wall was approximately 60 feet high. The south wall was composed of shale, original overburden and stockpiled overburden. The shale was approximately 20-30 feet in depth. Approximately 30 more feet of clay overburden sat on top of the shale. On top of that was previously removed overburden which had been stockpiled by Featherlite on top of the natural structure.

William Wilcox, employed as an MSHA inspector for 18 years, conducted the investigation and inspection of Featherlite following the fatal accident. Mr. Wilcox has a B.S. in mining engineering from the Missouri School of Mines and had 17 years of mining experience in private industry prior to working for MSHA. Mr. Wilcox did approximately 80 to 100 MSHA inspections per year.

Mr. Wilcox testified that the south wall area cited was an area where persons worked or traveled. The testimony at trial and Exhibit G-26 clearly show that the pit's south wall was the area where the fatal massive fall-of-ground occurred.

Mr. Wilcox stated that the south wall was composed of loose or unconsolidated material, as was clearly evidenced by its failure. This conclusion is also based on the sloughing observed on the wall, the cracks parallel to the cut being developed, the water saturation of the original topsoil, the relocated stripping, and the erosion product coming down into the cut being developed.

Jerry Davidson, a geologist with MSHA for 19 years in the ground support division, was called by the Secretary as an expert witness. Mr. Davidson has a B.S. in geology from the University of North Dakota and had 10 years experience as a geologist in the mining industry prior to coming to MSHA. Mr. Davidson testified he was an expert in mining techniques and geological studies. After reviewing the photographs (Exs. G-4 through G-25), Mr. Wilcox's report (Ex.G-26), and listening to the testimony at the hearing, Mr. Davidson, under oath, gave his expert opinion on the degree of consolidation of the south wall. Mr. Davidson stated the shale was relatively consolidated, and that the overburden was relatively unconsolidated, as evidenced by the fact that it could be loaded out with a self-loading scraper, as opposed to drilling or blasting, or other such techniques. The stockpiled overburden would be loose and unconsolidated and the overburden was "structurally weak."

Mr. Wilcox stated that, although the south wall of the pit was sloped at the west entrance of the cut, it was not as the cut progressed to the accident site where the angle of the pit wall was 75 degrees or steeper. Mr. Wilcox testified that there was no benching or stripping at the accident site, although there was some in the west cut a couple hundred feet from the accident site. Mr. Henson, who had been at the sit on the morning of the accident, testified the south wall went "fairly straight up" and was almost vertical.

Melvin Harold Robertson, an MSHA inspector for 16 years with 16 years prior mining experience, also stated the wall appeared to have no slope and to go up at 90° angle.

Mr. Wilcox stated that, based on his expertise in mining, safety, and health, the conditions at the south wall in the area of the fatal accident constituted a "very high-risk" hazard of a release of hundreds of thousands of tons of rock and dirt entrapping and burying people. He stated that there was a very definite probability of injuries occurring as a result of such hazard, and later made it clear that, in his opinion, it was "highly likely" that the hazard would result in an injury of a serious nature. He stated the types of injuries occurring would certainly be fatal. I credit the testimony of Messrs. Wilcox and Davidson and find that the violation is significant and substantial.

A violation such as we have here is properly designated significant and substantial if it contributes to a safety hazard which will reasonably likely result in a serious injury. Cement Division, National Gypsum, 3 FMSHRC 822 (1981); Mathies Coal Co., 6 FMSHRC 1 (1984).

Mr. Wilcox rated the gravity of the violation as "occurred"; the types of injuries that could occur as "fatal"; and the operation's negligence as "high."

Inspector Wilcox rated the operator's negligence as high, based on the operator's familiarity with the mining area and the benching and sloping he observed in other parts of the mine site. He also considered the custom and practice of the industry, and what a typical operator of this type of operation in this part of the country would do.

I agree with Mr. Wilcox's evaluation of the operator's negligence, the gravity of the violation, and the likelihood of serious injury. The violation contributed to a safety hazard which was reasonably likely and did, in fact, result in serious fatal injuries.

CENT 88-114-RM

Citation No. 3063549

This citation was issued by Inspector Wilcox originally for an alleged violation of 30 C.F.R. § 56.18002. Later, Inspector Wilcox amended the citation by changing the standard allegedly violated from 30 C.F.R. § 56.18002 to 30 C.F.R. § 56.3401. Section 30 C.F.R. § 56.3401 provides as follows:

> § 56.3401 Examination of ground conditions.
>
> Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.

Citation No. 3063549 reads as follows:

> "A power shovel operator was fatally injured when the overburden portion of a highwall fell and entrapped the miner within his machine. The mine operator

did not examine mine work places for safety hazards at least once each shift (30 CFR 56.18002(a)) and record such examinations (30 CFR 56.18002) He had recently been cited for the latter violation (Nov. 17, 1987). The imminent danger of the unstable overburden highwall was not brought to the immediate attention of the operator and all persons were not withdrawn from the area (30 CFR 56.18002c). The accident was not prevented from happening.

Mr. Wilcox testified that, when he asked if Featherlite was complying with the requirements of the cited standards, Edwin Lummus, general manager of Featherlite stated something like, "Heck, we're not doing that yet or at this time." Based on this statement, and the existence of the obvious hazard, Mr. Wilcox concluded the mine operator was not examining and testing for loose ground. I concur in Mr. Wilcox's conclusion.

Edwin Lummus admitted on cross-examination that Featherlite was not inspecting the pit, nor was it conducting any inspections of B.C.'s operations other than quality control.

This admission was made, even though it is undisputed that Featherlite scraper operator Jack Beardon worked at the pit every day and another Featherlite employee worked at the pit in the stripping area. Further testimony indicates that Ray Parsons and Ed Lummus, Featherlite supervisors, were out at the pit occasionally. In fact, Max Henson spoke to Ray Parsons, Featherlite plant superintendent, on the day of the accident. Mr. Parsons stated he had been to the pit and left just before the accident. Mr. Parsons told Mr. Henson he "didn't hardly have time to get to the gate" before the fatal ground fall occurred.

Mr. Wilcox testified that the failure to inspect the ground conditions constituted a hazard of sloughing or ground slide. Based on his expertise as a safety professional, Mr. Wilcox stated that the injury from such a hazard was "highly likely" and that such injuries would be very serious, if not fatal. I find that the violation is significant and substantial since it contributed to a safety hazard which was reasonably likely to result in a serious injury. Cement Division, National Gypsum, supra, Mathies Coal Co., supra.

Mr. Wilcox rated the gravity as "occurred," the types of injuries as "fatal" and the operator's negligence as "high." I concur in Mr. Wilcox's evaluation.

Mr. Wilcox observed that a previous citation had been issued to Featherlite for failure to inspect work places six months prior to the fatality. Mr. Wilcox further observed that, based on the high number of citations given Featherlite at its previous inspection, and the hazardous conditions observed (and later cited) during the investigation of the fatal massive ground-fall investigation, Featherlite did not have a great regard for safety.

Mr. Davidson, MSHA geological expert, stated that, based on the evidence he had heard and read, the hazard was apparent or readily discoverable. Mr. Davidson based this opinion on the evidence of sloughing, the types of machinery used for excavation, the height of the highwall, and the placing of the operator's cab next to the highwall. Because the cab was next to the wall, the operator had less room to maneuver or escape during ground slide. It would have been safer to have the cab away from the highwall. Another important factor was the water problem caused by the rainfall. The diversion ditches dug by Featherlite personnel indicate they knew about the problem of standing water. When the earth material filled up with water, it added weight and increased pore pressure within the rock areas.

Mr. Davidson testified that the photographs (Exs. G-4 through G-25) showed tension fractures which should have been apparent. He stated it would be highly unlikely that there wouldn't have been tension fractures which were apparent or readily discoverable on top of the south wall prior to the accident. Tension fractures would be readily discoverable during an inspection of the top of the pit wall, since there was little vegetation on top of the wall. These tension fractures indicate a failure surface has developed and is propagating downward.

Mr. Davidson stated he was familiar with the custom and practice in the industry with regard to inspections of ground stability. The conditions at the pit should have mandated a careful inspection. The sloughing described indicated a need to inspect both the pit floor and the crest area.

Featherlite knew, or should have known, of the hazardous conditions. They had been previously cited for failure to inspect every workplace. They had their own employees working daily at the pit. Management officials of Featherlite were at the pit regularly and Ray Parsons had been there just prior to the accident. Featherlite knew it was not inspecting the pit and the obvious nature of the hazard mandates it should have done so.

"Unwarrantable failure" means "aggravated conduct, constituting more than ordinary negligence, by an operator in relation to a violation of the Act." Emery Mining Corp., 9 FMSHRC 1997, 2010 (1987);

Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (1987). In this case, the evidence, summarized above, clearly shows that Featherlite's conduct in violating the provisions of § 56.3401 was aggravated conduct constituting more than ordinary negligence. The violation was due to Featherlite's unwarrantable failure to comply with the cited standard.

CENT 88-115-M

Citation No. 3063550

Inspector Wilcox issued Citation/Order No. 3063550 for an alleged violation of 30 C.F.R. § 56.3200, which provides as follows:

> § 56.3200 Correction of hazardous conditions.
>
> 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.

Inspector Wilcox, in the citation, described the violative conditions as follows:

> The mine operator determined the plan to be followed in the selected mining area and conducted the stripping portion of that plan prior to instructing a contractor to mine the exposed shale. He failed to correct the hazardous ground conditions to which the latter's employees would be exposed before instructing the contractor to begin shale mining. He did not post and barricade the area against entry by any person. He ordered mining to proceed and a massive fall of ground (overburden) occurred which resulted in fatal injury to the contractor's power shovel operator.

Mr. Wilcox testified that, based on the height of the wall, the condition or composition of the soil, the slope of the wall prior to the accident, the previous water condition requiring the digging of ditches on top of the south wall, and the sloughing in the east cut,

that the ground conditions of the south highwall constituted a hazard. These conditions were not taken down prior to work or travel in the area, or supported as shown by testimony concerning the slope of the wall at the time of the massive fall-of-ground. It is also clear that the area was not posted with a warning against entry or barrier.

Mr. Wilcox stated that the ground conditions of the south highwall created a hazard of falling ground. Based on his opinion as a safety professional, Mr. Wilcox rated the likelihood of injury as "very definitely." The injuries that could occur would be fatal and would be very likely to occur. I credit the testimony of Mr. Wilcox and find the violation is significant and substantial. Since the evidence established all the elements of the Mathies Coal Co., supra.

Mr. Wilcox rated the gravity as "occurred" and "highly likely. He rated the types of injuries as "fatal and tne operator's negli- negligence as "great." Mr. Wilcox based the operator's negligence on the operator's experience, work history, knowledge, contractual obligation, and obviousness of the hazardous condition. He further stated that he judged the operation against the typical operator of this type of work force.

Mr. Davidson, MSHA's expert in geological studies and mining techniques, stated the ground conditions created a hazard that was apparent or readily discoverable, based upon a careful inspection that a reasonably prudent operator would have done, given these conditions. Again, Featherlite knew, or should have known, of the dangerous conditions.

As previously stated, "unwarrantable failure" means "aggravated conduct constituting more than ordinary negligence, by an operator in relation to a violation of the Act." Emery Mining Corp., supra; Youghiogheny & Ohio Coal Co., supra. Featherlite's failure to address the cited conditions constituted more than ordinary negligence. The violation of § 56.3200 was due to Featherlite's unwarrantable failure to comply with the requirements of the cited standard.

All three violations could have been prevented if Featherlite had established a mining plan, removed the overburden, established benches, and made daily inspections at every shift.

Estoppel Issue

Preliminarily, it is noted that there appears to be no real dispute that the Secretary can cite the owner-operator, the independent contractor, or both, for violations committed by the independent contractor. This is supported by the language of the Act,

its history, and applicable court precedent. The Secretary has wide enforcement discretion and courts have traditionally not interfered with the exercise of that discretion. Intl. U., UMWA v. FMSHRC, supra, 840 F.2d at 83; Brock v. Cathedral Bluffs Shale Oil Co., supra, 796 F.2d at 537-538; BCOA v. Secretary, supra, 547 F.2d at 246.

Respondent asserted that the Secretary should be estopped from issuing the citations involved in this consolidated case. It is Featherlite's position that in the past MSHA had dealt with Featherlite in such a manner to justify Featherlite's belief that it was only responsible for mine safety violations at Featherlite's Ranger Plant and not for violationg involving the mining operations of its contractor B.C. at Featherlite's leased Laura Todd Pit. Although MSHA inspected the Laura Todd Pit every six months, Featherlite asserts MSHA officials never discussed the pit with Featherlite officials.

Featherlite asserts that its belief that it was not responsible for mine safety violations at the Laura Todd Pit was justified based on an MSHA inspector's prior termination of an earlier November 1987, citation. (Featherlite Ex. 2). In November of 1987, MSHA inspector, Harold Robertson, issued Featherlite a Section 56.18002(b) citation for failing to keep records of daily shift inspections. B.C. Was operating at the Laura Todd Pit when Mr. Robertson made the earlier November 1987 inspection. After receiving the citation, Featherlite had a plant engineer design a form that was exclusively devoted to recording inspections at Featherlite Ranger Plant. The form made no mention of inspections at the Laura Todd Pit. Mr. Robertson terminated the citation based upon his review of Featherlite's forms that exclusively dealt with safety inspections at the Ranger plant. Featherlite argues that Mr. Robertson's termination of the citation, based on Featherlite's compliance which indicated that Featherlite was only inspecting the Ranger plant area, justifiably reaffirmed Featherlite's belief that it was only responsible for mine safety at the Ranger plant and that B.C. was responsible for mine safety violations at the Laura Todd Pit.

Both the Secretary and Featherlite in their briefs state that a party seeking to estop the government has a very heavy burden to bear. Jones v. Dept. Health & Human Services, 843 F.2d 851 (5th Cir. 1988). The party claiming the estoppel must at least demonstrate that the traditional elements of an estoppel are present in order to prevail. Heckler v. Community Health Services of Crawford,

467 U.S. 51, 104 S.CT. 2218, 81 L. Ed.2d 42 (1984). Those elements are: 1) the party to be estopped must know the facts; 2) he must intend his conduct be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; 3) the latter must be ignorant of the true facts; and 4) he must rely on the former's conduct to his injury." Scime v. Bowen, 822 F.2d 7, 9 n.1 (2d Cir. 1987). The party "must have relied on his adversary's conduct in such a manner as to change his position for the worse ... ." That reliance must have been reasonable in that the party claiming the estoppel did not know, nor should it have known, that its adversary's conduct was misleading." Heckler, supra, 467 U.S. at 59, 104 S.Ct. at 2223.

"Those who deal with the government are expected to know the law and may not rely on the conduct of governmental agents contrary to the law"; therefore, courts will not find reliance was present if the governmental agency did not have the authority to make the "misleading" pronouncements. Heckler, supra, 467 U.S. at 634, 104 S.Ct. at 2225. See, Long Island Radio Co. v. N.L.R.B., 841 F.2d 474 [2d Cir. 1988 (holding the NLRB may not be estopped from enforcing a deadline which the Board had no authority to extend)].

In addition, a party cannot raise an estoppel argument "without proving that he will be significantly worse off" than if he had never obtained the wrong information. Heckler, 467 U.S. at 63, 104 S.Ct. at 2225.

In addition to showing that the traditional elements of estoppel are present, the party must show "affirmative misconduct" on the part of the Government. Scime, 822 F.2d at 8-9, n.2 (2d Civ. 1987). See, I.N.S. v. Hibi, 414 U.S., 5, 8-9, 94 S.Ct. 19, 21-22, 38 L.Ed.2d 7 (1973). "This affirmative misconduct suggestion must be seen as an attempt to provide a limited measure of relief in exceptionally sensitive cases without exposing the government to open-ended liability for merely negligent or improper actions or omissions by its agent." Note, Equitable Estoppel of the Government, 79 Colum. Rev. 551, 560 (1976).

The Court of Appeals for the Tenth Circuit, in Emery Mining Corporation v. Secretary of Labor, 3 MSHC 1585, affirmed the Commission's decision at 5 FMSHRC 1400 (August 1983), stating at 3 MSHC 1588:

> Although the record reflects some confusion surrounding MSHA's approval of Emery's training plan, as a general rule, "those who deal with the Government are expected to know the

law and may not rely on the conduct of government agents contrary to law" . . . .

I have considered the evidence and record as a whole and conclude that the Secretary is not estopped from issuing the citations in question to Featherlite. Inspector Robinson in his earlier November 1987 inspection of the Featherlite Ranger Plant and Laura Todd Pit and Plant issued 52 citations. Mr. Robinson testified that Ray Parson, Featherlite plant manager, accompanied him on the walk around of the pit as well as the plant. Featherlite had employees working at the pit on the day of that inspection just as they had employees working at the pit every day. On the day of that inspection, the Featherlite road grater, water trucks, and scraper were all working at the pit in the area where B.C. employees were mining. Mr. Parsons was present when Mr. Robertson interviewed the two B.C. truck drivers. Mr. Robertson discussed the hazardous practice of mining with the shovel operator's cab next to the highwall with Mr. Parsons.

Mr. Robertson issued Citation No. 3062555 alleging a violation of 30 C.F.R. § 56.18002(b) for not keeping records of inspections of each working place at least once each shift. The citation specifically states that it is issued to the Laura Todd Pit and Plant and served on Ray Parsons (Featherlite Plant Superintendent). (Ex. R-2).

Mr. Robertson discussed this citation wth Messrs. Parsons and Lummus at the closeout conference specifying that they need to inspect every workplace.

Approximately one month later, Mr. Robertson terminated the citation based upon Mr. Parsons' representation that they were inspecting and the records shown to him that inspections were being made and recorded. Petitioner asserts that Mr. Robertson did not realize until the massive fall-of-ground accident that the records shown to him were not for both the pit and the plant.

These facts do not warrant estoppel. Mr. Robertson believed, based on Mr. Parsons' representation, that Featherlite was complying with requirements of the cited safety standard. Mr. Parsons had been with Mr. Robinson on the inspection of the pit area and had been informed of Featherlite's independent contractor's violations. Featherlite had employees working at the pit daily. The citation was addressed to the Laura Todd Pit and Plant. Mr. Robertson stated he made no direct statement indicating Featherlite that it did not have to inspect the pit. I concur in Petitioner's assertion that it simply was not reasonable for Featherlite to rely on what, in the light most favorable to its position, was a mere oversight on the part of Mr. Robertson.

Moreover, when conducting the accident investigation, Mr. Wilcox pointed out to Mr. Lummus that they had been cited for the failure to inspect before. Mr. Lummus stated, "Heck, we're not doing tha yet or at this time." It is noted that Mr. Lummus did not say, "MSHA told us we did not have to inspect the pit." He merely indicated they hadn't started inspecting the pit.

The Commission in King Knob Coal Company, Inc., 3 FMSHRC 1416 (June 1981) pointed out that the Supreme Court has held that equilateral estoppel generally does not apply against the federal government. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383-386 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389, 408-411 (1917). In recent years, lower federal courts have permitted estoppel against the government in some circumstances. In King Knob Coal, supra, the Commission stated:

> Even the decisional trend which recognizes an estoppel defense refuses to apply the defense "if the government's misconduct [does not] threaten to work a serious injustice and if the public's interest would ... be unduly damaged by the imposition of estoppel" (emphasis added). United States v. Lazy F.C. Ranch, 481 F.2d at 989. In view of the availability of penalty mitigation as an evenue of equitable relief, we would not be persuaded that finding King Knob liable--would work such a "profound and unconscionable injury" (Lazy F.C. Ranch, 481 F.2d at 989) that estoppel should be invoked.

The Supreme Court in a recent decision reversed the Court of Appeals and again denied estoppel against the government just as it has reversed every lower court decision granting estoppel that it has reviewed. (Office of Personnel Management v. Richmond, 110 S.Ct. 2465 (1990), decided June 11, 1990). Insofar as it may be pertinent to this case, the Court held that erroneous oral and written information given by a Government employee to a benefit claimant who relied, to his detriment, on the misinformation cannot estop the Government from denying benefits not otherwise permitted by law.

The court in its dicta also stated:

> It ignores reality to expect that the Government will be able to "secure perfect performance from its hundreds of

> thousands of employees scattered throughout the continent." Hansen v. Harris, 619 F.2d 942, 954 (CA2 1980) (Friendly, J., dissenting), rev'd sub nom., Schweiker v. Hansen, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981). To open the door to estoppel claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens, imposing an unpredictable drain on the public fisc. Even if most claims were rejected in the end, the burden of defending such estoppel claims would itself be substantial.

The Court, however, refused to acquiesce to the Government's request that the Court adopt a per se rule that estoppel will not lie against the Government. Thus, the Court continued to leave open the question of whether an estoppel claim could ever succeed against the Government.

CIVIL PENALTIES

In determining the amount of penalty to be assessed, Section 110(i) of the Act requires consideration of the operator's previous history of violations, the size of the operator, the negligence of the operator, the effect on the operator to continue in business, the gravity of the violation, and the good faith in attempting to achieve rapid compliance.

The Secretary entered into evidence a certified copy of the operator's assessed violation history as Exhibit G-1. This report indicates that, during the two-year period prior to the issuance of the citations in question, respondent has been cited 60 times and paid $4,251.00 in penalties. With respect to size, Respondent mined approximately 200,000 cubic yards of usable shale material a year and had approximately a total of 40 employees. Respondent stipulated at hearing that the payment of the proposed penalties would not adversely affect Featherlite's ability to continue in business.

The negligence of the operator was high. The evidence established that Respondent had been cited for failure to keep records of inspected work sites six months before the issuance of the citation/orders at bar. Further, the hazards were apparent or readily discoverable. Respondent's personnel were at the pit site every day and had a degree of control over the areas to be mined.

The gravity of the violation is serious. The injuries from a high wall failure such as this would be reasonably likely to cause serious injury or death to exposed miners.

Considering the statutory criteria in § 110(i) of the Act and the availability of penalty mitigation as an avenue of equitable relief for any possible confusion that may have been caused by the way inspector Robinson abated the earlier November 1987 citation (No. 3062555), I find and assess an appropriate civil penalty for each of the violations as follows:

$3,000.00 for the violation of 30 C.F.R. 56.3131, as charged in Citation No. 3063548.

$1,000.00 for the violation of 30 C.F.R. 56.3401 as charged in Citation No. 3063549.

$3,000.00 for the violation of 30 C.F.R. 56.3200 as charged in Citation No. 3063550.

Finding of Facts

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. Grady Lee Daughty, an employee of B.C. Construction, was fatally injured at approximately 1:50 p.m. on May 18, 1988, when the power shovel he was operating was covered by a massive fall-of-ground from an unstabilized 60-foot highwall at the mine site, the Laura Todd Pit, leased and operated by the Featherlite Building Products Corporation.

2. Following an attempted rescue operation, William Wilcox and other MSHA personnel conducted a thorough accident investigation.

3. Lightweight aggregate was produced at the Featherlite plant site from shale mined at the nearby pit complex, the Laura Todd Pit.

4. The 60-foot highwall involved in the fatality was composed of shale covered by approximately 30 feet of undisturbed sandy-clay overburden and stockpiled overburden. The latter material was stripped by a self-loading type scraper and stockpiled both on mined and unmined areas of the leased land by Featherlite personnel.

5. An independent contractor, the B.C. Construction Company, had been retained to mine the shale exposed by the Featherlite stripping program and to transport the shale to the plant site crusher and primary storage facility.

6. Activities at the pit were planned and administered by Featherlite management on an informal basis; no maps or similar mine planning program tools were evidenced.

7. Featherlite's stripping operation determined approximately where shale was to be mined and the width and length of the mining at hand. The depth of shale mining was detemined by the local thickness of the formation and its freedom from inclusions as the base of the formation was neared. Stripping was excluded from the contractor's responsibilities.

8. The 60-foot pit wall involved in the fatality was a place where persons worked or traveled. The wall was composed of loose or unconsolidated material, and was not sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit wall. This condition posed a reasonable likelihood of injuries of a reasonably serious nature.

9. The mine operator did not designate persons experienced in examining and testing for loose ground. The mine operator did not test or examine loose ground where work was to be performed. This condition posed a reasonable likelihood of injuries of a reasonably serious nature.

Respondent knew, or should have known, of the hazardous condition. Featherlite had previously been cited for failure to inspect every workplace. It had management officials at the pit regularly and employees there every day. Sloughing, standing water, tension fractures, and the height of the wall were apparent or readily discoverable indicating the instability of the ground.

10. The ground conditions (specifically the 60-foot highwall) were hazards and the wall was not taken down or supported before work was permitted in the area. The area was not posted with a warning sign against entry or barricaded when unattended. This condition posed a reasonable likelihood of injuries of a reasonably serious nature. Respondent knew or should have known of this hazardous condition. Featherlite had management officials at the pit regularly and had one official there 10 minutes prior to the fatality. Featherlite had employees at the pit every day. The sloughing, standing water tension fractures and height of the wall were apparent or readily discoverable indicating the hazardous condition of the pit wall.

11. The violation history of respondent indicates that during the two years prior to the issuance of the citation/orders in question, respondent has been cited for 60 violations and paid $4,251.00 in penalties.

12. With respect to the size of the operator, respondent mined approximately 200,000 cubic yards per year of usable shale material and had a total of approximately 40 employees.

13. The negligence of the operator was high.

14. Respondent stipulated that the proposed penalties would not affect its ability to continue in business.

15. The gravity of the violations was serious and substantial.

16. All violations were timely abated by the permanent closure of the Laura Todd Pitt.

Conclusions of Law

Jurisdiction

1. Featherlite was at all times subject to the provisions of the Federal Mine Safety and Health Act, and I have jurisdiction over the parties and subject matter of this proceeding.

Violations

2. a. Respondent violated 30 C.F.R. § 56.3131 as alleged in Citation No. 3063548.

   b. The violation is significant and substantial.

   c. A penalty of $3000 is assessed.

3. a. Respondent violated 30 C.F.R. § 56.3401 as alleged in Citation No. 3063549.

   b. The violation is significant and substantial.

   c. The violation constitutes an unwarrantable failure of the operator to comply with the cited standard.

   d. A penalty of $1,000.00 is ASSESSED.

4. a. Respondent violated 30 C.F.R. § 56.3200 as alleged in Citation No. 3063550.

   b. The violation is significant and substantial.

   c. The violation constitutes an unwarrantable failure of the operator to comply with the cited standard.

   d. A penalty of $3,000.00 is ASSESSED.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citation/Order No. 3063548, including its finding that the violation was significant and substantial, is AFFIRMED. The Notice of Contest, Docket No. CENT 88-113-RM, is DISMISSED.

2. Citation No. 3063549, including its findings that the violation was significant and substantial and caused by unwarrantable failure, is AFFIRMED. The Notice of Contest, Docket No. CENT-88-114-RM, is DISMISSED.

3. Citation No. 3063550, including its findings that the violation was significant and substantial and caused by unwarrantable failure, is AFFIRMED. The Notice of Contest, Docket No. CENT 88-115-RM, is DISMISSED.

4. Respondent Featherlite Building Products Corporation shall pay to the Secretary of Labor $7,000.00, within 30 days of this Decision, as a civil penalty for the violations found herein.

August F. Cetti
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

DEC 14 1990

JOE G. PINA, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 90-106-DM
v.	:	SC-MD-90-06
FEATHERLITE BUILDING PRODUCTS, Respondent	:	Armadillo Quarry

DECISION

Appearances: Ed Watson and Robert Copeland, pro se, appearing on behalf of Respondent.

Before: Judge Morris

This case is before me upon the complaint of Joe G. Pina under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act"). Complainant alleges he was discharged by respondent in violation of Section 105(c)(1) of the Act.

A hearing in the case was scheduled in Austin, Texas, for November 6, 1990. Complainant Pina was served by certified mail with a copy of the notice of hearing.

Mr. Pina did not appear at the hearing nor has the Judge been advised of any reason why he did not appear.

Accordingly, the case is DISMISSED for failure to prosecute.

John J. Morris
Administrative Law Judge

Distribution:

Mr. Joe G. Pina, Route 3, Box 61-A, Liberty Hill, TX 78613 (Certified Mail)

Mr. Ed Watson, General Manager, Featherlite Building Products Corp., Texas Quarries, P.O. Box 820, Cedar Park, TX 78613

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DEC 14 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 90-17
	:	A.C. No. 36-00929-03666
v.	:	
	:	Marion Mine
TUNNELTON MINING COMPANY, Respondent	:	

DECISION

Appearances: Mark V. Swirsky, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; Joseph A. Yuhas, Esq., Ebensburg, Pennsylvania, for the Respondent.

Before: Judge Fauver

The Secretary seeks a civil penalty for an alleged safety violation, under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The parties have submitted the case on a stipulated record.

The key issue is whether 30 C.F.R. § 75.202(a) applies to a part of a coal mine (1) which is required to be traveled weekly by a certified examiner and (2) in which miners other than certified mine examiners are not normally required to work or travel but may from time to time be required to do so, e.g., for rock dusting or for removing pumps or equipment.

It is stipulated that unsupported loose roof was found in the area cited in Citation No. 2894260, which charges a violation of 30 C.F.R. § 202(a).

30 C.F.R. § 75.202(a) provides:

§ 75.202 Protection from falls of roof, face and ribs.

(a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise

controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

The regulation thus has three elements:

1. An area where persons work or travel

2. shall be supported or otherwise controlled

3. to protect persons from falls of roof, face or ribs.

The first element of the regulation is a coverage element: "where persons work or travel." The parties have stipulated that the area where loose roof was found "is required to be traveled weekly by a certified examiner" (Stip. 19) and that other miners "are not normally required to be in the cited area" but may work there "in certain situations such as for rock dusting, and for pump and equipment removal" (Stip. 25).

Respondent contends that § 202(a) does not apply to the cited area because it is not an "active working" within the meaning of 30 C.F.R. § 75.2(g)(4), which defines "active workings" as "any place in a coal mine where miners are normally required to work or travel." However, § 202(a) does not limit its protection to "active" or "inactive" places in a mine, but simply applies to "areas where persons work or travel . . . ." This plain meaning is also illustrated by the published explanation of the rule, as follows:

> For clarity, the final rule applies to all "areas where persons work or travel" replacing the existing requirement that this protection be afforded in all "active underground roadways, travelways and working places." [53 Fed. Reg. 2355 (Jan. 27, 1988).]

The regulation for weekly examinations requires that the certified examiner travel "in the return of each split of air where it enters the main return . . ., in the main return, at least one entry of each intake and return aircourse in its entirety, idle workings, and, insofar as safety conditions permit, abandoned areas." 30 C.F.R. § 75.305. Miners are not permitted to travel under unsupported roof, by virtue of § 202(b), which provides: "(b) No person shall work or travel under unsupported roof unless in accordance with this subpart." The exceptions permitting working or traveling under unsupported roof in Subpart C are not applicable to a man on foot, such as a mine examiner.

The interpretation of § 202(a) urged by Respondent would permit an examiner or other miner (who only occasionally works or

travels in a given area) to work or travel under unsupported roof, against the plain meaning of § 202(a) and (b). Respondent contends that a different regulation, instead of § 202(a), applies to the cited area. It relies on 30 C.F.R. § 75.211(c), which provides:

> When a hazardous roof, face, or rib condition is detected, the condition shall be corrected before there is any other work or travel in the affected area. If the affected area is left unattended, each entrance to the area shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel into the area.

Sections 202(a) and 211(c) are not mutually exclusive. I hold that the safety protection of § 202(a) applies equally to certified weekly examiners and any other persons who "work or travel" in any area of an underground coal mine.

Citation No. 2894260 was properly issued. Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of $85 is appropriate for this violation.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 2894260 is AFFIRMED.

2. Respondent shall pay a civil penalty of $85 within 30 days of this decision.

William Fauver
Administrative Law Judge

Distribution:

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DEC 17 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 89-413-M
	:	A.C. No. 04-04862-05510
v.	:	Docket No. WEST 89-414-M
	:	A.C. No. 04-04862-05511
CORONA INDUSTRIAL SAND PROJECT, Respondent	:	Docket No. WEST 89-450-M
	:	A.C. No. 04-04862-05512
	:	Docket No. WEST 89-460-M
	:	A.C. No. 04-04862-05513
	:	Docket No. WEST 90-22-M
	:	A.C. No. 04-04862-05514
	:	Corona Industrial Sand Project

DECISION

Appearances: Eve Chesbro, Esq., Jonathan S. Vick, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for the Secretary; Stanley D. Hendrickson, General Manager, Corona Industrial Sand Project, Corona, California, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Respondent, Corona Industrial Sand Project (Corona), with violating regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801, et seq. (the Act).

After notice to the parties, a hearing on the merits was held in Ontario, California, commencing on May 30, 1990.

The parties were granted leave to file post-trial briefs. Subsequently, they withdrew their requests.

STIPULATION

At the commencement of the hearing, the parties stipulated as follows:

1. Corona produced 389,687 tons of sand in 1989.

2. The production was about the same in 1990.

3. A certified copy of Corona's assessed history can be received in evidence. (Tr. 7; Ex. P-1).

WEST 89-413

ARTHUR S. CARISOZA, an MSHA inspector since 1975, is a person experienced in mining. (Tr. 11, 12).

Corona, a silica sand plant, processes various grades of silica sand. The company runs three shifts and employs 40-45 people. (Tr. 12, 13).

Citation No. 3296982

Mr. Carisoza issued this citation, which alleges Corona violated 30 C.F.R. S 56.9300. 1/

The inspector observed a 200- to 250-foot roadway that ran along a creek. There was no berm, guard, barrier, or railing to protect from driving off the edge. (Tr. 14, 15; Ex. P-2). The incline (to the creek) averaged five to six feet. (Tr. 15).

The inspector observed a front-end loader pushing sand over the edge of the incline. The tracks of the loader, as well as the tire marks of pickups and service trucks, were within five feet of the edge. (Tr. 2, 16; Exs. P-2, P-3, P-4). The night shift would have used this roadway. (Tr. 19).

Vehicles using the roadway would have occasion to back up near the incline. (Tr. 19-20). The majority of the vehicles either back into the area or back out; no high speeds are involved. (Tr. 75).

1/ § 56.9300 Berms or guardrails.

(a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

The operator had been previously cited for lack of a berm in this area. (Tr. 21).

The inspector further testified concerning the factors involved in assessing civil penalties. (Tr. 21, 22).

KEITH SPEAK, Corona's engineer, testified a nearby building and the irregular creek were about 15 to 40 feet apart. The narrowest part of the area is a dead end. (Tr. 107, 109).

Opposite the main entrance of the plant a sign designates a speed limit of 5 to 10 miles an hour. From the witness's observation, vehicles in this area would travel two to three miles per hour, or at a walking speed. (Tr. 108).

Vehicles would get as close as three or four feet from the edge. (Tr. 108). The area was not considered hazardous, hence no berm was installed at the creek. (Tr. 109).

WILLIAM W. WILSON, MSHA's area supervisor for southern California, is a person experienced in mining. (Tr. 149).

Mr. Wilson was familiar with the area involving the lack of berms and guard rails. (Tr. 150). There was never a question of a berm being required. He had never seen large equipment using the area.

The present height requirement for a berm is mid-axle, but in May 1988 there was no such requirement. (Tr. 15).

DISCUSSION

The testimony of Mr. Carisoza establishes a violation of § 56.9300.

Corona's witness basically affirms the Secretary's evidence. Exhibits P-2 and P-3 establish the hazardous condition and the necessity for a berm adjacent to the edge.

The citation should be affirmed.

CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in assessing a civil penalty.

The number of persons employed by Corona indicates it is a small operator.

STANLEY D. HENDRICKSON, general manager of Corona, is familiar with the financial affairs of the company. A letter from the First Interstate Bank of Los Angeles outlines the status of Corona's loan with the bank. (Tr. 131; Ex. R-1).

The company is also engaged in a severe price war. In addition, Corona is unable to make principal payments although interest payments have been timely. (Tr. 133).

The severity of MSHA's inspections and their number are far worse than normal. (Tr. 133).

Mr. Hendrickson indicated the company had defaulted on its credit agreement with First Interstate Bank. (Exhibit R-1).

The above evidence warrants a reduction in the penalty. However, to eliminate a penalty in the circumstances presented here would not be in furtherance of the Mine Act.

The assessment of moderate penalties should not severely affect the company's ability to continue in business. Although Corona has defaulted on its credit agreement, it is current on its interest payments.

In the two years ending May 31, 1989, Corona had 56 violations and paid $2,805 in civil penalties. These figures indicated Corona's prior history is average. (Ex. P-1).

Corona was negligent since the unbermed creek was open and obvious. Further, the operator had been previously cited for the lack of a berm.

The gravity is established, inasmuch as vehicles operate in close proximity to the edge.

Good faith was established by the operator, promptly abating the violative condition.

On balance, a civil penalty of $50 is appropriate for Citation No. 3296982.

Citation No. 3296996

This citation alleges a violation of 30 C.F.R. § 56.14107. 2/

During the inspection, Mr. Carisoza observed a small belt drive, pulleys, and a V-belt powered by a conveyor belt. The area is adjacent to a catwalk where workers travel. A worker could come in contact with this unguarded machinery which was 12 inches from the outside frame. (Tr. 23, 24, 79; Ex. C-5) If this occurred, he could suffer a severe cut.

The Secretary has adopted § 56.14107 and it is published in the Federal Register (Tr. 99; Ex. P-15).

DISCUSSION AND FURTHER FINDINGS

As a threshold matter, it is necessary to identify the regulation in effect when this citation was issued.

The citation was issued on June 21, 1989. At that time, the regulation cited in footnote 2 applied.

A degree of confusion has been caused by the Secretary's 1988 regulation governing moving machine parts, namely, 30 C.F.R. § 56.14001. 3/

2/ § 56.14107. Moving machine parts.

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

(b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

3/ This regulation provides as follows:

§ 56.14001 Moving machine parts.

Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

CHARLES G. INMAN, an MSHA inspector, is a person experienced in mining. He is stationed in San Bernardino, California. (Tr. 136, 137).

The witness visited Corona's site in 1988. At that time, the guards were discussed. (Tr. 139).

The Secretary changed the regulations between 1987 and the present time. The principal change is to prevent any deliberate contact with moving machine parts. (Tr. 140).

As to MSHA's citation, Corona cries foul: The company fully complied, at considerable expense and effort, with MSHA's rules in 1987. However, MSHA changed those rules and Corona finds itself cited by MSHA.

The uncontroverted testimony of plant engineer Speak establishes that, after MSHA inspected the plant in 1987, the equipment MSHA found objectionable was modified with additional guarding, reducing any openings to a 3-inch by 29-inch space. (Tr. 102-106).

In adopting what was enacted as § 56.14107, MSHA reviewed its statistics and concluded that most injuries were caused in those instances where the persons were performing work-related actions with the machinery. (Ex. P-5). MSHA, therefore, considered it appropriate to require operators to totally enclose self-cleaning tail pulleys. (Pages 5 and 6 of Exhibit P-8 demonstrate MSHA's interpretation of the guarding now required.)

Corona's objections must fail. MSHA has an obligation to modify its regulations if such modifications will improve the safe working conditions for miners.

Further, all operators are subject to any such changes. However, Corona's actions, as hereafter noted, will reduce the civil penalties.

Corona's size and its ability to continue in business, and its previous history have already been discussed.

The operator was negligent. It should have known of MSHA's revised guarding requirements.

The gravity of the violation must be considered as less than severe, since Corona, in 1987, fully complied with the requirements MSHA then believed constituted adeqaute guarding.

Under the broad umbrella of good faith, Corona abated the violative conditions in 1987 and without any changes in those conditions the company again abated in 1989.

On balance, a civil penalty of $25 is appropriate for the violation of Citation No. 3296996.

Citation No. 3466364

In this situation, the operator was charged with a violation of 30 C.F.R. § 56.14107.

Inspector Carisoza observed that the guards on the equipment did not meet MSHA's guarding standards. The open areas existing in the guard presented a hazard. (Tr. 29)

The openings measured 3 by 19 inches; the self-cleaning tail pulley was approximately four inches from the opening. (Tr. 30; Ex. P-7).

Employees were generally working in close proximity to this area. (Tr. 3).

MSHA's guarding guidelines address the described condition. (Tr. 32; Ex. P-8). The guards the company had installed were adequate for a solid tail pulley but not for a self-cleaning tail pulley. (Tr. 32, 33).

During the initial inspection in November of 1988, the guards, at MSHA's recommendation, were changed. (Tr. 35; Ex. P-7). The company was advised that the guards must be extended so a person could not reach around and contact a moving part. (Tr. 35). In November 1988, the company was advised that MSHA was revising the regulation. The citation in this case was issued in June of 1989. (Tr. 36).

DISCUSSION

For the reasons previously stated, this citation should be affirmed and a civil penalty of $25 assessed.

Citation No. 3466365

This citation, an alleged violation of § 56.14107, was issued because the guarding on the C-19 conveyor belt had the same hazards as in the previous citation (No. 4566364). (Tr. 36, 37).

The opening measured 3 by 29 inches. The belts are below waist height. Employees work in the vicinity when the units are in motion.

The rotating spurs can come in contact with a worker while he is servicing the unit. (Tr. 37).

DISCUSSION

The evidence is uncontroverted. For the reasons previously stated, this citation should be affirmed and a penalty of $25 assessed.

Citation No. 3466368

The inspector issued this citation alleging a violation of 30 C.F.R. § 56.14107. He observed that employees could cross directly under two unguarded return idlers adjacent to a conveyor belt. The idlers were low enough that a person could contact the equipment. (Tr. 38-44; Ex. P-9, P-10, P-11).

The openings located on the sides of the pulleys were about 3 X 29". The rollers were about 50-54 inches off the ground. (Tr. 44).

The inspector testified as to matters relating to a civil penalty. (Tr. 45). He further believed the violation was significant and substantial. (Tr. 46).

DISCUSSION

The testimony and the photographs (Exs. P-9, P-10, P-11) establish that the return idlers were unguarded. A worker could contact the idlers.

Corona's negligence was high since the condition was open and obvious. Even though the idler was overhead, if a worker or his tools became entangled, he could get injured.

Citation No. 3466368 should be affirmed and a penalty of $50 should be assessed.

Citation No. 3466370

While the inspector was conducting a noise and dust survey, he noticed a feeder lacked guarding. The rollers, head pulley, and tail pulley were exposed. Workers in the area could contact the exposed parts. As a result of the described condition, the inspector issued Citation No. 3466370 alleging a violation of § 56.14107. (Tr. 47-50; Ex. P-12, p. 13).

The head pulley was 8 inches by 24 inches; the rollers were about 3 by 24 inches.

The feeder sits above the tail pulley about waist high. A person can easily contact the exposed parts on both sides. (Tr. 52).

The inspector further testified as to gravity and negligence. In the inspector's view, this was an S&S violation. (Tr. 54-56).

Witness Speak testified that the equipment involved in Citation Nos. 3466470 and 3466372 was built when the original plant was constructed. (Tr. 115).

After a CAV inspection, Peerless Conveyor fabricated brackets which were then installed. (Tr. 116). The equipment remained in place until the date of the instant inspection.

The CAV inspection of October 7, 1987, resulted in written notices. (Tr. 117). Some of the notices refer to tail pulleys. (Tr. 123).

The feeder and feed belt were not remodeled between the MSHA inspections of November 1988 and June 1989. (Tr. 118).

Robins Engineers and Constructors, originally Hewitt Robins, is described as the premier designer of conveyors in the world. (Tr. 127). The Robins Company agreed with the fix on the tail pulleys. (Tr. 128).

DISCUSSION

The factual situation here is similar to that involved in the previous citation. The same reasoning applies.

This citation should be affirmed and a civil penalty of $25 assessed.

Citation No. 3466371

The feed conveyor, below the #1 feeder, carries material from the feeder to the scalping screen. The tail pulley was not covered. Employees could contact the exposed parts, thus a violation of § 56.14107 was alleged.

The inspector estimated the size of the pulley to be around 13-27 inches. It was located about 12 inches above the ground.

Access for cleaning was available from both sides. (Tr. 57-60; Exs. P-13, P-14).

There were no guards protecting the equipment although there was a shield for dust purposes. (Tr. 60, 61).

The inspector further testified as to gravity and negligence. In the inspector's opinion, the violation was S&S. (Tr. 60-62).

During the initial inspection in 1988, the unguarded tail, head, and take-up pulleys were discussed. (Tr. 63). At that time, the operator was asked to totally enclose the tail pulleys. (Tr. 63).

After a previous CAV, the operator reduced the size of some openings; however, some of the openings remained. (Tr. 64).

Exhibit P-7 illustrates the partial guarding installed by the operator on that particular moving part. Although the size of the openings was reduced, the guards still didn't comply with the MSHA regulations. At the initial inspection, the opening was 12 by 29 inches. It had been reduced to that size. (Tr. 67). Other conveyor openings had also been reduced in size. (Tr. 68).

DISCUSSION

The factual situation here is basically the same as previously discussed.

The citation should be affirmed and a penalty of $25 assessed.

Citation No. 3296997

This Citation alleges a violation of 30 C.F.R. § 56.14109. 4/

4/ § 56.14109 Unguarded conveyors with adjacent travelways.

Unguarded conveyors next to the travelways shall be equipped with--

(a) Emergency stop devices which are located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor; . . .

Mr. Carisoza entered the area where the conveyor belt was located. An area 3 to 3.5 feet long at the head pulley of the conveyor belt was exposed. It was lower than the waist-high catwalk. The belt was moving at 200 to 350 feet per minute. If a person fell on the belt he could not reach the stop cord. (Tr. 25, 26, 85; Ex. P-6). He would be carried into the head pulley. (Tr. 27).

The platform, where the unguarded section was located, is basically used for maintenance purposes. (Tr. 27; Ex. P-6). The opposite side of the conveyor was equipped with all necessary guards and pull cables. (Tr. 84).

Witness Speak indicated there was a hand railing around the platform. However, there was no guarding between the platform and the conveyor except at the head chute. (Tr. 113).

The platform is designed purely for maintenance. (Tr. 114). Mr. Speak believes that conveyor idlers or rollers are not considered the same as head, tail, snub, or take-up pulleys. The exposure along the belt was for two feet. (Tr. 114).

According to Corona's witness Speak, the speed of the conveyor belt is monitored to detect any slippage of the belt. (Tr. 110). The monitor device was in place at the time of a CAV inspection. (Tr. 110). A monitor of this type would not create a hazard. (Tr. 111).

DISCUSSION

The uncontroverted facts establish a violation of the regulation. A monitor to detect slippage of the belt, as discussed by Mr. Speak, would not be equivalent to an "emergency stop device," as required by the regulation.

The criteria for assessing a civil penalty has been generally discussed. However, in this case, the operator's negligence and gravity are greater than in the other citations.

A civil penalty of $100 is appropriate.

WEST 89-414-M

The parties stipulated that the previous evidence of both parties could be considered as applicable to Citation Nos. 3466372, 3466375, and 3466376. Further, the ruling on the citations in WEST 89-414 would be dispositive of these citations. (Tr. 198, 201). In addition, Exhibits P-17 and P-18 depict the conditions described in Citation No. 3466372.

On the basis of the stipulation, the three citations herein should be affirmed and a civil penalty of $25 is assessed for each violation.

WEST 89-450-M

Citation No. 3296989, issued by Mr. Carisoza, alleges a violation of 30 C.F.R. § 14132(b)(1). 5/

While on Corona's property, Mr. Varisoza inspected a water truck for a back-up alarm. (Tr. 167). Mr. Speak stated the company owned the vehicle.

Mr. Allen, the production supervisor, stated that the truck lacked a back-up alarm. (Tr. 168). The inspector found no alarm on the vehicle and Mr. Allen agreed this was unsafe. (Tr. 168, 180).

Mr. Eaton, general superintendent, and the inspector had a heated discussion as to whether Corona was liable for the condition of a vehicle it did not own. (Tr. 168).

The vehicle was operated in the plant area where people traveled on foot. Also, the vehicle had a water tank at the back. From inside the cab it was not possible to see the total area behind the vehicle. (Tr. 170). No observers had been used when the truck was in operation. (Tr. 171).

The inspector testified as to gravity and negligence. (Tr. 172-174).

MICHAEL ALLEN, Corona's daytime production supervisor, testified. (Tr. 181). He indicated the water truck is operated and maintained by McClinton Trucking.

The witness was under the impression the truck was equipped with a backup alarm. (Tr. 182).

5/ § 56.14132 Horns and backup alarms.

(b)(1) When the operator has an obstructed view to the rear, self-propelled mobile equipment shall have--

(i) An automatic reverse-activated signal alarm; . . .

The company electrician located an alarm on the rear axle but it was faulty and was replaced. (Tr. 183).

Except for one occasion, the witness had never observed the truck backing up. All of Corona's equipment have backup alarms. (Tr. 184-186).

DISCUSSION

The credible evidence establishes a violation of the regulation. I reject Michael Allen's somewhat hesitant explanation that it was his "impression" that the vehicle had an alarm. Further, no defense is established merely because the truck was not owned by Corona. It is clear that Corona's employees were exposed to the hazard presented by the lack of a backup alarm.

The Secretary alleges this condition was due to the unwarrantable failure of the operator.

The Commission has set forth the parameters of the unwarrantable failure doctrine, Emery Mining Corporation, 9 FMSHRC 1997 (197); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (1987); Rushton Mining Company, 10 FMSHRC 249 (1988).

The record here fails to establish such aggravated conduct and the unwarrantable failure allegations are stricken.

Several facets of the civil penalty criteria have been previously discussed.

Corona was negligent since it should have known the truck lacked a backup alarm. The gravity is high since an employee in the work area could have been injured.

On balance, a civil penalty of $75 is appropriate.

Citation No. 3296990

This citation alleges a violation of 30 C.F.R. § 56.14100. 6/

6/ The cited standard provides:

§ 56.14100 Safety defects; examination, correction and records.

(1) Self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift.

According to the inspector, the plant supervisor admitted he failed to conduct a safety inspection before he permitted the truck to be operated. (Tr. 174, 175, 179).

DISCUSSION

The uncontroverted evidence establishes that the truck was not inspected before it was placed in service.

The negligence of the plant supervisor is imputed to the company. The gravity is also high.

On balance, a civil penalty of $75 is appropriate.

WEST 89-46-M

As to six of the citations in this case, the parties renewed their agreement as they had expressed in connection with the previous self-cleaning type tail pulleys. (Tr. 203). The remaining citation is this case was litigated.

On the basis of the stipulation, I conclude that Citation Nos. 3466361, 3466363, 3466366, 3466367, 3466369, and 3466374 should be affirmed and a civil penalty of $25 should be assessed for each violation.

Citation 3466362

This citation alleges a violation of 30 C.F.R. § 56.5005(b). 7/ (Tr. 205, 206, 210).

7/ The relevant portion of the cited standard reads:

§ 56.5005 Control of exposure to airborne contaminants.

Control or employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. Whenever respiratory protective equipment is used a program for selection, maintenance, training, fitting, supervision, cleaning, and use shall meet the following minimum requirements:

In the presence of the MSHA inspector, Keith Speak directed an employee to contact a certain individual in the company. Approximately 90 minutes later, the inspector saw the same employee in an affected area cleaning up silica sand spills. When questioned, the employee stated he had not been trained or fit-tested in the use of the respirator. At that point, a 104(d) order was issued and the employee was withdrawn until he was trained. (Tr. 206, 207, 212; Ex. P-20).

Exhibit P-20, page 24, addresses procedures for use of the respirator and proper test fillings. (Tr. 209). The ANSI standard indicates training for an employee should take place where respiratory protection is required. (Tr. 209).

The dust exposure at the site was excessive. (Tr. 215).

In prior uncontested citations Corona's employees were exposed to .51 and 2.78 milligrams per cubic meter. (Tr. 217).

In June 1989 the inspector, in a usual check, found parts of the system had been worn through. In addition, in some places material was spilling and leaking. (Tr. 221).

KEITH SPEAK indicated that a labor agency provides laborers to assist plant personnel. (Tr. 224).

The MSHA inspectors and the new employee arrived together. Mr. Speak sent the employee to the maintenance shop. He had no way of knowing the employee would later be at the screen house and untrained. (Tr. 225). He had, not knowingly, sent the employee into an area under citation. (Tr. 225). In short, he did not believe the company's actions were unwarrantable. (Tr. 226). If the employee had arrived in normal circumstances, he would have been trained by video tapes in Mr. Speak's possession. (Tr. 227).

(b) A respirator program consistent with the requirements of ANSI Z88.2-1969, published by the American National Standards Institute and entitled "American National Standards Practices for Respiratory Protection ANSI Z88.2-1969," approved August 11, 1969, which is hereby incorporated by reference and made a part hereof. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdivision Office of the Mine Safety and Health Administration.

Mr. Speak didn't direct the employee to stay in certain areas, nor did he give any directions to the foreman. (Tr. 228). He was also aware that prior respirator citations had been issued to the company. (Tr. 229; Ex. P-22).

Exhibit P-22, a memorandum dated May 16 or 17, indicates Corona was experiencing problems with employees fully complying with respirator training of the silica dust program. (Tr. 234). However, Corona was having difficulty finding qualified people to hire. (Tr. 235). The company has a high turnover rate in its workforce. (Tr. 237).

All of the areas in the plant are currently in compliance in a recent dust sampling. (Tr. 240).

DISCUSSION

The inspector's evidence establishes Corona violated the Act. Corona's evidence does not establish a contrary view. The citation should affirmed.

I find Mr. Speak's testimony to be credible and no unwarrantable failure has been established as required by the Commission rulings. Such allegations are stricken.

The facts establish Corona was negligent, but the exposure to the dust was only for a short time. In view of the minimal exposure, I consider the gravity to be low.

On balance, a civil penalty of $100 is appropriate.

WEST 90-22-M

Citation No. 3466380 alleges a violation of 30 C.F.R. § 50.20.

At the hearing, petitioner moved to vacate the citation.

For good cause shown, the motion should be granted.

In view of the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

The following citations are AFFIRMED and the penalties as indicated are ASSESSED.

1. WEST 89-413-M

Citation Nos.	Penalty
3296982	$ 50
3296996	$ 25
3466364	$ 25
3466365	$ 25
3466368	$ 50
3466370	$ 25
3466371	$ 25
3296997	$100

2. WEST 89-414-M

Citation Nos.	Penalty
3466372	$ 25
3466375	$ 25
3466376	$ 25

3. WEST 89-450-M

Citation Nos.	Penalty
3296989	$ 75
3296990	$ 75

4. WEST 89-460

Citation Nos.	Penalty
3466361	$ 25
3466363	$ 25
3466366	$ 25
3466367	$ 25
3466369	$ 25
3466374	$ 25
3466362	$100

5. WEST 90-22-M

Citation No. 3466380 and all penalties therefor are VACATED.

John J. Morris
Administrative Law Judge

Distribution:

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/ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

DEC 17 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 90-75 A.C. No. 05-00301-03732
v.	:	
	:	Dutch Creek Mine
MID-CONTINENT RESOURCES INCORPORATED, Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb, P.C., Glenwood Springs, Colorado, for Respondent.

Before: Judge Morris

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

After notice to the parties, a hearing commenced in Glenwood Springs, Colorado, on November 14, 1990.

At the hearing, the parties announced they had reached an amicable settlement of all issues not previously settled.

The citations, the original assessments, and the proposed disposition of all matters in controversy are as follows:

Citation No.	Assessment	Disposition
3225328	$483	$100
3410961	$295	Vacate
9996381	$530	$295

Order No.	Assessment	Disposition
2931575	None	Vacate
3410940	None	Affirmed

In connection with their settlement the parties further seek to amend the "Significant and Substantial" allegations in Citation No. 3225328.

In support of their motion the parties have further submitted information relating to the statutory criteria for assessing civil penalties as contained in 30 U.S.C. § 820(i).

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved.

Accordingly, I enter the following:

ORDER

1. The settlement agreement is APPROVED.

2. Citation No. 3225328 is AFFIRMED and a civil penalty of $100 is ASSESSED.

3. Citation No. 9996381 is AFFIRMED and a civil penalty of $295 is ASSESSED.

4. Citation No. 3410961 is VACATED.

5. Order No. 3410940 is AFFIRMED.

6. Order No. 2931575 is VACATED.

7. Respondent is ORDERED to pay to the Secretary of Labor the sum of $395 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge

Distribution:

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/ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

December 18, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION ON BEHALF OF JOSEPH C. CULP, Complainant,	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 91-108-D
	:	DENV-CD-90-13
v.	:	Dutch Creek Mine
MID-CONTINENT RESOURCES, INC., Respondent	:	

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
Edward Mulhall, Jr., and Timothy A. Thulson, Esq., DELANEY & BALCOMB, P.C., Glenwood Springs, Colorado,
for Respondent.

Before: Judge Cetti

Statement of the Proceeding

On November 28, 1990, the Secretary of Labor (Secretary), pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 and Commission Rule 29 C.F.R. § 2700.44(a), filed an application for an order requiring Respondent, Mid-Continent Resources, Inc., to reinstate Joseph C. Culp to his job as maintenance foreman at Mid-Continent Resources, Inc., Dutch Creek Mine, from which he was suspended from the payroll on August 23, 1990. The application stated that the Secretary found the complaint of discrimination indicating an adverse action of suspension and discharge is not frivolous. The application was accompanied by copies of the complaint filed by the Applicant and by an affidavit of Dennis M. Ryan of the Mine Safety and Health Review Administration asserting that Respondent suspended and later terminated Complainant and has failed to recall him, and concluding that the complaint filed by him is not frivolous. The application was accompanied by proof of notice to, and service on, Mid-Continent Resources, Inc., by express mail, return receipt requested, on November 28, 1990.

Respondent, within 10 days following receipt of the Secretary's application for temporary reinstatement, requested a hearing on the application pursuant to 29 C.F.R. § 2700.44(b).

On December 12, 1990, pursuant to Respondent's request, a hearing was held before the undersigned Commission Administrative Law Judge on the application for temporary reinstatement. The scope of the hearing is limited to the single issue before me which is whether Mr. Culp's complaint is frivolously brought. Oral and documentary evidence was presented and the matter was submitted for decision on this limited issue and a request for an Order of Temporary Reinstatement.

The Testimony

At the hearing, Complainant presented the testimony (approximately 240 pages of as yet to be transcribed) of the Complainant Joseph C. Culp and the testimony of Mr. Lee H. Smith, Supervisor of Coal Mine Safety and Health Inspectors located at Glenwood Springs, Colorado.

Undisputed evidence was presented that on August 16, 1990, carbon monoxide ranging from 500 PPM to 660 PPM "and climbing" was detected emanating from the 211 longwall gob. MSHA, on that date, August 16, 1990, issued 103(b) Order No. 358626 to "assure the safety of any person in the coal mine" until the source of the carbon monoxide was found and extinguished or otherwise controlled. The source was an unplanned ignition of methane in the 211 advancing longwall tailgate entry gob. The 103(k) order, with various amendments and modifications (Ex. R-2), was not terminated until November 5, 1990, when it was determined that the fire had been extinguished.

On August 18, 1990, a roaring fire with visible bright orange flames was first observed on top of the 211 longwall gob. Continuous unsuccesful attempts were made by Respondent to extinguish the fire with the use of water and dry chemicals.

On August 18, 1990, MSHA issued its 107(a) imminent danger Order No. 3583688 which continued in effect with various modifications (Ex. R-1) until terminated on September 27, 1990.

The Complainant, Joseph C. Culp, testified that he had worked as a coal miner in various mines for 10 years. On June 1, 1989, Respondent appointed Mr. Culp to the position of maintenance foreman in Respondent's Dutch Creek Mine. He continued working in that position until his suspension from the payroll on August 23, 1990, followed by his discharge from the payroll on October 15, 1990. His assigned work duties prior to the fire included work on the surface as well as work duties underground.

Mr. Culp testified that approximately "20 percent of the time or less" he was assigned jobs involving work on the surface, such as work on the belt system and ventilation fans.

The last day Mr. Culp worked at the mine was September 22, 1990. At that time, MSHA was allowing only 25 miners at any one time to work underground in the mine. Bill Porter, the acting mine foreman, on September 22, 1990, assigned him to do maintenance work underground in support of the activity of the miners who were fighting the fire. Part of his work required him to be at the fresh air base.

Mr. Culp's maintenance superintendent, Mr. Tuck, was not underground on August 22, 1990, so Culp had to complete his shift underground before he was able to go to the surface and talk to Mr. Tuck. He told Mr. Tuck of his safety concerns as well as those of his wife's about being required to work underground during the mine fire. Mr. Culp said it was unsafe, that no one could guarantee that the mine is not going to blow up. Mr. Tuck told him that his wife (Mrs. Tuck) was also concerned; that he had seen the fire and that it "wasn't that bad." Mr. Culp did not believe that it wasn't bad, in view of the mine's past history of explosions. He knew of the 1981 explosion at the mine that killed 15 miners, including miners working outby the face as well as inby. Mr. Culp was concerned for his safety and believed anything could happen. He said he did not want to work underground while the mine fire burned. He asked to be assigned to any work above ground. He testified that there was work to be done above ground that he had done in the past and that he was able to do. Work on the surface was refused. Mr. Culp asked, as an alternative, to be allowed to go on vacation or to be laid off without pay until the mine fire was extinguished or until he could be assigned to work not requiring him to work underground while the fire continued. These alternative requests by Mr. Culp were refused. He was told that all vacations were canceled, except for employees already out of town, and that Respondent needed him to do underground maintenance work in support of the efforts of the miners fighting the underground fire. Mr. Culp told Mr. Tuck that he liked his job and that he did not want to quit. Mr. Tuck told him "I understand your concerns" and "you have to do what you have to do, and I have to do what I have to do."

Mr. Culp was scheduled to report to work the next morning, August 23, 1990. Early that morning, he called the mine and talked to the acting foreman Mr. Scott Jones, who told him the fire in the mine was continuing. Mr. Culp asked him to inform Mr. Tuck that he "reported off," which is the standard procedure required of a miner who is not coming in on a scheduled workday.

Mr. Culp then got a phone call from Mr. Tuck. Mr. Culp reminded Mr. Tuck of what he told him in their talk at the end of the shift on August 22, 1990. Mr. Tuck acknowledged their talk but said, "You have to come to work or be terminated." Mr. Tuck indicated to him that all salaried employees were needed to fight the fire, that Mr. Culp's only alternatives were to work, quit, or be fired. Mr. Culp testified that he did not quit his job and, because of his concern for his safety, refused only underground work while the mine fire continued.

Mr. Tuck told Mr. Culp that he wanted him to talk to Mr. Myers, the Personnel Director. Mr. Culp talked to the Personnel Director and told him what the situation was and of his and his wife's safety concerns and that he did not want to quit. He asked for work on the surface while the fire inside the mine was continuing. Mr. Myers got back to him a few days later and told him he was suspended without pay as of August 22, 1990. Later he received the letter from Mr. Myers, dated September 4, 1990 (Ex. G-1), advising him that he was suspended from the payroll as of August 22, 1990, pending a hearing with management. On September 12, 1990, he had a hearing before Mr. M.J. Turnipseed, Respondent's Vice President of Operations. After the hearing, he received Mr. Turnipseed's letter dated October 11, 1990 (Ex. G-3), advising him that his (Mr. Culp's) actions "constituted a voluntary relinquishment of his position" and the severance of the employment relationship was to be effective October 15, 1990.

Mr. Lee A. Smith called by Complainant stated that since March 12, 1990, he has been the supervisory of the coal mine safety and health inspectors located at Glenwood Springs. He is familiar with the mine fire in question. The fire was under his jurisdiction, and he was one of the coal mine inspectors at the mine during the fire. He was aware of the 103(k) order issued August 16, 1990, and the 107(a) imminent danger order issued November 18, 1990. However, no Section 103(j) Order was ever issued. With respect to the mine fire, the Respondent would make proposals and MSHA would either approve the proposed plan or disapprove it. MSHA would either say "Yes" or "No." MSHA never supervised the fire-fighting efforts but was observing it. Respondent continued to be in control of the mine.

Mr. Lee Smith stated that when he observed the fire, the flame was bright orange, about 14.5 feet long, and 12 feet wide. Within a limited area in the 211 longwall gob, the fire moved around. Sometimes there was a single flame and at other times there were multiple flames.

Methane is an explosive gas. The mine had a history of liberating large quantities of methane gas and, in the past, has been and continues to be subject to an MSHA spot inspection every five working days under Section 103(c) of the Act. There have been three mine explosions in the past. The April 15, 1981, explosion resulted in the death of 15 miners, some outby the face area. The December 1986 explosion resulted in the death of nine miners. There was a third explosion which fortunately did not result in any deaths. Mr. Culp's safety concerns and belief that working underground in the mine was hazardous while the mine fire continued was a reasonable belief.

Documentary Evidence

The following documents were tendered by the Secretary on behalf of Complainant and received in evidence.

1. Exhibit G-1 is a copy of a letter dated September 4, 1990, by Respondent's Personnel Director advising Mr. Culp he was suspended from the payroll August 22, 1990, pending a hearing with management.

2. Exhibit G-2 is a copy of a letter dated Septmber 7, 1990, notifying Mr. Culp of his hearing with management to be held September 12, 1990, regarding his suspension.

3. Exhibit G-3 is a copy of a letter dated October 11, 1990, by Respondent to Mr. Culp incorporating management's review of the evidence presented at the September 12, 1990, hearing.

4. Exhibit G-4 is a copy of a page from Respondent's "Salaried Employee Handbook" given to Mr. Culp stating

> No employee will be required to work under conditions which he reasonably believes to be dangerous beyond the normal hazards inherent in underground mining.

5. Exhibit G-5 is a diagram showing a plan view of the location of the 211 longwall fire.

The following documents were tendered by Respondent and, except for Exhibit R-4, received into evidence.

1. Exhibit R-1 is MSHA's 107(a) Imminent Danger Order re the 211 longwall fire issued August 18, 1990, and its various modifications through September 27, 1990.

2. Exhibit R-2 is MSHA's 103(k) Order issued August 16, 1990, and its various modifications through November 5, 1990.

3. Exhibit R-3 is Respondent's summaries of MSHA's 103(k) and 107(a) orders and their various modifications.

4. Exhibit R-4, marked for identification only, not received into evidence, consists of 200 loose pages entitled MSHA PERSONNEL AND ACTIVITY.

5. Exhibit R-5 is a chart prepared by Respondent showing, for the period August 16, 1990, to November 5, 1990, time lines relating to the 211 longwall fire and MSHA's 103(k) and 107(a) Orders and their modification.

DISCUSSION

Under 29 C.F.R. § 2700.44(c) (1986), 30 U.S.C. § 815(c)(2) the scope of a temporary reinstatement hearing is limited to a determination as to whether the miner's discriminatory complaint is frivolously brought. Secretary of Labor on behalf of Yale E. Hennessee v. Alamo Cement Company, 8 FMSHRC 1857-1858 (December 8, 1986).

Webster's New Collegiate Dictionary 1979 defines "frivolous" as follows:

> 1 : of little weight or importance
> 2 a: lacking in seriousness; irresponsibly self-indulgent
> b: marked by unbecoming levity

Black's Law Dictionary; Revised Fifth Edition, 1979, defines the term "frivolous" and "frivolous appeal" as follows:

> Frivolous. Of little weight or importance. A pleading is "frivolous" when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent.
>
> Frivolous appeal. One in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed.

I have carefully reviewed and considered the testimony of Mr. Joseph C. Culp and Mr. Lee A. Smith summarized above and the documentary evidence. I find that the record clearly raises a non-frivolous issue as to whether Mr. Culp's discharge was in violation of the Mine Act. I credit Mr. Culp's testimony, as well as the testimony of Mr. Lee Smith. A viable issue was raised as to whether Mr. Culp's refusal to work underground while the 211 longwall gob fire continued to burn was based in part on Mr. Culp's reasonable good faith belief that such work was hazardous or that it exposed him to the danger of serious injury or death.

Mr. Culp's complaint is not frivolously brought. The Secretary on behalf of Mr. Culp has carried its burden of proof. The application for temporary reinstatement should be granted.

FINDINGS AND CONCLUSIONS

1. At all relevant times Respondent, Mid-Continent Resources, Inc., did business and operated its Dutch Creek Mine in the production of coal and therefore is an operator within the meaning of Section 3(d) of the Act;

2. At all relevant times Joseph C. Culp was employed by Respondent as maintenance foreman at Respondent's Dutch Creek Mine, and was a miner, as defined by Section 3(g) of the Act;

3. Respondent's Dutch Creek Mine, located near Redstone, Pitkin County, Colorado, is a mine, as defined in Section 3(h) of the Act, the products of which affect commerce;

4. On August 22, 1990, Joseph C. Culp had complained to Respondent about unsafe mining conditions and practices at the Dutch Creek Mine, specifically being required to work underground during a mine fire, and asked to be assigned to work at the surface until the mine fire was extinguished;

5. Respondent, through its maintenance superintendent and mine foreman, Robert E. Tuck, was unresponsive to these safety complaints and, in fact, stated that it was "not all that bad";

6. Mr. Culp's requests for an alternative to working underground in the mine while the mine fire continued, such as working on the surface, vacation, temporary layoff without pay, were all refused by Respondent.

7. On August 23, 1990, Joseph C. Culp was suspended from the company payroll. He later received written notice from Mid-Continent that his employment with Respondent was terminated on October 15, 1990;

8. Based on the evidence presented at the hearing and the record as a whole, I find that a "viable issue" was raised as to whether Mr. Culp's refusal to work underground in the mine that preceded his discharge, was based in part on his reasonable good faith belief that working underground in the Dutch Creek Mine while the mine fire continued would expose him to an injury, danger, and hazard.

ORDER

The application for an order of temproary resintatement of Mr. Joseph C. Culp is GRANTED. Respondent is ORDERED to immediately reinstate Mr. Culp to his position as maintenance foreman, from which position he was discharged, at the same rate of pay, and with the same or equivalent duties assigned to him immediately prior to his discharge.

As previously stated in the body of this decision, the scope of this temporary reinstatement hearing is limited to my determination as to whether Mr. Culp's discrimination complaint is frivolously brought. The respondent will have a full opportunity to respond, and the parties will be afforded an opportunity to be heard on the merits of any discrimination complaint filed. The parties will be notified further as to the time and place of any hearing requested.

August F. Cetti
Administrative Law Judge

Distribution:

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Edward Mulhall, Jr., Esq., DELANEY & BALCOMB, P.C., Drawer 790, Glenwood Springs, CO 81602 (Certified Mail)

Mid-Continent Resources, Inc., P.O. Box 500, Carbondale, CO 81623 (Certified Mail)

/ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 20, 1990

LEO SLONE & 180 MINERS, Complainants	:	COMPENSATION PROCEEDING
	:	Docket No. KENT 90-122-C
v.	:	
	:	No. 1 Mine
SUN GLO COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER OF DISMISSAL

Before: Judge Merlin

By order dated October 23, 1990, the operator's "Agreed Order Settling" this complaint was disapproved and the operator was ordered to file additional information in order to have the settlement approved. As set forth in the order, the operator was directed to provide the names of all affected miners; the number of hours for which each of them were being compensated; the amount of compensation paid to each miner; and signatures to the agreement by the duly authorized representatives of the miners and operator. On December 7, 1990, the operator filed another "Agreed Order Settling" which sets forth the details of the settlement as follows:

> The shutdown [of the mine] at issue occurred on March 20, 1990 at approximately 2:30 P.M. All miners were sent home. The mine reopened at 4:00 P.M. on March 21, 1990. The lost hours were the remainder of the day shift on the 20th, the full evening shift on the 20th, the full night shift on the 21st and the full day shift on the 21st. The Complainants represent that the stated payments fully reimburse each affected employee for all hours lost on their scheduled shift, including overtime. There was no reduction in the hours payable negotiated between the parties as a function of the settlement. Each Complainant represents that he/she has been fully satisfied and made whole by the Respondent's payment as described in Exhibit A, and that this action may be dismissed.

A list of miners containing the hours and monetary amounts of compensation was attached and both parties signed the agreement.

The order of October 23, 1990 having been complied with, I accept the foregoing representations and approve the recommended settlement.

Accordingly, it is **ORDERED** that the proposed settlement be **APPROVED** and that this case be **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

Distribution:

Mr. Leo Slone, Chairman, Mine Committee, 101 Jackson's Branch, Elkhorn City, KY 41522 (Certified Mail)

Mr. C. Tom Anderson, President, Sun Glo Coal Company, Inc., P. O. Box 280, State Route 197, Ash Camp, KY 41512 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DEC 20 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF MICHAEL L. PRICE AND JOE JOHN VACHA, Complainants	:	DISCRIMINATION PROCEEDING Docket No. SE 87-128-D No. 4 Mine
and	:	
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	
v.	:	
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION ON REMAND

Before: Judge Broderick

STATEMENT OF THE CASE

On July 13, 1988, I issued a decision on the merits in this case in which I concluded (1) Section IIE of JWR's Drug Abuse and Rehabilitation Control Program was on its face in violation of section 105(c) of the Act. I further concluded (2) that the discharge of Price and Vacha was motivated in part because of activity protected under the Act, but that JWR established that they would have been discharged for unprotected activity alone and that the drug testing program was not discriminatorily applied to Price and Vacha. 10 FMSHRC 896 (1988). On August 20, 1990, the Commission reversed my determination that the drug program was facially discriminatory under the Mine Act. It affirmed my conclusion that Price and Vacha established a prima facie case of discriminatory discharge. However, the Commission determined that my decision did not fully examine and explain the impact on JWR's affirmative defense of the evidence concerning the pre-testing supervisory joking directed at Price and Vacha, and the differences in procedures followed in testing Price and Vacha from those followed at other mines. The case was therefore remanded to me to analyze and explain the impact of this evidence. 12 FMSHRC 1521 (1990). On August 27, 1990, I issued an order to the parties to file briefs directed to the question whether JWR's drug program was discriminatorily applied to Price

and Vacha. In the meantime, JWR filed a Motion for Reconsideration of the Commission's decision which was denied by order issued November 28, 1990. All parties have now filed briefs in response to my order of August 27, 1990.

FACTUAL ANALYSIS

I

JWR instituted its Substance Abuse Program on January 1, 1987. By its terms it applied to all hourly and salaried employees in JWR's Mining division. However, the drug testing aspect of the program was directed first to (a) employees demonstrating a reasonable cause for testing and (b) employees whose duties, "whether by job title or by reason of elected office," involve safety. In my decision of January 13, 1988, I concluded that the program was not designed or intended to interfere with safety committee members including Price and Vacha, even though it impinged particularly on such miners' representatives. JWR's motive in setting up the program was not to retaliate against Price and Vacha or other safety committee persons, or to limit their safety rights and responsibilities.

II

The evidence shows that Price and Vacha were, and had the reputation of being, safety activists. Both filed a number of safety grievances, and both have had serious disputes with JWR management over safety issues. 10 FMSHRC 903. In the opinion of the International Health and Safety Representative of the UMWA, the No. 4 Mine Safety Committee was the "most active committee" in the State of Alabama, which includes other Jim Walter mines.

III

Prior to the date that paragraph IIE was implemented (March 2, 1987), Price and Vacha were subjected to kidding and joking by supervisory employees in the mine safety office about the impending drug testing. In part this apparently resulted from the fact that Price told the JWR safety inspectors that he had difficulty urinating in front of others. Rayford Kelly, JWR's industrial relations supervisor at the subject mine, was aware of some of this. 10 FMSHRC 900. This joking was directed at Price and Vacha because they were going to be tested. They were going to be tested because they were safety committee members. Whether or not the joking was intended to affect their ability to submit the requested urine samples, the evidence establishes that it had such an effect. There is no evidence in the record as to any joking or harassment directed to other safety committee members on other shifts or in other mines.

IV

The urine samples program at the No. 4 Mine where Price and Vacha worked was conducted under the supervision of the mine safety department--by Wyatt Andrews and Bob Hendricks. Andrews and Hendricks were of course involved in mine safety matters with Price and Vacha in the normal course of their duties. Andrews and Hendricks had been involved in the pre-testing joking directed at Price and Vacha related to their claimed inability to urinate in public described in III, above. In the other JWR mines, the samples were taken under the direct supervision of the industrial relations office, and not by JWR safety personnel. The record does not indicate the reason for this difference.

V

On March 2, 1987, Price and Vacha were informed that they would have to provide urine samples at the end of the shift, which extended from 7:00 a.m. to 3:00 p.m. Price was told at about 8:00 a.m. and Vacha at about 11:30 a.m. Andrews and Hendricks accompanied Price and Vacha to the bathroom as they were instructed to do, to witness the collection of the samples. This procedure was not followed in all the other mines, in some of which those tested were permitted to produce specimens without an observer being present. Price and Vacha attempted to produce a specimen on a number of occasions between 3:00 p.m. and 7:00 p.m. Price offered to go into the bathroom naked if he could go alone, but this offer was refused. Price and Vacha asked whether they could return the next morning to give the samples, but JWR refused. At 7:30 p.m., they were formally suspended with intent to discharge because of insubordination. In another mine, a committeeman who was unable to produce a sample when requested was permitted to return at the end of his shift to do so. In another instance, a miner being tested for cause was permitted to return the next day to give a sample.

VI

Price and Vacha were made to feel nervous and upset by the manner in which the testing was conducted. They did not refuse to submit the samples but were physically or psychologically unable to do so. I conclude that the fact that the procedure was supervised by those who often had an adversarial relation to them in safety disputes, contributed to their discomfort. I also conclude that the past safety activities of Price and Vacha were part of the motivation of these supervisors in their conduct of the drug testing program.

VII

The evidence establishes that JWR's drug testing program included a specific proviso that failure to submit urine samples

when requested would result in discharge. This proviso applied to all who came under the program.

VIII

Price and Vacha were discharged by Rayford Kelly, Industrial Relations Supervisor. Kelly believed that Price and Vacha deliberately refused to provide the specimens--that they were "playing games." Kelly was aware of the fact that the testing was conducted by safety department supervisors, and that both Price and Vacha claimed inability to produce specimens while being observed. Kelly refused to permit Price to attempt to provide a specimen without being observed by going into the bathroom naked. He refused to accept the offer of Price and Vacha to return the following morning to give the samples. He was aware of at least some of the prior joking and harassment of Price and Vacha in which Andrews and Hendricks were involved.

ISSUE

Whether the JWR Substance Abuse Program as applied to Complainants Price and Vacha resulting in their discharge was in violation of their rights under section 105(c) of the Mine Act?

CONCLUSIONS OF LAW

I

My conclusion in the decision issued July 13, 1988, that Price and Vacha established a prima facie case of discriminatory discharge was based in part on the fact that JWR sought to test Price and Vacha because they were safety committeemen and therefore representatives of miners, and in part on the evidence of disparate treatment in the testing procedures shown in the Findings of Fact III, IV, V and VI above. My conclusion that a prima facie case of discrimination was made was affirmed by the Commission.

II

The evidence does not establish that the pre-testing joking and harassment directed toward Price and Vacha were related to their safety positions or safety activities. The joking and harassment did result in part from their claimed inability to urinate in public, and in turn contributed to their inability to produce the urine samples involved in this proceeding.

III

The procedures followed in testing Price and Vacha which differed from those followed in other mines contributed to their inability to comply with the request for urine samples. They

were in part related to Price and Vacha's prior safety activities in that they were conducted by those who bore an adversarial relationship to Price and Vacha in mine safety matters.

IV

There is no evidence of a motive for the challenged discharges unrelated to the drug testing matter involved in this case. Therefore, this is not a truly "mixed motive" case. Cf. Eastern Assoc. Coal v. Federal Mine Safety and Health Review Commission, 813 F.2d 639, 643 (4th Cir. 1987). My prior decision erroneously treated the case as a mixed motive case when I concluded that JWR would have discharged Price and Vacha "for violating a work order (not protective activity) in any event." 10 FMSHRC 910. My conclusion that the drug testing program was not discriminatorily applied was contrary to the evidence and erroneous. Price and Vacha were discharged for failing to comply with JWR's drug testing program. The implementation of that program was discriminatorily applied to Price and Vacha in part because of their prior safety activities. JWR has not established that it would have discharged Price and Vacha for unprotected activity alone, i.e., without reference to the implicated drug testing program. Therefore their discharges were in violation of section 105(c) of the Mine Act.

ORDER

Based on the above findings of fact and conclusions of law, **IT IS ORDERED:**

1. Respondent shall permanently reinstate Michael L. Price and Joe John Vacha to the positions from which they were discharged on March 2, 1987.

2. Respondent shall pay Complainants Price and Vacha within 30 days of the date of this decision all back wages and other benefits from March 3, 1987, until the date of their reinstatement, with interest thereon in accordance with the Commission decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988) calculated proximate to the time payment is actually made.

3. Respondent shall expunge from its personnel records all references to the discharges of Price and Vacha on March 2, 1987.

4. Respondent shall restore to Price the three days of graduated vacation pay he took to attend the hearing.

5. Respondent shall pay to the Secretary within 30 days of the date of this decision the sum of $500 as a civil penalty for the violation found herein.

James A. Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 20 1990

ROY FARMER AND OTHERS, Complainants	:	COMPENSATION PROCEEDING
v.	:	Docket No. VA 91-31-C
ISLAND CREEK COAL COMPANY, Respondent	:	VP-3 Mine

ORDER OF DISMISSAL

Before: Judge Broderick

On November 2, 1990, Applicant Roy Farmer, Miner Representative, filed on behalf of himself and some 275 other miners at the Virginia Pocahontas No. 3 Mine of Respondent a claim for compensation under section 111 of the Mine Act. The claim covers the period April 17 through April 20, 1990, when the employees were said to have been idled following a section 107(a) imminent danger withdrawal order accompanied by a section 104(a) citation charging a violation of a mandatory health and safety standard. Copies of the order and citation accompanied the claim for compensation.

Island Creek filed an Answer on November 28, 1990, and a Motion to Dismiss on November 30, 1990.

The Motion to Dismiss argues that the case should be dismissed because it was filed 198 days from the date of the claimed entitlement, and Commission Rule 35, 29 C.F.R. § 2700.35 requires that a complaint for compensation shall be filed within 90 days after the commencement of the period the Complainants are idled or would have been idled as a result of the order which gives rise to the claim.

Complainants have not replied to the Motion.

Because the complaint appears to have been filed substantially later than Rule 35 permits, and Complainants have not advanced any excuse or justification for the late filing, I conclude that the motion should be granted.

Therefore, **IT IS ORDERED** that the claim for compensation and this proceeding are **DISMISSED.**

James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 2 0 1990

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 91-56-R
	:	Citation No. 3306262; 10/15/90
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Blacksville No. 2 Mine Mine I.D. 46-01968

DECISION

Appearances: Walter J. Scheller, III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Contestant; Glenn Loos, Esq., U.S. Department of Labor, Office of the Solicitor, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Notice of Contest and Application for Extension of Abatement, and a Motion for Expedition of Proceedings all of which were filed by the Operator (Contestant) on November 15, 1990. Pursuant to telephone conference calls between the undersigned and counsel for both Parties on November 15 and November 16, 1990, this case was scheduled for hearing and was subsequently heard on November 20, 1990, in Morgantown, West Virginia. At the hearing, Spencer Allan Shriver and Paul Michael Hall, testified for the Secretary (Respondent), and Robert Church, Charles E. Bane, Sr., and John F. Burr, testified for Contestant. At the conclusion of the hearing, counsel for Contestant requested an allowance of 7 days subsequent to the receipt of the transcript to file a brief. Subsequent to a discussion, it was agreed that the Parties would file Briefs by December 6, 1990, and Briefs were timely filed by the Parties. The Parties waived the right to file a Reply Brief.

FINDINGS OF FACT AND DISCUSSION

I.

Spencer Allan Shriver, an electrical engineer employed by MSHA, testified that he had visited the subject mine on October 12, 1990, to investigate an accident. Upon investigation, Shriver was informed that a short circuit had occurred in the controller box of a locomotive at the mine,

burning a hole in its steel cover and blowing out some hot gases that burned the locomotive operator, Robert Fetty. Charles Wise, who was in the locomotive compartment along with Fetty, told Shriver that he had removed the fuse from its holder on the trolley pole, and installed a spare 300 ampere (amp) fuse that he had located in the trolley. According to Shriver, Wise then replaced the trolley pole on the wire, its power source, thus enabling him to operate a radio. Wise next notified the traffic dispatcher that Fetty had been injured and that the locomotive was disabled. Wise then proceeded with the locomotive to the bottom. When he was about 100 yards from the bottom he put the locomotive onto a spur, at which time a second short circuit developed.

According to Shriver, and not contradicted by Contestant, Wise had indicated to Shriver that he (Wise) was not a certified electrician. Shriver then issued a Section 104(a) alleging a violation of 30 C.F.R. § 75.511 which repeats the language of Section 305(f) of the Federal Mine Safety and Health Act of 1977 (the Act), which, as pertinent, provides:

> No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person.

It is undisputed that Wise was not a qualified person, as defined by the Regulations (30 C.F.R. § 75.512), nor a person trained to perform electrical work, and that Wise in fact did remove a blown fuse and replace it with an unblown fuse. Thus the issue for resolution is whether § 75.511, supra, applies to the facts presented herein. In other words, it must be resolved whether "electrical work" encompasses the changing of a fuse on a trolley pole. For the reasons that follow I conclude that it does not.

II.

The physical acts involved in removing a fuse and replacing it with another one is depicted in a video that was shown at the hearing. (Operator's Exhibit 3). Essentially, in replacing a fuse, the first step is to remove the trolley boom from the power line, its sole power source. This act is performed regularly by operators of trolleys who are not qualified electricians. The next step is to unwrap the tape which holds the fuse holder to the boom. The cover cap is then unscrewed from the fuse holder

revealing the fuse connector and the fuse. These two items are pulled apart, and the fuse is then pulled out and replaced with another fuse. A fuse with an amperage rating which is not the same as the one that had been replaced, will not fit in the same fuse holder.

The term "electrical work", is defined in neither the Act nor in the appropriate Regulations (30 C.F.R. et. seq.), Respondent's and Contestant's witnesses essentially agreed that there is no recognized definition in the mining industry of the term "electrical work", and that it has usually been defined by example.

Section 48-7-2.1(b)(14) of Title 48 of the Code of State Rules of West Virginia (48 C.S.R. § 48-7-2.1(b)(14)), in interpreting West Virginia Code § 22A-2-40(19) which contains the same language as Section 75.511, supra, lists as an example of work that is not required to be performed by an electrician or apprentice electrician as follows: "Replace blown fuses on trolley poles and nips." On the other hand, an MSHA publication, Coal Mine Inspection; Underground Electrical Inspections, effective June 1, 1983, sets forth as an example of work required to be performed by a qualified person or a person trained to perform electrical work, the following: 1. "1.2 Replacing blown fuses;" (Govt. Exhibit 7, pg. 3). Also, the MSHA Program Policy Manual, dated July 1, 1988, contains the same example (Govt. Exhibit 6). Although weight is to be accorded the Secretary's interpretation of Regulations, [1]/ the interpretation clearly is not binding where it is not reasonable [2]/ especially in light of the fact that a prior Manual dated March 9, 1978, did not include the changing of fuses as an example of electrical work (Exhibit O-14). In the same fashion, a letter dated October 25, 1979, from Joseph O. Cook, Administrator for Coal Mine Safety and Health, MSHA, to District Managers, Coal Mine Safety and Health, indicates that the letter was written in response to request for an interpretation of "electrical work," and advises that "electrical work" is generally considered to be the work required to install or repair electric equipment or conductors. The changing of fuses is not listed among the examples of electrical work set forth in the memorandum. (Exhibit O-8).

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[1]/ See the legislative history and cases cited in Respondent's Brief at pages 15-16.

[2]/ See, Miller v. Bond 641 F 2d 997, 1002 (D.C. Cir. 1981); See also, King Knob Coal Co., 3 FMSHRC 1417, 1420 n.3 1981).

III.

In evaluating whether electrical work encompasses replacing blown fuses on trolley poles, an inquiry is appropriate as to what a reasonably prudent person familiar with the mining industry and the protective purpose of this section would have concluded with regard to its applicability. (See, Ideal Cement Company, Docket No. WEST 88-202-M, 12 FMSHRC _____ (slip op., November 27, 1990.)) This inquiry requires, as a first step, an analysis of the hazards, if any, involved in allowing nonqualified personnel to change blown fuses on trolley poles.

According to Shriver, if a fuse blows, it is reasonably likely that a short circuit had occurred in the equipment protected by the fuse. Accordingly, if an uncertified person replaces the fuse and reenergizes the circuit without inspecting the protected equipment, a short circuit may reoccur causing an injury due to the extremely high temperature of an electrical arc. He thus concluded that changing fuses is to be considered electrical work, as the equipment protected by the fuse should be evaluated by a certified person before the fuse is replaced, in order to avoid the possibility of an injury. However, as he conceded upon cross examination, there are no regulatory requirements requiring a certified electrician to examine effected equipment to determine the cause of a blown fuse. Indeed Shriver conceded upon cross examination that a nonqualified electrician would not be performing electrical work if he were to remove a trolley pole from its wire, remove its fuse, give it to a mechanic and then replace it upon being advised that the fuse is still good. He also conceded that placing a fuse in an empty fuse holder is not electrical work. Thus, as per Shriver's testimony, the act of replacing a blown fuse can be performed by a noncertified as well as a qualified electrician.

Also, Shriver indicated, in essence, that a circuit breaker, which performs the same function as a fuse, can be reset by a nonqualified person. Hence, according to Shriver's testimony, the resetting of the breaker is not electrical work. Shriver distinguished a circuit breaker from a fuse by indicating that a fuse can carry more than a hundred percent of its amperage rating for a few minutes. Thus an injury is possible, if a fuse is replaced without first checking the equipment for a short circuit. Shiver explained that, in contrast, a circuit breaker can tolerate amperage only a few percents above its rating and then will immediately operate and shut off power. However, the effect of this distinction is diluted, inasmuch as Shriver conceded that, essentially, in some conditions a breaker can be reset, and yet power would still remain on, resulting in a situation that could cause a cable to blow up.

Paul Michael Hall, the Chief Engineer of MSHA District 3, essentially agreed with the assessment of Shriver that a nonqualified electrician could, by mistake, replace a blown fuse with a fuse of the wrong size which would result in inadequate overload and short circuit protection. He explained that, should this occur in the event of an overload, there would be a possibility that high amounts of current would continue to flow, causing a fire. However Respondent did not impeach or rebut the testimony of Robert Church, Contestant's Safety Supervisor, that, in essence, it would not be physically possible for a nonqualified person to place a wrong fuse in the fuse holder on the trolley pole. He indicated that a smaller sized fuse would go into the holder, but would not make a ground contact. He also indicated that larger fuses, such as those rated for 60 or 90 amps, would not fit into the connector for the trolley fuse due to their size or configuration. Further, he indicated that although a 100 amp fuse is the same dimension as the 300 amp fuse in issue, they are clearly not interchangeable as, according to his uncontradicted testimony, the ends of the fuses are different, i.e., the 100 amp is round and the 300 amp fuse in question contains a metal part that protrudes from its end.[3]/

In essence, Hall opined that a qualified electrician is required to replace a fuse " . . . to assure that equipment was going to be maintained in a safe operating condition, ..." (Tr. 103). He further indicated that if a short circuit in the controller occurs and a fuse blows, the controller should be repaired by qualified personnel before the blown fuse is replaced. However, upon cross examination, he indicated that resetting a circuit breaker is not electrical work, and, in essence, had the trolley pole in issue contained a breaker rather than a fuse, a qualified person would not have been required to reset the breaker in spite of the fact that there was a short circuit in the controller. Hence, I find that it is totally inconsistent for Respondent to maintain that (1) replacing a blown fuse is electrical work on the ground that the controller containing a short circuit must first be repaired, but on the other hand (2) had a circuit breaker been used, resetting it would not have been considered electrical work, even though the controller should be examined and repaired. In other words, if, in the circumstances presented herein, resetting a circuit

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[3]/ See, for illustrative purposes, a comparison between Exhibits 0-7 and 0-8.

breaker is not considered electrical work, then similarly, replacing a blown fuse, in the same circumstances, should also not be considered electrical work.

Hall opined that the replacing of fuses is hazardous in a situation where more than one type of fuse is contained in a box and one is replaced while the other still is live. Not much weight is accorded this opinion, as it is not relevant to the situation herein, which involves a single fuse holder containing one fuse.

In essence, Hall asserted that a qualified person would generally be more aware of the hazards in replacing a fuse. However, in weighing the hazards of a possible electrical shock to a nonqualified person, it is significant to note, as explained by Church, that the hazard of an electrical shock attendant upon the act of changing a fuse, is the same as that involved in placing a trolley pole off or on the trolley wire, its power source. As indicated by John F. Burr, Respondent's manager of maintenance, this is a task performed regularly by trolley operators upon reversing direction. Hence, to have such a person replace a blown fuse would not expose him to any additional hazard.

Specifically, Hall indicated a qualified person would be more aware of the need to ensure that the pressure plates containing the fuse would exert the proper pressure on the fuse. However, both the Program Policy Manual, and the Coal Mine Inspection Manual: Underground Electrical Inspections, (Govt. Exhibits 6 and 7), list as electrical work "replacing blown fuses." (Emphasis added.) Accordingly, as conceded by Shriver upon cross examination, inserting an unblown fuse into an empty holder, or removing an unblown fuse, examining it, and replacing it, would not be considered electrical work. Hence, the distinction between the electrical work and nonelectrical work, with regard to replacement of fuses, cannot stem from the hazards dependent upon the physical acts in replacing a fuse, as these are the same whether the fuse is blown or unblown.

I thus conclude that the record fails to establish the existence of hazards, of more than a minor degree, attendant upon a nonqualified person being permitted to change a fuse. Accordingly, the record is insufficient to support a finding that a reasonably prudent person would have concluded that this work is "electrical work."

IV.

In evaluating whether a reasonably prudent person would consider the changing of a blown fuse on a trolley pole to be nonelectrical work, and allow a nonqualified person to change the fuse, an analysis must be made of the hazards attendant upon

requiring such an action to be taken only by a qualified person.[4]/ If a fuse on a trolley is blown, electricity from the trolley wire would not be available to the trolley. Hence, the trolley phone which gets its power from the trolley wire, would be inoperable. Accordingly, communication from the trolley to the dispatcher would not be possible. Hence, if the trolley operator, a nonqualified person, could not change the blown fuse, he would be forced to abandon the vehicle and walk up to a mile to find a telephone to call for a qualified person to change the fuse. A trolley which has been so abandoned would be without power and accordingly, would not have any lights on.[5] Hence, a

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[4]/ I am not unmindful of the diminution of safety cases relied upon by the Respondent at pages 10-12 of its' Brief. I find they are inapplicable, as in each case the operator sought to be relieved from complying with a mandatory standard on the ground that an action explicitly required by a standard would lead to a diminution of safety. In contrast, in the present case the issue is whether a standard, whose terms are not totally unambiguous, is to be applied to the specific situation presented herein. In resolving this issue, an inquiry must be made as to whether the terms of the standard encompass the alleged violative practice. Specifically, it must be resolved whether "electrical work" encompasses the act of replacing a blown fuse on a trolley pole. Certainly one of the factors that can be taken into account, in this contest proceeding, is an analysis of the hazards attendant upon the placement of this act within the purview of electrical work. In contrast, in Pennsylvania Allegheny Coal Company, Inc., 3 FMSHRC 1392 (1981), the sole basis for the Operator's position that it was not liable for violating a mandatory standard, was an assertion of diminution of safety. The Commission held that inasmuch as the Operator has not sought modification under Section 101(c) of the Federal Mine Safety and Health Act of 1977 (the Act), that it was precluded from raising a defense of diminution of safety in an enforcement proceeding. In the instant case, Contestant has filed a petition for modification which has not yet been resolved. Accordingly, in considering whether the undefined, and thus not unambiguous terms of the standard at issue are to be applied to the acts in issue, it must be determined if such an application is reasonable. In making such a determination, one of the factors to be considered is the hazard attendant upon such an application. Further, this factor can clearly be considered as the Petition for Modification has not yet been resolved. (See, Sewell Coal Company, 5 FMSHRC 2026 n.3, (1983)).

[5]/ Contestant's transportation vehicles are equipped with reflectors, that, if clean, can be seen for 700 to 800 feet along a straight track. However, in the mine in question, the track contains curves, and according to Charles E. Bane, Sr.,

vehicle traveling behind the trolley, such as one carrying cars filled with coal, would run a risk of crashing into the nonoperative trolley and possibly derailing it, which could cause roof supports to be knocked out. Moreover, if the trolley was being used to transport an injured miner, medical treatment would be delayed, by requiring the nonqualified operator to wait for a qualified person to change the fuse.

Hence, I find that a reasonable prudent person familiar with the mining industry and protective purposes of the Act, would conclude that the hazards attendant upon requiring only a qualified person to change a blown fuse on a trolley pole outweighs the hazards involved in allowing such a person to perform this task.

For all the above reasons, it is concluded that having a nonqualified person replace a blown out fuse on a trolley pole does not violate Section 75.511, supra.[6]/ Thus the Notice of Contest is **SUSTAINED** and **IT IS ORDERED** that Citation No. 3306262 be **DISMISSED.**

Avram Weisberger
Administrative Law Judge

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dcp

Contestant's Regional Manager of Safety, the Morgantown mines have grades of up to 2 to 3 percent. Also the main line in the mine in question is not lit.

[6]/ In light of this conclusion, it is not necessary to decide whether the time for abatement can be extended.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DEC 27 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 90-21-M
	:	A.C. No. 41-03425-05506
v.	:	
	:	Docket No. CENT 90-68-M
C & C CRUSHED STONE, INC., Respondent	:	A.C. No. 41-03425-05507
	:	
	:	C & C Quarry

DECISION

Appearances: Sarah D. Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
Mr. Carl Chaney, C & C Crushed Stone, Inc., Route 1, Box 16, Burton, Texas, for the Respondent.

Before: Judge Fauver

The Secretary seeks civil penalties for eight alleged safety violations under § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and additional findings of fact in the Discussion below:

FINDINGS OF FACT

1. Respondent owns and operates a quarry and plant, known as C & C Quarry, in Washington County, Texas, where it mines, processes and sells crushed stone with a regular and substantial effect on interstate commerce.

2. Respondent is a small size mine operator.

August 9, 1989, Inspection

3. Federal Mine Inspector Robert R. Lemasters inspected the quarry and plant around 8:30 a.m., August 9, 1989. When he reached the scale house, the plant was operating, producing crushed stone. In a few minutes, the plant conveyor and crushing operation was turned off. When Inspector Lemasters reached the conveyor and stone-crushing operation at the plant, he found that the guards for the tail pulley on the main feed conveyor, for the tail pulley on the sand belt, for the V-belt drive on the stockpile belt, and for the conveyor to the shaker, were removed from the machinery. They were nearby, but had been removed and not reinstalled.

4. Because of the missing guards, Inspector Lemasters issued Citation Nos. 3282571, 3282572, 3282573, and 3282574, each charging a violation of 30 C.F.R. § 56.14112(b), which provides:

> (b) Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.

5. The missing guards were designed to guard pinch points of moving belts, axles, and other moving parts. Employees regularly cleaned up spillage in close proximity to the pinch points while the machinery was running. Without the guards, the employees were exposed to a substantial and significant hazard of becoming entangled in the moving parts or coming into contact with them, with a reasonable likelihood of serious injury.

6. Respondent's president, manager and principal owner -- Mr. Carl Chaney -- knew about the requirements of 30 C.F.R. § 56.14112(b), and in prior inspections had been cautioned by MSHA inspectors to keep the guards on the machinery whenever the machinery was operating.

7. The plant had recently been shut down for repair of an engine, but the repair work had been completed before August 9, 1989, and the plant was operating on August 9, 1989.

8. When Inspector Lemasters saw the plant operations on August 9, 1989, Respondent was not running the conveyor and crusher operation in order to test or adjust the equipment, but was running it to produce crushed stone.

9. Inspector Lemasters observed that the Euclid R-25 end dump truck No. 1 did not have adequate brakes. He issued Citation No. 3282575 for this condition, charging a violation of 30 C.F.R. § 56.14101(a), which provides:

§ 56.14101 Brakes

(a) Minimum requirements. (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. This standard does not apply to equipment which is not originally equipped with brakes unless the manner in which the equipment is being operated requires the use of brakes for safe operation. This standard does not apply to rail equipment

(2) If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

10. The dump truck was used on a steep ramp and other grades. Its defective brakes created a serious hazard to the driver and others.

11. Inspector Lemasters observed that Euclid R-25 end dump truck No. 2 did not have an operable backup alarm. This defect created a serious hazard of striking a pedestrian or vehicle while operating the dump truck in reverse. The inspector issued Citation No. 3282576, charging a violation of 30 C.F.R. § 56.14132(b), which provides that, when the driver has an obstructed view to the rear, self-propelled mobile equipment shall have an audible backup alarm or an observer to signal when it is safe to backup. The dump truck had a substantial area of obstructed view to the rear, and Respondent did not use an observer to signal the driver when operating in reverse.

December 13, 1989, Inspection

12. Federal Mine Inspector Steven R. Kirk inspected the quarry and plant around 1:30 p.m. on December 13, 1989. He observed the conveyor and crusher operating and producing crushed stone. Guards were missing for the tail pulley on the twin jaw crusher return conveyor and for the tail pulley for the discharge conveyor belt. The inspector issued Citation Nos. 3445581 and 3445582, charging violations of 30 C.F.R. § 56.14112(b).

13. The missing guards were designed to guard pinch points of moving belts, axles, and other moving parts. Employees regularly cleaned up spillage in close proximity to the pinch points while the machinery was running. Without the guards, the employees were exposed to a substantial and significant hazard of becoming entangled in the moving parts or coming into contact with them, with a reasonable likelihood of serious injury.

DISCUSSION WITH FURTHER FINDINGS

Mr. Chaney was not at the plant when Inspector Lemasters observed the plant operating and observed the missing guards on August 9, 1989. He suggested at the hearing that the plant was in the process of starting up on August 9, and was not operational on that date. However, he did not present any witnesses to prove that contention and Inspector Lemasters gave eye-witness testimony that the plant was operating and producing crushed stone.

The inspector's testimony is supported by the undisputed evidence that in the next inspection, on December 13, 1989, the plant was operating and guards were missing, indicating a pattern that Respondent was not careful about keeping the guards installed when the plant was operating.

Respondent has demonstrated a poor safety attitude respecting the guard safety standard in 30 C.F.R. § 56.14112(b). Mr. Chaney's attitude appears to be that the guards are not necessary because his employees are not "so ignorant that they would put their fingers in moving parts." This opinion overlooks the serious risk of an employee falling or otherwise accidentally coming into contact with an exposed moving part. Accidents are not simply a test of alertness, but may happen to anyone if safety standards are not followed.

Considering the prior notice given to Mr. Chaney concerning the guard safety standard in inspections before August 9, 1989, and considering all of the criteria for civil penalties in § 110(i) of the Act, I find that the government's proposed penalties for the August 9, 1989, violations of 30 C.F.R. § 56.14112(b) are reasonable.

The violations of vehicle safety standards on August 9, 1989, i.e., the defective brakes and backup alarm, are serious and due to plain negligence. Both violations were readily detectable by ordinary care in checking the vehicles. The penalties proposed by the government for these violations are reasonable.

The two remaining violations -- missing guards on tail pulleys on December 13, 1989 -- reflect a very poor safety attitude by the operator concerning the safety guard standard. Although Respondent may not agree with the wisdom of the statute or of this particular safety standard, it is not at liberty to violate the guard safety standard in a "catch as catch can" approach to MSHA inspections. It must be deterred from violating the safety standards when an MSHA inspector is not on the scene. The unnecessary and unjustified risk to its employees in this case warrants a deterrent penalty higher than the penalties proposed by MSHA. Considering this and all the criteria for

civil penalties in § 110(i) of the Act, I find that a civil penalty of $200 for each of the two December 13, 1989, violations is appropriate.

In summary, Respondent is assessed the following civil penalties:

Citation	Civil Penalty
3282571	$ 74
3282572	$ 74
3282573	$ 74
3282574	$ 74
3282575	$ 91
3282576	$ 91
3445581	$200
3445582	$200
	$878

CONCLUSIONS OF LAW

1. The judge has jurisdiction in these proceedings.

2. Respondent violated the safety standards as alleged in Citation Nos. 3282571, 3282572, 3282573, 3282574, 3282575, 3282576, 3445581, and 3445582.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above civil penalties of $878 within 30 days of the date of this decision.

William Fauver
Administrative Law Judge

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