DECEMBER 1991

NO COMMISSION DECISIONS ISSUED

ADMINISTRATIVE LAW JUDGE DECISIONS

DECEMBER 1991

There were no cases filed in December where review was either granted or denied.

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DEC 2 1991

MICHAEL D. BURTON, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 91-223-D
ARCH OF KENTUCKY, INCORPORATED, Respondent	:	BARB CD 90-31
	:	Mine No. 37

DECISION

Appearances: Susan Oglebay, Esq., UMWA District #28, Castlewood, Virginia, for the Complainant; Marco M. Rajkovich, Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant Michael D. Burton against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c). The complainant filed his initial complaint with the Department of Labor, Mine Safety and Health Administration (MSHA), and after completion of an investigation, Mr. Burton was advised that the information received did not establish any violation of section 105(c) of the Act. Thereafter, Mr. Burton filed a complaint with the Commission, and a hearing was held in Big Stone Gap, Virginia. MSHA filed a posthearing brief, but the complainant did not. However, I have considered all of the oral arguments made in the course of the hearing.

In his MSHA complaint of July 24, 1990, Mr. Burton stated that at the start of the second shift on July 5, 1990, a routine check of the mantrip used to transport miners underground disclosed an inoperable sander. He alleged that shift foreman Scott Johnson instructed the crew to walk to the underground working section and refused their request for self-contained self-rescuers (SCSR) and union representation. Mr. Burton stated that Mr. Johnson "forced" the crew to walk the track entry towards the longwall section which was approximately 3 to 5 miles away without SCSR's. Mr. Burton further alleged that Mr. Johnson sent him home on July 13, 1990, without pay, because he had previously complained about the defective mantrip sanders and unsafe practices in sending the crew underground without SCSR's,

and that he was charged with certain unexcused absences because of his safety complaint to Mr. Johnson.

In his Commission complaint, Mr. Burton alleged that following the initial filing of his discrimination complaint, the respondent continued to harass him and discriminate against him because he invoked his individual safety rights pursuant to the Act. Although Mr. Burton did not specify the alleged acts of additional harassment and discrimination, in the course of the hearing he provided testimony concerning a visit to the dentist on July 11, 1990, which the respondent initially treated as an unexcused absence charged against his attendance record. He also provided testimony concerning his placement in the respondent's chronic excessive absenteeism program sometime in late July, 1990, and a counseling session of August 1, 1990, concerning his work attendance. Mr. Burton believed that all of these incidents resulted from his July 5, 1990, complaint to foreman Johnson about the defective mantrip sanders and the refusal by Mr. Johnson to provide Mr. Burton and his crew with SCSR's after ordering them to walk to the working section. That incident triggered a union safety grievance pursuant to section 103(g) of the Act, with notification to MSHA, and a subsequently issued violation by an MSHA inspector for an alleged failure by the respondent to comply with its SCSR storage plan.

The relief sought by Mr. Burton includes payment of backpay with interest for the July 13, 1990, day that he was sent home by foreman Johnson, expungement from his personnel record of any record of any alleged unexcused absences, including the July 13, 1990, incident, the removal of Mr. Johnson from his position as second shift foreman, and a request that the respondent cease and desist from taking any further discriminatory actions against him for bringing unsafe conditions to its attention.

The respondent denied any acts of discrimination against Mr. Burton as a result of the July 5, 1990, mantrip and SCSR incident, and it maintained that any actions taken against Mr. Burton were taken as a business justification.

Issues

The principal issue presented in this case is whether or not the incidents referred to by Mr. Burton following his initial encounter with shift foreman Johnson on July 5, 1990, constituted prohibited acts of discrimination, harassment, or retaliation because of that event. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1), (2) and (3).

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

Complainant's Testimony and Evidence

Michael Burton, the complainant, testified that he has been employed by the respondent for 14 years, and he could not recall having any prior work difficulties or disciplinary actions. He stated that he was a longwall shear operator, and that on July 5, 1990, he was the designated mantrip driver responsible for inspecting the mantrip before transporting the crew to the working place. After finding that the sanders were inoperable, he proceeded to clean them and he informed the second shift foreman, Scott Johnson, about the situation. Mr. Johnson pointed to two other mantrips and instructed him to use them. However, one mantrip had inoperable brakes, and while he was checking the sanders on the third mantrip, Mr. Johnson "got red faced and mad and said walk in" (Tr. 5-8). Mr. Burton stated that the working section was three miles away and when he asked for a self-contained rescuer before starting to walk, Mr. Johnson said "no" (Tr. 9). Mr. Burton stated that he had previously been exposed to smoke during a motor fire and wanted to take a self-rescuer with him. A certain number of self-rescuers are required to be on each mantrip which the crew usually rides to the section. However, since they were walking, he wanted to take one with him (Tr. 10).

Mr. Burton stated that Mr. Johnson informed him that he did not need a self-rescuer because the mine was on a storage plan which required that self-rescuers be located at several strategic underground locations. Mr. Johnson also informed him that after the sanders were repaired, the mantrip would come in and pick up the crew at the point where they had walked to (Tr. 10-12). Mr. Burton stated that 14 men were walking into the section and he later learned that four self-rescuers were kept at each head piece location. He believed that there were eight head pieces located along the three miles into the section (Tr. 13). Mr. Burton stated that he and the crew began walking at 2:45 p.m., and that the mantrip picked them up at approximately 4:00 p.m. (Tr. 13).

Mr. Burton stated that he never refused to walk to the section, and that other crew members also asked for self-rescuers. He requested to speak with a union safety committeeman, but Mr. Johnson denied his request. A few days later, union safety representative Bob Clay found out about the matter and contacted an MSHA inspector who came to the mine for an inquiry in response to a verbal section 104(g) complaint by

Mr. Clay. The inspector interviewed some of the miners, including Mr. Burton. As a result of the inquiry, a section 104(d)(1) citation was issued for an alleged violation of mandatory standard section 75.1101-23, and the parties stipulated that the citation was subsequently modified to a section 104(a) citation (Exhibit ALJ-1; Tr. 18-20).

On cross-examination, Mr. Burton confirmed that he is provided with a WD filter type rescuer and an SCSR when he is underground and that he is trained to use them. He stated that prior to the adoption of the SCSR storage plan, he was given an SCSR and was responsible for it at all times while underground. After the adoption of the plan, he no longer was responsible for the SCSR and they were stored on the mantrips, other mobile equipment, and at various locations throughout the mine. He further confirmed that he was trained about the location and use of escapeways and evacuation routes, and that company policy required him to check the mantrips, including the sanders, to see that they are operable (Tr. 45-49).

Mr. Burton confirmed that three supervisors and a longwall engineer were also scheduled to ride the mantrip with the crew to the section on July 5, 1990. After beginning work on the sanders, and performing other duties assigned by foreman Johnson while awaiting the repairs to the mantrips, Mr. Johnson then told the crew, including the three foreman and the longwall engineer to start walking. Mr. Burton confirmed that Mr. Johnson told him that he did not need to take an SCSR with him because there was a storage plan in effect underground. Mr. Burton confirmed that he did not refuse to walk, and did not invoke his individual safety rights, or refuse to continue walking when he encountered slippery conditions (Tr. 49-53).

The dental visit of July 11, 1990

Mr. Burton stated that on July 11, 1990, he was experiencing teeth and gum problems and did not go to work. He visited his dentist that day, and upon his return to work the next day he submitted a doctor's excuse pursuant to standard company procedure (Exhibit C-1). He gave the excuse to his immediate foreman Hubert Boggs, and mine clerk Jim Waldron informed him (Burton) that it contained insufficient information (Tr. 23). Mr. Burton stated that he had turned in similar doctor's slips in the past and never had any problems with them, but that Mr. Waldron told him to get another one within 24-hours and that he wanted to know about his specific problem which required a visit to the dentist. Mr. Burton then obtained another dentist slip (Exhibit C-2), but Mr. Waldron would not accept it and told him that it was late but that he would let mine superintendent Dan Strickle look at it and determine whether to excuse the absence (Tr. 24-25).

Mr. Burton stated that his dentist informed him that the respondent contacted him about his condition, but that no decision was made as to whether the dental visit was considered excused or unexcused. Mr. Burton stated that it was still unexcused until a few months later after he filed his discrimination complaint. At that time, he reviewed his work records and found that his absence of July 11, 1990, had been changed to an excused doctor's visit (Tr. 26). He confirmed that he is not paid for any doctor's visit, regardless of whether it is excused or unexcused (Tr. 28). However, an accumulation of unexcused absences may lead to a suspension (Tr. 29). He stated that no one ever informed him that his unexcused absence had been changed to an excused absence (Tr. 29).

On cross-examination, Mr. Burton acknowledged that he knew about the information which had to be included in a doctor's excuse slip in order to establish an excused absence, and he conceded that the first slip which he obtained did not contain all of the required information. He believed that the second slip was acceptable, but that the respondent would not accept it and considered it as an unexcused absence. He confirmed that if he were to work without an excuse, management would not know about the problem requiring him to be off and would consider his absence as unexcused. However, if he subsequently brings in an excuse, the absence would be excused, as it was in this case, albeit at a later date (Tr. 71).

The Grievance Meeting of July 13, 1990

Mr. Burton testified that the safety grievance meeting concerning the SCSR incident of July 5, 1990, was scheduled for 12:00 noon. He expected the meeting to last for an hour and he believed he had adequate time to go home and return before his work shift began at 2:15 p.m. He stated that he needed to go home to eat lunch, and to obtain his work clothes and medicine. When he realized that he would not have time to go home before his shift began he spoke with foreman Scott Johnson at approxi- approximately 1:00 p.m., and told him that he did not have his work clothes and had not eaten. Mr. Johnson did not reply and "never said no or yes" (Tr. 31). The grievance meeting ended at 2:42 p.m., and Mr. Burton stated that he went straight home and returned to the mine as quickly as possible, arriving at 3:37 p.m. (Tr. 32).

Mr. Burton stated that when he returned to the mine the crew was "at the mantrip getting ready to get on". Mr. Johnson was standing at the ramp and said nothing to him as he walked by to go and change into his work clothes. After changing into his work clothes ten minutes later, Mr. Burton stated that "I asked him what he wanted me to take in or if the other men had went in or not. By then I didn't know" (Tr. 33). Mr. Johnson then told him that "You're too late. I can't let you go to work" and sent

him home (Tr. 33). Mr. Burton stated that another miner, Bobby Rogers, was permitted to go home and return to work, but he did not know when Mr. Rogers may have returned to work. Mr. Burton did not believe that there were any problems or inconvenience with allowing him to go to work and he stated that "other people has went in before that have been late" (Tr. 32, 33). Mr. Burton stated that the mantrip had not left when he returned at 3:37 p.m., but he was not sure whether it was still there 10 minutes later after he changed clothes (Tr. 34). He also confirmed that he was not paid for that day and that this is the basis for his back pay claim (Tr. 35).

On cross-examination, Mr. Burton acknowledged that some of the miners who attended the grievance meeting came to the meeting prepared to go to work after it was over, and that they did so. Although no one from management gave him permission to go home, he casually mentioned to Mr. Johnson his need to go home but Mr. Johnson "never did reply back" and did not tell him to go (Tr. 74). Mr. Burton then left the mine and went home, and upon his return Mr. Johnson told him that he was tardy and sent him home. Mr. Burton was charged with an unexcused absence and lost eight hours pay (Tr. 76).

Mr. Burton stated that at 1:00 p.m., the grievance meeting was still in session, but he could not recall whether he had already testified. Assuming that he had, he believed he could have gone home at that time (Tr. 76). He confirmed that he lived seven to eight miles from the mine, and he explained that he did not take his work clothes or equipment with him because "I was late that day. I can't remember if I had to go get my allergy shot that day and I had my wife's vehicle . . . Something came up that day and I was running to get to the meeting that day at 12:00" (Tr. 82). When the grievance concluded at 2:43 p.m., he told Mr. Johnson that he had to go home but that Mr. Johnson "was kind of mad at the end of the meeting and he never would talk to me" (Tr. 83).

Respondent's chronic excessive absenteeism program

Mr. Burton stated that a week or two after July 13, 1990, he was on vacation, and that upon his return to work mine clerk Waldron informed him that he was being placed under the respondent's new chronic absenteeism program because of his July 11 and July 13, 1990, absences when he visited the dentist and when he was sent home after the grievance meeting. Mine superintendent Dan Stickle informed him that his vacation time and the two absences which were counted against him placed him in a "higher bracket" pursuant to the leave policy (Tr. 37). Mr. Burton confirmed that he was subsequently removed from the chronic excessive absenteeism list two months after he filed his complaint in this matter (Tr. 39). A copy of the notification letter removing him is dated October 29, 1990 (Exhibit C-3).

On cross-examination, Mr. Burton stated that he was aware of the respondent's tardiness policy, and although he recalled hearing about such a policy notice (Exhibit R-4), he could not recall seeing it posted on the mine bulletin board (Tr. 58). Mr. Burton "guessed" that he knew that if he was late for work it would be considered as tardiness, and he would be subject to an unexcused absence. He stated that he was aware of others being late for work, who were allowed to go to work, and that "I know they had some kind of a tardiness program, but I wasn't aware of how it works" (Tr. 60-61). He admitted that he knew that if he were sent home after reporting to work late that his absence would be considered unexcused (Tr. 62).

In response to questions concerning the respondent's chronic excessive absenteeism policy (Exhibit R-5), Mr. Burton stated that he was aware of it "When I got put in it" (Tr. 63). When asked if he were aware of it prior to that time, he replied "I heard talk about it", and that it "probably" and "might have been" discussed by management with the employees, but that he did not know because he could not remember (Tr. 63).

Counseling session of August 1, 1990

Mr. Burton confirmed that he had a counseling session under the excessive absenteeism program on August 1, 1990, and that he had a union representative with him (Exhibit R-6). He denied any knowledge that ten other miners who were not involved with the July 5, 1990, SCSR incident also received counseling at or about the same time (Tr. 66-67). Mr. Burton could not remember being told at the counseling meeting that it only pertained to the months of April, May, and June, 1990, and that July was not included. He confirmed that he was informed that his attendance had to at least meet the mine average, that quarterly attendance reviews would be made, and that his attendance would be monitored for the next three months (Tr. 69).

Mr. Burton confirmed that he refused to sign the counseling form because of union disagreement with the policy, and his disagreement with the seven days of absences that he was charged with in April, May, and June. He believed he was only absent five days and not seven. He explained that he was off sick for five days, that he attended a hydraulic class on June 29, and while he was paid for that day, it was considered a leave day. The remaining day was a contract "floating day" off with pay which he had turned in ahead of time, and it was considered an excused absence (Tr. 91). Mr. Burton stated that he spoke with the mine clerk and mine superintendent Stickle about the matter and that "it was cleared up later after August" (Tr. 96).

Robert Clay, Chairman of the mine safety committee, testified that the SCSR incident of July 5, 1990, came to his attention later that evening, or possibly the next day. Since he

determined that there was a violation he was asked by the crew to initiate a safety grievance under the union contract, and he did so. MSHA was notified and called in and provided with names of witnesses, including Mr. Burton. Mr. Clay stated that he and Dickey Estep, the respondent's safety director, estimated that the grievance proceeding would last about an hour and it came "right in the middle of a longwall move, a crucial time at the mine" (Tr. 101-102).

Mr. Clay stated that the meeting lasted considerably longer, and that sometime after 1:00 p.m., he indicated to foreman Scott Johnson that the meeting may go beyond the 2:15 p.m. start of the work shift and he asked Mr. Johnson if he wanted the men to go to work, and Mr. Johnson "indicated to me yes" and that "he wanted them to go to work" because people were needed for the longwall move. Mr. Clay stated that "my understanding was that when the grievance got through that he would like for the people to go to work because he needed people regardless of time" (Tr. 103-105).

Mr. Clay stated that during one of the grievance breaks he made Mr. Johnson aware that several of the men needed to go home and that Mr. Johnson "indicated to me that he didn't have a problem with that". Mr. Clay stated that Greg Adams, Bobby Rogers, and Mr. Burton went home and returned to go to work, and that only Mr. Burton was sent back home and not allowed to work (Tr. 106). Mr. Clay further confirmed that he specifically identified the three individuals who wanted to go home to Mr. Johnson, including Mr. Burton, and that Mr. Johnson indicated that it was "okay" for them to go home after the grievance meeting and then come back to work (Tr. 108).

Mr. Clay explained his understanding of the respondent's absenteeism policy and he confirmed that a copy is posted on the bulletin board. He could not remember whether any tardiness policy was posted at the time Mr. Burton arrived for work after the grievance meeting, and he confirmed that it is up to the discretion of the work supervisor as to whether a miner who arrives late for work will be allowed to go to work (Tr. 113).

On cross-examination, Mr. Clay stated that the respondent's chronic excessive absenteeism policy has been upheld through the grievance procedure, and that the tardiness policy is in effect at the mine. In response to questions concerning how Mr. Johnson indicated that Mr. Burton, Mr. Rogers and Mr. Adams could go home after the grievance meeting and then return to work, Mr. Clay stated as follows (Tr. 118-119):

> Q. (Mr. Rajkovich continues.) How did he indicate that? You said he indicated he didn't have a problem. What did he say?

A. He said, "Yes. We need all the people we can get."

Q. Did he give them permission to go home?

A. I took it from that that was permission for those people to go home and get their dinner buckets and return to work.

Q. Did he specifically give them permission to go home and leave the mine premises?

A. He told me.

Q. What did he tell you?

A. He told me, he said, "We need all the people that we can get."

Q. Did he tell you that he gave his permission for those people to go home?

A. I took that as being permission.

Q. But did he say that?

A. I took that as being permission.

Respondent's Testimony and Evidence

Joe Richard Estep, Safety manager, explained the respondent's SCSR storage plan, and he confirmed that it was in effect on July 5, 1990. He testified about the people walking into the mine that day for a distance of approximately 4,000 feet before they were picked up, and he believed the route of travel was safe since he traveled it and inspected the longwall face and working section on July 4 and 5, 1990, and he saw no hazards or dangers (Tr. 124-131).

On cross-examination, Mr. Estep confirmed that he was not involved with the matters concerning Mr. Burton's leave and that he was not Mr. Burton's supervisor (Tr. 137).

Kenneth McCoy, superintendent of High Splint #1 Mine, testified that he was superintendent of operations at the No. 37 Mine on July 5, 1990. With respect to Mr. Burton's absence to visit his dentist on July 11, 1990, Mr. McCoy explained that management had prior to that time received many doctor's slips from employees which simply stated that they saw a doctor but did not explain the reasons for the visit or whether or not the employee was able to work. As a result of this, a policy was instituted requiring the doctor's slip to state that an employee was under a doctor's care and was unable to work, and an example

of the type of slip required was posted and discussed at meetings with the employees. In Mr. Burton's case, the initial slip simply stated that he had gone to the dentist, but after he brought in an acceptable slip, his absence was excused (Tr. 139-140).

Mr. McCoy stated that he did not participate in the July 13, 1990, grievance meeting, but he was present on the surface at approximately 2:30 p.m. when it ended. He stated that Mr. Johnson came to his office and told him that Mr. Burton was leaving because he had to take his wife's car home and he had to go eat. Mr. Johnson asked Mr. McCoy "what do you want me to do?", and Mr. McCoy stated that he instructed Mr. Johnson to send Mr. Burton home (Tr. 142). Mr. McCoy explained further as follows at (Tr. 143-144):

> THE WITNESS: As I recall, Mike Burton said in the meeting, perhaps, I don't know, to Scott Johnson, I'm going home to take my wife's car home and get something to eat.
>
> THE COURT: Mr. Johnson told you that?
>
> THE WITNESS: No. See, Scott worked for -- I was superintendent of operations and he was the second shift mine foreman. He come to me for direction. He said, what do I do? He's going to come back in an hour or -- he's going to come back. When he comes back what do I tell him? I said, if you didn't give him permission to leave, when he comes back you send him home.
>
> THE COURT: All right.
>
> THE WITNESS: I made that decision.
>
> * * * * * * *
>
> Q. (Mr. Rajkovich continues.) And then Mr. McCoy, when he did come back, did you make that decision then not to allow him to go to work?
>
> A. Well, I didn't see him. I had already made the decision. When Scott came and asked me what do I do, I said you send him home. If you did not give him permission to leave, when he shows up you send him home.
>
> Q. Did Scott Johnson ever tell you if he gave him permission?

A. No. I asked him that. He said he did not give him permission and that Mike just simply stated, I'm leaving. I have to take my wife's car home. I have to go get something to eat. I'll be back later.

Mr. McCoy stated that his decision to send Mr. Burton home was based on the company's tardiness policy which provides that an employee will be sent home and charged with an unexcused absence if he reports for work late without prior approval or if he asked for approval and had no legitimate reason to be late. To do otherwise, he stated, "you would have your entire work force coming to work when they wanted" (Tr. 144). Mr. McCoy identified Mr. Larry Johnson as an individual who he suspended with intent to discharge for violating the tardiness policy. Mr. McCoy denied that his decision to send Mr. Burton home and to treat it as an unexcused absence was motivated at all by Mr. Burton's section 105(c) complaint. He also denied that his decision was motivated by the July 5, 1990, SCSR incident (Tr. 145). Mr. McCoy stated that even if Mr. Burton had a clean record, he would still have given him an unexcused absence for showing up late without prior approval.

On cross-examination, Mr. McCoy denied that Mr. Johnson informed him that two other employees were also going home after the grievance meeting of July 13, and he stated that Mr. Johnson told him that the two went to work. He then stated that he did not remember who told him that they returned to work immediately, and that Mr. Johnson "probably" told him, but that he was not positive (Tr. 147).

Mr. McCoy stated that Mr. Johnson did not mention that "I need all the men I can get" in response to a statement by Mr. Clay that some of his men needed to go home. Mr. McCoy stated that Mr. Johnson mentioned that Mr. Burton had to take his wife's car home and get something to eat, but did not mention anything about medication or work clothes, or the fact that the meeting might end at 1:00 p.m. (Tr. 147). Mr. McCoy stated that any permission by him to allow Mr. Burton to go home and return to work would "depend on the circumstance". However, he would not have granted Mr. Burton permission to go home "if it meant coming back two hours into the shift", nor would he have granted permission to the other two men to leave (Tr. 149).

Mr. McCoy stated that an example of an acceptable doctor's slip was mailed to the employees, and he recalled that it was discussed and posted. He did not know why it took "a considerable amount of time" to approve the second slip and clear the matter up with Mr. Burton. He stated that management's contact with Mr. Burton's dentist was standard procedure and that "we contact the doctor's on a regular basis" when there are

questions and that he personally has visited doctors in this regard. He did not know why the dentist was not called after Mr. Burton brought in his first excuse rather than making him go back again (Tr. 151). He explained that with 250 employees "the updating of the cards sometimes lags behind", and that "when the time clerk ultimately gets to it is when it's taken care of" (Tr. 152).

In response to further questions, Mr. McCoy stated that as the superintendent, he would expect to know if someone other than Mr. Burton left the property. He stated that it was conceivable that Mr. Johnson may have allowed the two other employees to go home, but that he (McCoy) would expect people to go underground at the 2:15 p.m. shift starting time (Tr. 154). He stated that he expects the mantrip to leave at starting time, and "with 250 employees you don't hold their hand. You expect them to be responsible adults and to be at work on time and work eight hours" (Tr. 156).

Mr. McCoy stated that he was not present during the mantrip and SCSR incident of July 5, 1990, but after Mr. Johnson explained what had happened "I told him he messed up in regard to the self-rescuers". Mr. McCoy stated that he knew when Mr. Johnson sent 14 people underground with only four SCSR's stored at strategic locations that he had violated the plan and that he should have allowed the employees to take the devices with them. Mr. McCoy stated that the next day Mr. Johnson met with the crew and "told them that he screwed up and gave them bad information" (Tr. 157).

Mr. McCoy stated that he was not aware that Mr. Burton complained to Mr. Johnson about the SCSR's and sanding devices, and that Mr. Johnson did not tell him that Mr. Burton had complained. Mr. McCoy stated that it was not uncommon to have to repair sanders at the start of the shift. He confirmed that he was aware of the complaint filed with MSHA, and the citation which followed, and that he was at the first step prievance meeting where the matter could not be resolved. The union wanted him to write a letter stating that there was a violation of the law and Mr. McCoy would not agree to post such a letter (Tr. 159). The union then stated that it would call MSHA and Mr. McCoy stated that he replied "Well, call them" (Tr. 158).

Mr. McCoy stated that he was not aggravated with Mr. Burton because of his involvement with the sanders and the SCSR matter, and he indicated that sanders always need attention because of moisture which stops them up. He stated that he wanted the sanders repaired and would think less of Mr. Burton if they were not repaired. Mr. McCoy confirmed that Mr. Waldron discussed the first dentist slip supplied by Mr. Burton with him, and it

contained incomplete information. Mr. McCoy stated that he was not familiar with the second slip and could not recall seeing it (Tr. 160).

James Waldron, Acting Labor Relations Manager, stated that on July 5, 1990, he was the mine supervisor of human resources. He is sometimes referred to as the "mine clerk". He stated that the respondent's chronic and excessive absenteeism program is a standardized attendance control program that has been in existence for approximately 12 years, and he explained that it is designed to maintain and correct an employee's attendance behavior pattern, and it includes employee counselling (Exhibit R-5, Tr. 161-167). Mr. Waldron confirmed that he was familiar with Mr. Burton's attendance record through the records maintain by the clerks in his department. He stated that Mr. Burton was designated an "irregular worker" in 1989 because of six days of unexcused absences, and he explained how those absences were entered on his leave records (Exhibits R-11, R-12, Tr. 168-171). He also confirmed that Mr. Burton received counseling, as did other employees (Exhibit R-13, Tr. 174-178).

Mr. Waldron confirmed that he attended the grievance meeting of July 13, 1990, and he identified the grievants as Mr. Burton, Clifton Fox, Greg Adams, and Bobby Rogers. The meeting began at 12:15 p.m., and ended at 2:25 p.m. Mr. Waldron stated that to his knowledge, Mr. Burton was the only person who left the mine after the meeting ended, and that the others went to work (Tr. 179). He observed Mr. Burton at the parking lot going to his vehicle, and he confirmed that Mr. Johnson informed him about Mr. McCoy's statements concerning Mr. Burton being sent home upon his return to the mine at 3:50 p.m. (Tr. 180). Mr. Waldron stated that Mr. Johnson told Mr. Burton that he could not work and that this was consistent with the tardiness policy. Mr. Burton would have been charged with an unexcused absence for leaving the mine even if he had a "clean" attendance record (Tr. 181-182).

On cross-examination, Mr. Waldron confirmed that he assumed that no one but Mr. Burton left after the meeting because he did not watch each employee and Mr. Johnson did not tell him that anyone else left (Tr. 182). He further explained Mr. Burton's leave records and the leave entries that resulted in his being counseled, and he conceded that an error was made with respect to an absence, but that it was later corrected (Tr. 181-187). He also conceded that one of his clerks should have checked to determine whether Mr. Burton had any "floating days" available, and that vacation days should not have been counted in the attendance formula (Tr. 188, 191).

Posthearing testimony

Two miners who purportedly were allowed to go home and then return to work, at the conclusion of the July 13, 1990, grievance meeting (Greg Adams and Bobby Rogers), and foreman Scott Johnson were not called by the parties to testify in this case. At the conclusion of the hearing, the parties were advised that these were critical witnesses and that I would consider ordering posthearing testimony. I subsequently ordered the parties to take the testimony by deposition or affidavit and to file it with me. The parties have done so.

Affiants Gregory W. Adams and Bobby Rogers gave the following identical statement:

> That on July 13, 1990, I attended the safety grievance meeting; subsequently, I went home prior to reporting to work; that as a result of returning home I was late for my shift; that Mr. Johnson was aware that I was going to be late and approved it; and that he was aware that I was late and took no disciplinary action.

Affiant Scott Johnson, currently employed as a senior planning engineer for Arch of Wyoming, Rock Springs, Wyoming, stated that he was employed as a shift supervisor at the No. 37 Mine on July 13, 1990. He stated that he attended a safety grievance meeting on that day, and he confirmed that Mr. Burton, Mr. Adams, and Mr. Rogers, as well as others, were present. He identified these three individuals, and Mr. Clifton Fox, as the "grievants". Mr. Johnson stated that the meeting began at approximately 12:00 noon and was concluded by approximately 2:25 p.m. Since the meeting had extended beyond the shift starting time of 2:15 p.m., and the four grievants missed the mantrip into the mine, he arranged for another mantrip to transport these individuals to their underground section.

Mr. Johnson stated that he was approached by Mr. Clay and Mr. Burton at the conclusion of the grievance meeting, and Mr. Burton informed him that he was going home to eat and let his wife have their vehicle. Mr. Johnson stated that he told Mr. Burton, in the presence of Mr. Clay, that he should have come prepared to go to work as Mr. Adams and Mr. Rogers did, and that he would not be allowed to go to work if he left the mine and returned later. Mr. Johnson stated that shortly thereafter, at approximately 2:30 p.m., while making arrangements for another mantrip, he walked through the bathhouse and observed Mr. Burton, Mr. Adams, and Mr. Rogers having a conversation. Mr. Johnson stated that at approximately 2:42 p.m., he saw Mr. Burton get into his vehicle and leave the property.

Mr. Johnson stated that shortly after he observed Mr. Burton leave the property, he informed superintendent of operations Ken

McCoy that Mr. Burton had left and asked his advice as to what to do about the situation. Mr. Johnson confirmed that he informed Mr. McCoy that he had not given Mr. Burton permission to leave, and Mr. McCoy concurred that Mr. Burton should not be allowed to go to work that day and instructed him to send Mr. Burton home when he showed up.

Mr. Johnson stated that at approximately 2:50 p.m., the mantrip was readied, and Mr. Adams and Mr. Rogers got into the mantrip and left for their assigned work section underground. Mr. Burton returned to the property at approximately 3:50 p.m., and Mr. Johnson told him that he would not be allowed to work that day.

Mr. Johnson stated that between the time the grievance meeting ended and the time he saw Mr. Burton leave the property, he saw none of the other individuals in question leave the property, and to the best of his knowledge they did not leave. He denied that he gave any of these individuals permission to leave the property, or that he ever stated directly or indirectly that he had "no problem" with their leaving. He further denied giving Mr. Burton permission to leave, and he stated that when the subject was raised by Mr. Clay and Mr. Burton, he informed them that if Mr. Burton left he would not be allowed to return to work. Mr. Johnson stated that given the short time span between the conclusion of the grievance meeting and the departure of the underground mantrip, and based on his observations in the bathhouse, he had no reason to believe that anyone other than Mr. Burton left the property during that time.

Mr. Johnson stated that his initial conversation with Mr. Burton when he informed him that he would not be allowed to come to work if the left the property was based on his interpretation of the company's leave policy and was in no way intended to discriminate against Mr. Burton. Mr. Johnson stated that he confirmed that interpretation with Mr. McCoy, who then instructed him to tell Mr. Burton that he would not be allowed to work upon his return.

Findings and Conclusions

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 Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on

behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other ground sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmately defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, ____U.S.____, 76 l.ED.2D 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd another grounds sub nom. Donovan v. Phelps Doge Corp ., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eight Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

In Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982), the commission stated as follows:

> As we emphasized in Pasula, and recently reemphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted to the alleged discrimiatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

Mr. Burton's Protected Activity

It is clear that Mr. Burton enjoys a statutory right to voice his concern about safety matters or to make safety complaints to mine management or a mine inspector without fear of retribution or harassment by management. Management is prohibited from interfering with such activities and may not harass, intimidate, or otherwise impede Mr. Burton's participation in these kinds of activities. Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra.

The Alleged Acts of Discrimination

The SCSR incident of July 5, 1990

Mr. Burton's assertion that he and his crew "were forced" to walk to their working section without their SCSR's suggests that foreman Johnson somehow coerced or intimidated Mr. Burton to do something against his will, thereby exposing him to a hazard, because he informed foreman Johnson about the inoperative sanding devices on the mantrip which the crew was scheduled to use to transport them to the section. However, I am not convinced that this was the case.

I have carefully reviewed Mr. Burton's testimony, and I cannot conclude that he specifically lodged a safety complaint with Mr. Johnson with respect to the inoperable sanding devices. Mr. Burton's testimony reflects that while he was pre-shifting the mantrip in compliance with Company policy he found that the

sanders were clogged and he proceeded to clean them, thus delaying the departure of the mantrip. Mr. Johnson then pointed to two other mantrips and suggested to Mr. Burton that he should use one of those. However, the second mantrip had inoperable brakes and Mr. Johnson agreed that it should not be used. Mr. Burton then discovered that the third mantrip also had some clogged sanders, and while he was in the process of checking it out in preparation of cleaning the devices, Mr. Burton stated "walk in".

Mr. Burton testified that Mr. Johnson was "red faced and mad" when he made the statement "walk in ". This suggests that Mr. Johnson was chagrined at Mr. Burton personally and was somehow taking it out on him. However, quite the opposite could also be true. As the shift foreman responsible for getting the crew to work on time, Mr. Johnson may have been frustrated over the lack of any operable mantrips, and reacted out of that frustration. I find no evidence that Mr. Johnson harbored any ill will toward Mr. Burton at the time in question, and Mr. Burton was not the only person who began to walk to the section. The entire crew, including several management employees, began walking. No one, including Mr. Burton, voiced any complaints about walking, and Mr. Burton and the union miners did not invoke their individual safety rights, did not refuse to walk in, and apparently did not protest to Mr. Johnson. I also take note of the fact that Mr. Johnson informed Mr. Burton that the mantrip would pick up the crew after the sanders were repaired, and safety manager Estep testified the men were picked up after they had walked approximately 4,000 feet, which is less than a mile.

With regard to the self rescue devices, I find no evidence to support any reasonable conclusion that Mr. Johnson's refusal to allow Mr. Burton to take one from the mantrip with him when he began to walk was done to punish or harass Mr. Burton. Contrary to Mr. Burton's assertion that he had complained about the unsafe practice of sending the crew into the section without the devices, I find nothing in his testimony to support any such conclusion. The testimony shows that Mr. Burton simply asked Mr. Johnson for a self-rescue device and was refused. Mr. Burton confirmed that Mr. Johnson explained to him that he did not need the device because the mine had a plan that required such devices to be stored at strategic locations along the travelway taken by the crew. The fact that Mr. Johnson was subsequently proved wrong and conceded that he had erred is not relevant to his state of mind on July 5, when he refused Mr. Burton's request. Further, Mr. Burton conceded that he is provided with a personal filter type rescue device at all times while underground and that he is trained in its use. Although Mr. Burton testified that he wanted to take the mantrip device with him because of a prior experience when he was exposed to smoke from a motor fire, there is no evidence that he told Mr. Johnson about this incident, and

Mr. Burton admitted that no one invoked their individual safety rights by refusing to proceed to the section without the SCSR's.

Superintendent McCoy candidly admitted that Mr. Johnson made a mistake by not allowing Mr. Burton and the crew to take the SCSR devices with them when they were directed to walk to the section, and Mr. McCoy confirmed that Mr. Johnson met with the crew the next day and conceded to the miners that he was in error and had given them some bad information. Further, the July 5, 1990, incident concerning the miners walking without the SCSR's was the subject of a grievance filed by the union, and it resulted in a citation issued by MSHA for a violation of the SCSR storage plan. Although the evidence reflects that Mr. Burton, as well as others, were "witnesses" at the grievance meeting, that particular event took place after July 5, 1909. Under the circumstances, I cannot conclude that Mr. Johnson's actions on July 5, 1990, standing alone, constituted illegal discrimination within the parameters of section 105(c) of the Act. In my view, the union pursued the proper avenue of appeal in that matter when it filed a grievance and requested MSHA to pursue the matter.

The Dental Visit of July 11, 1990.

The evidence establishes that the typewritten complaint letter dated March 21, 1991, containing Mr. Burton's signature, which was filed with the Commission, was in fact drafted and typed by union safety committee chairman Robert Clay, who also addressed the hand-written envelope (Tr. 45). As noted earlier, the letter states in part that "Since my initial charge was filed, Arch of Kentucky management has continued to harrass and discriminate aginst its employees, namely me." I take note of the fact that Mr. Burton's MSHA complaint was filed on July 24, 1990, after his dental visit of July 11, 1990, and I assume that the "initial charge" referred to in the Commission complaint letter is the grievance filed by the union concerning the July 5, 1990, incident. Mr. Burton and three other miners have been characterized as the "grievants" in those proceedings.

Mr. Burton confirmed that an employee is not paid for any absences from work due to doctor or dentist visits regardless of whether the absence is treated as excused or unexcused. However, an accumulation of unexcused absences may adversely impact on his attendance record pursuant to the company absenteeism program. In this case, the parties stipulated that Mr. Burton's absence from work because of the visit to his dentist was initially recorded on his record as unexcused, but was eventually changed to excused (Tr. 27). In the couse of the hearing, Mr. Burton's counsel asserted that Mr. Burton believed that he was treated unfairly with respect to the dental excuse matter and that his treatment by the respondent "was harassing and an attempt to harass him" (Tr. 196). Although not specifically alleged,

counsel suggested that the respondent's follow-up telephone calls to the dentist to verify Mr. Burton's visit was also harassment.

Mr. Burton acknowledged that he was aware of the information required to be included on a doctor's excuse slip to support an excused absence. Although he stated that he had previously turned in slips similar to the one which he initally turned in to his immediate foreman Hubert Boggs (exhibit C-1), he conceded that the slip did not contain all of the required information. Under the circumstances, I conclude and find that Mr. Waldron acted correctly in rejecting the initial slip submitted by Mr. Burton, and I find no credible evidence of any harassment.

With regard to the second dentist slip (exhibit C-2), Mr. Burton testified that he obtained that one after Mr. Waldron instructed him to do so within twenty-four hours of his rejection of the first one. Mr. Burton confirmed that Mr. Waldron rejected the second slip because it was late, but informed him that superintendent Strickle would make a determination as to whether or not it was acceptable. Mr. Strickle did not testifiy, and no testimony was elicited by the parties from Mr. Waldron concerning the dental slips in question.

Superintendent McCoy explained the respondent's policy concerning doctor's excuse slips and follow-up calls by management to doctors to verify an employee's absence. Mr. McCoy confirmed that Mr. Waldron discussed the first slip with him, and that it contained incomplete information. Mr. McCoy testified that he was not familiar with the second slip, and did not recall seeing it, and he did not know why it took so long to ultimately approve it as an excused absence. However, he explained that the updating of the leave cards of 250 employees sometimes lags behind, and that the time clerks ultimately take care of them.

I find no evidence of any involvement by foreman Scott Johnson in the matter concerning Mr. Burton's dental leave slips. As noted earlier, Mr. Burton's second leave slip was apparently accepted and his records were ultimately corrected to reflect an excused absence. I find no evidence of any animus by management towards Mr. Burton, and I find reasonably plausible Mr. McCoy's explanation that with the number of employee records dealt with by his clerks, the updating of individual cards is somewhat lax. Indeed, Mr. Burton's counsel observed during the hearing that the respondent's bookkeeping was "a little shaky", and she candidly discounted any suggestion that management altered Mr. Burton's leave records or that there was any management conspiracy against him (Tr. 188-192). Under all of these circumstances, I cannot conclude that management's handling of Mr. Burton's dental leave slips amounted to discrimination or harrassment because of any protected safety activity on his part.

The Chronic Excessive Absenteeism Program and the Counseling Session of August 1, 1990.

As noted earlier, Mr. Burton's discrimination complaints did not specify the particular acts of alleged management harassment. In the course of the hearing however, Mr. Burton implied that his placement in the respondent's chronic excessive absenteeism program and his counseling session of August 1, 1990, resulting from his placement in the program, were acts of harrassment or retaliation because of his safety complaints. In addition, Mr. Burton's counsel questioned "whether certain things occurred because in retaliation for it that series of events that ended up with the citation" (Tr. 204). Counsel expressed confusion "about the handling of the chronic absenteeism policy" and she questioned the fact that Mr. Burton was unaware of certain matters that were placed in his personnel records. Counsel also asserted that "it's a fair inference" that these events occurred because Mr. Burton caused problems for the respondent (Tr. 205-206).

The parties stipulated that the respondent was free to establish an additional chronic excessive absenteeism policy beyond that covered by the Union/Management Agreement of 1988 (Exhibits R-3, R-4; Tr. 57). Mr. Burton testified that in late July, 1990, Mr. Waldron informed him that he was being placed under the respondent's chronic absenteeism program because his vacation time, coupled with his absences of July 11 and July 13, 1990, placed him in a "higher bracket" as compared to other employees. However, Mr. Burton confirmed that he was subsequently removed from the chronic excessive absenteeism list.

The record reflects that Mr. Burton had been previously designated an "irregular worker" on July 15, 1989, because of an accumulation of six days of unexcused absences during May and June, 1989. Mr. Burton's counsel indicated that she would stipulate that the respondent designated Mr. Burton as an irregular worker, but she contended that the designation was improper, that Mr. Burton had no notice that he was so designated, and that several of the recorded absences were the result of a general mine strike during which all union employees were affected (Tr. 172).

Mr. Waldron confirmed that Mr. Burton was placed in the chronic absenteeism program in July, 1990, because of his attendance record during the months of April, May, and June. Mr. Waldron denied that Mr. Burton's July absences were included in the computations which resulted in his being placed in the program (Tr. 174). Mr. Waldron stated that Mr. Burton, as well as several other employees, were considered "pattern missers" or "long weekend syndrome" workers who missed work on Fridays and Mondays, and that this was one of the determining factors for counseling him (Tr. 176-177). Mr. Waldron confirmed that in

addition to Mr. Burton, ten other employees were also counseled in late July and early August, 1990 (Tr. 176; exhibit R-13).

Mr. Waldron confirmed that Mr. Burton was no longer in the chronic absentee program, and he candidly conceded that errors were made in connection with some of the charged absences and that the leave clerks should have checked more closely and not counted Mr. Burton's vacation days or "floating days" against his attendance records for purposes of the counseling program. Mr. Waldron explained the different leave codes used in making entries on an employee's leave cards, and he confirmed that at the time he counseled Mr. Burton he relied on the leave entries made on his records by his clerks. However, when he later determined that Mr. Burton should have been credited with certain excused, rather than unexcused days, the appropriate corrections were made to his records (Tr. 185-188).

As noted earlier, Mr. Burton is no longer under the respondent's chronic excessive absenteeism program, and Mr. Waldron candidly conceded that administrative errors were made in designating some of Mr. Burton's absences as "unexcused", but that corrective action was taken to correct the records. I find no credible evidence to support any reasonable inference that Mr. Burton was placed in that program because of the July 5, 1990, SCSR incident which eventually led to the grievance and a citation being served to the respondent. As noted earlier, I find no evidence of any animus by management against Mr. Burton, and Mr. McCoy agreed that Mr. Burton acted properly in bringing the mantrip sanders condition to Mr. Johnson's attention and that he would have thought less of him if he had not done so. I also find no evidence that Mr. Johnson had anything to do with Mr. Burton's attendance record problems.

With regard to Mr. Burton's designation as an "irregular worker" in July, 1989, that event preceded the July 5, 1990, SCSR incident and I find no evidence that his designation was motivated by an protected activity on his part. As for the counseling session of August 1, 1990, the respondent's evidence, which I find credible, establishes that ten other employees were also counseled at approximately the same time as Mr. Burton, and none of those employees were involved in the July 5, 1990, incident. Further, Mr. McCoy's credible and unrebutted testimony establishes that he had previously disciplined another miner by suspending him with intent to discharge for violating the respondent's tardiness policy (Tr. 144). Under the circumstances I cannot conclude that Mr. Burton was "singled out" for any "special treatment" because of his involvement in the July 5, 1990, SCSR incident, or because he saw fit to exercise his right to file a discrimination complaint with MSHA. In short, I find no credible evidence to support any reasonable finding of disparate treatment of Mr. Burton by management because of any protected activity on his part. What the evidence does suggest

is a rather inept and disjointed system of recordkeeping by the respondent with respect to employee attendance records, and a rather lax and untimely method of correcting records when errors are discovered.

The tardiness incident of July 13, 1990.

According to the testimony of the various witnesses, the grievance meeting ended sometime between 2:25 p.m. and 2:42 p.m. Mr. Johnson stated that he observed Mr. Burton leave the mine to go home at 2:42 p.m., and that he returned at 3:50 p.m. Mr. Waldron, who also observed Mr. Burton at the parking lot after the meeting ended, also placed his return at 3:50 p.m. Mr. Burton testified that he returned at 3:37 p.m. All of the witnesses agreed that the normal starting time for the shift was 2:15 p.m. In any event, regardless of the slight time discrepancies, I find that Mr. Burton went home after the grievance meeting ended and returned to the mine with the intention of going to work, albeit after the normal shift starting time.

The most significant part of Mr. Burton's complaint is his contention that Mr. Johnson sent him home and would not allow him to work because he (Burton) had previously complained about the defective mantrip sanders and Mr. Johnson's sending employees underground without SCSR's. In support of this conclusion, Mr. Burton maintains that Mr. Johnson allowed other employees to go home after the grievance meeting was over and to return to work late, and that they were not sent home without pay. In short, Mr. Burton relies on this alleged disparate treatment by Mr. Johnson to support a conclusion that Mr. Johnson retaliated and discriminated against him because of their prior encounter of July 5, 1990, concerning the mantrip sanders and SCSR's.

There are two critical issues presented here. The first is whether or not Mr. Burton had foreman Johnson's permission to go home and return to work late after the conclusion of the grievance meeting, and the second is whether or not Mr. Johnson gave other employees permission to go home at the conclusion of the grievance meeting and allowed them to work late upon their return to the mine. If Mr. Burton had permission to go home and return to work late, then his unexcused absence would not stand scrutiny under the respondent's tardiness program. If foreman Johnson did in fact give other employees permission to go home and return to work late, but denied the same privilege to Mr. Burton, one could reasonably conclude that this disparate treatment was the result of animus by Mr. Johnson towards Mr. Burton and would support a reasonable inference that Mr. Johnson retaliated against Mr. Burton because of the July 5, 1990, incident which prompted the union to file a grievance and which resulted in the issuance of a citation to the respondent.

Mr. Burton testified on direct examination that when he realized he would not have time to go home before his work shift was scheduled to begin, he talked to foreman Johnson during the grievance meeting and told him that he had not eaten and did not have his work clothes or mining hat with him. Mr. Johnson did not reply, said nothing, and "never said no or yes" (Tr. 31-32). Mr. Burton repeated this testimony during cross-examination, and he conceded that no one in mine management gave him permission to go home (Tr. 73-74). In response to several bench questions, he admitted that he did not specifically ask Mr. Johnson for permission to go home and that he simply casually mentioned to him that he had a need to go home (Tr. 75). Mr. Burton also confirmed that he had no knowledge that Mr. Johnson was asked if he wanted the men to go to work even though they would be late (Tr. 80). Mr. Burton also indicated that he again told Mr. Johnson at the end of the meeting of his need to go home and that Mr. Johnson did not reply (Tr. 83).

Mr. Clay testified on direct examination that after realizing that the grievance meeting would likely extend beyond the normal start of the working shift at 2:15 p.m., he mentioned this to Mr. Johnson and Mr. Johnson indicated that he expected and wanted the men to go to work after the meeting was over, regardless of the time (Tr. 103-105). Mr. Clay stated that during a break in the grievance meeting, he told Mr. Johnson that several of the men had to go home after the meeting and that Mr. Johnson indicated that he had "no problem" with this and that he needed everyone to work regardless if they first had to go home (Tr. 106-107). Mr. Clay further testified that he specifically identified Mr. Adams, Mr. Rogers, and Mr. Burton to Mr. Johnson as the individuals who needed to go home at the conclusion of the grievance meeting and that Mr. Johnson stated that it was "o.k." for them to do so and to return to work regardless of the time they returned (Tr. 108).

On cross-examination, and when pressed to explain his testimony that Mr. Johnson said that he had "no problem" with Mr. Burton, Mr. Adams, and Mr. Rogers going home, Mr. Clay stated that Mr. Johnson indicated "Yes. We need all the people we can get" (Tr. 118). In response to several repeated questions seeking a direct answer to the question of whether or not Mr. Johnson specifically gave his permission for the three named individuals in question to leave the mine after the grievance meeting and to then return to work, Mr. Clay stated that he construed Mr. Johnson's statement "we need all the people that we can get" as permission for the three individuals to go home (Tr. 119).

After viewing Mr. Clay during the course of the hearing, and upon careful examination of his testimony, I find him to be less than a credible witness. I do not believe his direct testimony, which was given in response to my bench questions, and I have

given it little weight in support of any conclusion that Mr. Johnson gave his permission for Mr. Burton, Mr. Rogers, and Mr. Adams to go home after the grievance meeting and to then return late to work. Indeed, Mr. Burton conceded that no one from mine management, including Mr. Johnson, gave him permission to go home after the grievance meeting and I take note of the fact that Mr. Burton identified only Mr. Rogers as someone who had gone home, and said nothing about Mr. Adams.

In their identical affidavits, Mr. Adams and Mr. Rogers stated that they went home after the grievance meeting, and as a result of going home, they were late for their work shift. They do not state that Mr. Johnson gave them permission to go home after the meeting or that Mr. Johnson knew that they were going home. Although they both asserted that Mr. Johnson was aware that they would be late and approved of it, I construe this to mean that Mr. Johnson had no objection to their going to work late after the grievance meeting ended. However, I reject their assertions as credible evidence that Mr. Johnson gave them permission to go home, or that he even knew that they had gone home.

In his affidavit Mr. Johnson stated that since the grievance meeting had extended beyond the normal start of the work shift and the four grievants (Burton, Adams, Rogers, and Fox) missed the scheduled mantrip, he arranged for another mantrip to transport these individuals underground. While in the process of making these arrangements, Mr. Johnson observed Mr. Burton leave the mine at approximately 2:42 p.m., and Mr. Adams and Mr. Rogers left in the mantrip to go to work at 2:50 p.m. At no time did Mr. Johnson see anyone other than Mr. Burton leave the property, and to the best of his knowledge Mr. Adams and Mr. Rogers did not leave the mine. Mr. Johnson denied that he had given any of these individuals, including Mr. Burton, permission to leave the property, and he denied that he ever stated that he had "no problem" with their leaving.

Safety Committee Chairman Clay initially testified that miners are aware of the respondent's tardiness and excused absence policy and that it is posted on the bulletin board (Tr. 110). He later stated that he could not remember whether the policy was posted at the time Mr. Burton was sent home, but he confirmed that there was an "oral policy" which vested discretion in the work supervisor to send someone home if he reported late for work (Tr. 112-113)). He further confirmed that the policy has been upheld through the union grievance procedures (Tr. 114).

Mr. Burton was rather equivocal about his knowledge of the mine tardiness policy. He initially testified that he was aware of the policy but could not recall seeing it posted. He "guessed" that he knew if he were late for work he would be

considered tardy and charged with an unexcused absence. He also indicated that he knew there was "some kind" of a tardiness program, but denied any knowledge as to how it worked. Finally, he admitted that he knew that if he were sent home after reporting to work late his absence would be considered unexcused, and he acknowledged that he would not be paid for such an absence.

After careful consideration of all of the testimony and evidence, I conclude and find that Mr. Burton was well aware of the respondent's tardiness policy and that he knew if he were sent home after reporting late for his work shift he would not be paid. After viewing Mr. Burton during the hearing, and taking into consideration the fact that he has worked for the respondent for some 14 years, I remain unconvinced that he was ignorant of his rights and responsibilities with respect to timely reporting for work, and I am not persuaded that he did not know about the policy and rules in this regard.

The credible and unrebutted testimony of Mr. McCoy establishes it was he, and not Mr. Johnson, who made the decision to send Mr. Burton home and not allow him to work upon his late return to the mine after going home at the conclusion of the grievance meeting. I conclude and find that Mr. McCoy's decision in this regard was based on Mr. Johnson's statement to him that he had not given Mr. Burton permission to go home, and the respondent's policy of treating tardy work starts where an employee does not have permission to go to work late as unexcused absences. I further conclude and find that Mr. Johnson was simply carrying out Mr. McCoy's instructions when he informed Mr. Burton that he would not be allowed to go to work and sent him home.

Mr. Burton conceded that some of the miners who were at the grievance meeting came to work that day with their work clothes and other equipment prepared go to work after the meeting ended (Tr. 72-73). Mr. Burton explained that he did not bring his work clothes and equipment with him because he was late leaving his home, had his wife's car, and was late for the meeting (Tr. 81-82). These are matters within Mr. Burton's control, and in hindsight, better planning on his part may have prevented the situation which resulted in his arriving late for work after going home and missing the mantrip which Mr. Johnson had arranged for the other miners who were also late after the grievance meeting. Under the circumstances, Mr. Burton has no one to blame but himself for being sent home and not allowed to work that day.

I find that Mr. Burton made a unilateral decision to leave the mine at the conclusion of the grievance meeting of July 13, 1990. I further find that Mr. Burton did not have the permission of foreman Johnson or any other management official to leave the

mine to go home and to return later to go to work. Mr. Burton's contention that Mr. Johnson sent him home and would not allow him to work because of the prior SCSR incident of July 5, 1990, is rejected. As noted earlier, the decision to send Mr. Burton home was made by Mr. McCoy, and it was carried out by Mr. Johnson. Further, the decision not to allow Mr. Burton to work was based on his leaving the mine without permission rather than reporting to work immediately after the grievance meeting ended. By taking it upon himself to leave without permission, Mr. Burton arrived back at the mine later than the other miners who had also attended the meeting but who were on their way to their working section by the time Mr. Burton returned and got dressed and presented himself to Mr. Johnson for further instructions.

I find no reasonably supportable credible evidence, either direct, or circumstantial, to support any conclusion that Mr. Johnson or Mr. McCoy, individually or collectively, were motivated by a desire to retaliate against Mr. Burton, or to harass him for any protected activity on his part when they would not allow him to go to work when he reported back to the mine after leaving without permission. To the contrary, I conclude and find that management's decision to send Mr. Burton home pursuant to company policy when he left the mine without permission and returned later to report for work was a reasonable and plausible management decision incident to its right to control the work force. As previously noted by the Commission in Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 1982), citing its Pasula and Chacon decisions, etc., "Our function is not to pass on the wisdom or fairness or such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed".

I further find no credible evidence of any disparate treatment of Mr. Burton by mine management with respect to its refusal to allow him to return to work and sending him home when he arrived back at the mine after leaving without permission. The available credible evidence establishes to my satisfaction that Mr. Burton was the only individual known to Mr. McCoy and Mr. Johnson who left the mine without permission to go home after the grievance meeting ended, and their motivation in sending Mr. Burton home was based on what I believe was a reasonable belief that this was the case. Even if I were to accept as true the fact that Mr. Adams and Mr. Rogers also went home after the grievance meeting, I find no credible evidence to support any reasonable conclusion that Mr. McCoy and Mr. Johnson knew that they had gone home, or that Mr. Johnson had given them permission to leave. Further, as noted earlier, both of these individuals were ready to return to work timely following the grievance meeting when Mr. Johnson made arrangements for a special mantrip to take them to their work places, but Mr. Burton was not.

ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that Mr. Burton has failed to establish a violation of section 105(c) of the Act. Accordingly, his complain IS DISMISSED, and his claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge

Distribution:

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Susan Oglebay, Esq., UMWA District #28, P.O. Box 28, Castlewood, VA 24224 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 4 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF CHARLES SCOTT HOWARD II, Complainant	:	DISCRIMINATION PROCEEDING Docket No. KENT 91-1352-D No. 404 Mine
v.	:	
SOUTH EAST COAL COMPANY, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Melick

This case is before me upon a Complaint of Discrimination in which the Secretary has also filed a petition for assessment of civil penalty under the Federal Mine Safety and Health Act of 1977. The Complainant, Secretary has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $1,500 to $400 and payment of damages of $327 to the individual Complainant, Charles Scott Howard, is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a civil penalty of $400 to the Secretary of Labor and damages of $327 to Charles Scott Howard, within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

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DEC 4 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 91-134
	:	A.C. No. 11-00585-03787
v.	:	
	:	Mine No. 10
PEABODY COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Susan J. Bissegger, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
David R. Joest, Esq., Midwest Division Counsel, Peabody Coal Company, Henderson, Kentucky, for the Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed several motions to approve a settlement agreement the latest at hearings on November 26, 1991. A reduction in penalty from $1,200 to $600 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $600 within 30 days of this order.

Gary Melick
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DEC 6 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 91-485
	:	A.C. No. 11-00586-03653
v.	:	
	:	Murdock Mine
ZEIGLER COAL COMPANY, Respondent	:	
	:	Docket No. LAKE 91-498
	:	A.C. No. 11-00612-03555
	:	
	:	Spartan Mine

DECISIONS

Appearances: Rafael Alvarez, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for the Petitioner;
Gregory S. Keltner, Esq., Zeigler Coal Company, Fairview Heights, IL, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for two alleged violations of certain mandatory safety standards found in Parts 70 and 75, Title 30, Code of Federal Regulations. The respondent filed timely answers denying the alleged violations, and the cases were docketed for hearings on the merits in St. Louis, Missouri, with two additional cases concerning these same parties. Those cases were heard on the merits, but the parties decided to settle the instant cases and they were afforded an opportunity to present oral arguments on the record in support of the proposed settlements, and bench decisions were rendered.

Stipulations

The parties stipulated to the following (ALJ-1):

1. The Commission has jurisdiction in these proceedings.

2. The respondent owns and operates the subject mines.

3. The respondent's mines are underground mines which extract bituminous coal, and the mines affect interstate commerce.

4. The respondent extracted 14,918,109 tons of coal at all of its mines ending on February 5, 1991.

5. The respondent extracted 994,759 tons of coal from the Murdock Mine from February 5, 1990, to February 5, 1991.

6. The respondent had 183 violations in the preceding 24 months ending on May 30, 1991, at the Murdock Mine.

7. The payment of the full penalty assessment on each citation will not impair the respondent's ability to continue in business.

With respect to the respondent's Spartan Mine, the parties agreed that the mine produced 1,290,418 tons of coal from May, 1990, to May 1991. MSHA's counsel asserted that the mine had 56 violations during the 24 months preceding the issuance of the contested citation in Docket No. LAKE 91-498. This history includes five violations of 30 C.F.R. § 70.100(a), (Tr. 7).

Discussion

Docket No. LAKE 91-485

In this case the respondent was served with a section 104(a) non-"S&S" Citation No. 3537733, on March 18, 1991, charging an alleged violation of mandatory safety standard 30 C.F.R. § 75.512. The cited condition or practice states as follows:

> The continuous miner was not being maintained in a safe operating condition. Under test the emergency stop (foot) switch failed to de-energize the tramming circuit.

Petitioner's counsel asserted that upon further investigation of this matter MSHA has determined that the cited regulation does not apply to the facts presented and that the citation was issued in error. Under the circumstances, counsel moved to vacate the citation and to withdraw MSHA's proposed civil penalty assessment. The motion was granted from the bench (Tr. 6-7). My bench decision is herein reaffirmed, and the citation IS VACATED.

Docket No. LAKE 91-498

In this case the respondent was served with a section 104(a) "S&S" Citation No. 9941672, on April 2, 1991, charging an alleged violation of mandatory health standard 30 C.F.R. § 70.100(a). The cited condition or practice states as follows:

> The results of five (5) respirable dust samples collected by the operator as shown by computer message No. 003-0(036) dated March 20, 1991, indicates the average concentration of respirable dust in the working environment of the designated occupation in mechanized mining unit No. 003-0(036) was 2.3 mg/m3 which exceeded the applicable limit of 2.0 mg/m3. Management shall take corrective actions to lower the respirable dust and then sample each production shift until five (5) valid samples are taken.

The respondent did not dispute the fact of violation in this case. The parties agreed to a proposed settlement requiring the respondent to pay a civil penalty assessment of $75 for the violation in question. In support of the reduced penalty assessment the petitioner's counsel asserted that although the designated occupation which was tested exceeded the legal respirable dust limit of 2.0 mg/m3, mine management has constantly taken the necessary corrective measures to maintain a dust-free working environment and that the mine has a traditional history of compliance with the respirable dust requirements. Further, counsel asserted that the violation was not the result of aggravated conduct by the respondent, and that the cited condition was timely abated in good faith (Tr. 8-10).

After careful consideration of the pleadings and arguments presented in support of the proposed settlement of this case, and taking into account the six statutory civil penalty criteria found in section 110(i) of the Act, the proposed settlement pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, was approved from the bench (Tr. 11). My decision in this regard is herein reaffirmed.

ORDER

Docket No. LAKE 91-485. Section 104(a) Citation No. 3537733, March 18, 1991, 30 C.F.R. § 75.512, IS VACATED. The petitioner's proposed civil penalty assessment is WITHDRAWN AND DISMISSED.

Docket No. LAKE 91-498. Section 104(a) Citation No. 9941672, April 2, 1991, 30 C.F.R. § 70.100(a), IS AFFIRMED. The respondent shall pay a civil penalty assessment of $75 in satisfaction of the violation. Payment is to be made to MSHA

within thirty (30) days of the date of this decision and order, and upon receipt of payment, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

DEC 6 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 91-100
	:	A. C. No. 15-16901-03502
v.	:	
	:	No. 1 Mine
MUSTANG FUELS CORPORATION, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Maurer

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). The parties have filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $450 to $175 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that respondent pay a penalty of $175 within 30 days of this order.

Roy J. Maurer
Administrative Law Judge

Distribution:

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Ms. Donna Johnson, Secretary/Treasurer, Mustang Fuels Corporation, P. O. Box 134, Barbourville, KY 40906 (Certified Mail)

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

DEC 9 1991

KERR-MCGEE COAL CORPORATION, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 91-84-R
	:	Citation No. 3242337; 10/25/90
v.	:	
	:	Docket No. WEST 91-85-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH REVIEW ADMINISTRATION, Respondent	:	Order No. 3242340; 10/25/90
	:	Jacobs Ranch
SECRETARY OF LABOR, MINE SAFETY AND HEALTH REVIEW ADMINISTRATION, Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 91-220
	:	A.C. No. 48-00997-03513
v.	:	Jacobs Ranch
KERR-MCGEE COAL CORPORATION, Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner;
Charles W. Newcom, Esq., SHERMAN & HOWARD, Denver, Colorado, for Contestant/Respondent.

Before: Judge Lasher

These three consolidated contest/civil penalty proceedings came on for hearing in Denver, Colorado, on July 23, 1991. Kerr-McGee Corporation (herein "K-M") in two contests challenges Citation No. 3242337 issued on October 25, 1990, by MSHA Inspector Jimmie Giles [1] charging a violation of 30 C.F.R. § 40.4 and

[1] The Citation, issued pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (herein "the Act"), describes the alleged violation in these terms: "The operator has failed to post a list of the representatives of the miners on the mine bulletin board." The Citation, which was served on Ron Crispin, Manager of K-M's Jacobs Ranch Mine, did not designate the infraction as "significant and substantial."

§ 104(b) "failure to abate" Withdrawal Order No. 3242340 [2] issued approximately 10 to 20 minutes after the Citation was issued. The Secretary of Labor (herein "MSHA") in the related penalty proceeding captioned seeks assessment of a penalty for the violation alleged in the citation.

Contentions of the Parties

The general issues are whether K-M violated 30 C.F.R. Part 40.4 and § 103(f) of the Act by failing to post the designation of representative of miners (in the record three times as Exhibits K-1, M-1, and A-1 to the stipulation) and, if so, the appropriate amount of penalty for such violation.

As MSHA points out, there is no question that K-M did not post the "designation" and that it refused to abate the allegedly violative practice by posting it after being requested to do so by MSHA--which resulted in MSHA's issuance of a "failure to abate" withdrawal order. The issue then is whether the defenses asserted by K-M relieve it from posting the designation and excuse the failure to abate.

K-M states the issues as:

1. Can a union, or an employee of that union, "represent" miners at a mine when the union does not represent the mine's employees pursuant to the provisions of the Labor Management Relations Act ("LMRA")?

2. Does MSHA's application to 30 C.F.R. Part 40 create an unnecessary and improper conflict between MSHA's regulations and the LMRA?

3. Under Utah Power & Light Co. v. Secretary of Labor, 897 F.2d 447, 452 (10th Cir. 1990) is it an "abuse" for a union, which does not represent employees at a mine pursuant to the provisions

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[2] This "no area affected" Order, which did not close or shut down any area of the mine or equipment, alleged "The operator has made no effort to post a list of the miners' representatives on the mine bulletin board, and refuses to do so." In its Notice of Contest, K-M contends that "No violation can be found because the designation of the United Mine Workers of America as a representative of miners under 30 C.F.R. part 40 for Jacobs Ranch Mine miners is improper."

of LMRA to seek to become a "representative of miners" under 30 C.F.R. Part 40 to facilitate organizing efforts at the mine?

4. If a union's use of 30 C.F.R. Part 40 would require a mine operator to waive its rights under the LMRA, is such a use of Part 40 an "abuse?"

K-M's contentions then are:

1. Properly interpreted, 30 C.F.R. Part 40 requires that before a labor union, or an employee of a union, can "represent" miners and thus be a "Representative of Miners," under the Act the union must be certified as a representative under the LMRA (T. 33-34); [3]

2. MSHA's application of 30 C.F.R. Part 40 to K-M unnecessarily and impermissibly conflicts with the LMRA (T. 43, 44);

3. The designation in this matter is for union organization purposes and is thus an abuse of Mine Act regulations as applied to K-M, and under Utah Power & Light, supra, K-M can take action against the abuse (see T.37);

In this connection, KM alleges that "Both the UMWA's attempt to gain under Mine Act regulations what it cannot acquire under the LMRA (access to mine property and various mine records, and a role in mine business as it relates to health and safety ...) and MSHA's proposed application of Part 40 at K-M which aids the UMWA in this organizing endeavor are an abuse."

4. K-M, in this litigation, does not raise the issue of technical defects in the designation of miners (T. 49).

30 C.F.R. Part 40, headed "Representative of Miners" consists of five sections which appear below.

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[3] K-M's Jacobs Ranch Mine employees have never been represented for collective bargaining purposes by UMWA or any other union. (T. 75).

The Regulation

§ 40.1 Definitions.

As used in this Part 40:

(a) "Act" means the Federal Mine Safety and Health Act of 1977.

(b) "Representative of miners" means:

(1) Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act, and

(2) "Representatives authorized by miners", "miners or their representative", "authorized miner representative", and other similar terms as they appear in the Act.

§ 40.2 Requirements.

(a) A representative of miners shall file with the Mine Safety and Health Administration District Manager for the district in which the mine is located the information required by § 40.3 of this part. Concurrently, a copy of this information shall be provided to the operator of the mine by the representative of miners.

(b) Miners or their representative organization may appoint or designate different persons to represet them under various sections of the act relating to representatives of miners.

(c) All information filed pursuant to this part shall be maintained by the appropriate Mine Safety and Health Administration District Office and shall be made available for public inspection.

(Approved by the Office of Management and Budget under control number 12190042)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[43 FR 29509, July 7, 1978, as amended at 47 FR 14696, Apr. 6, 1982]

§ 40.3 Filing procedures.

(a) The following information shall be filed by a representative of miners with the appropriate District Manager, with copies to the operators of the affected mines. This information shall be kept current:

(1) The name, address, and telephone number of the representative of miners. If the representative of miners. If the representative is an organization, the name, address, and telephone number of the organization and the title of the official or position, who is to serve as the representative and his or her telephone number.

(2) The name and address of the operator of the mine where the represented miners work and the name, address, and Mine Safety and Health Administration identification number, if known, of the mine.

(3) A copy of the document evidencing the designation of the representative of miners.

(4) A statement that the person or position named as the representative of miners is the representative for all purposes of the Act; of if the representative's authority is limited, a statement of the limitation.

(5) The names, addresses, and telephone numbers, of any representative to serve in his absence.

(6) A statement that copies of all information filed pursuant to this section have been delivered to the operator of the affected mine, prior to or concurrently with the filing of this statement.

(7) A statement certifying that all information fled is true and correct followed by the signature of the representative of miners.

(b) The representative of miners shall be responsible for ensuring that the appropriate District Manager and operator have received all of the information required by this part and informing such District Manager and operator of any subsequent changes in the information.

§ 40.4 Posting at mine.

A copy of the information provided the operator pursuant to § 40.3 of this part shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.

§ 40.5 Termination of designation as representative of miners.

(a) A representative of miners who becomes unable to comply with the requirements of this part shall file a statement with the appropriate District Manager terminating his or her designation.

(b) The Mine Safety and Health Administration shall terminate and remove from its files all designations of representatives of miners which have been terminated pursuant to paragraph (a) of this section or which are not in compliance with the requirements of this part. The Mine Safety and Health Administration shall notify the operator of such termination.

FINDINGS

A. Stipulated Facts (Ex. M-7)

1. Kerr-McGee is the owner and operator of the Jacobs Ranch Mine, located in Campbell County, Wyoming. There are no issues of jurisdiction in this matter.

2. On or about July 24 and 25, 1990, seven miners employed at the Jacobs Ranch Mine signed Exhibit A to the Stipulation which may be introduced into evidence in this case.

3. Exhibit A [4] lists the UMW as the miners' representative and lists UMW representatives to represent miners at the Jacobs Ranch Mine.

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[4] The stipulation refers to Exhibits "A", "B", and "C", which are described in the stipulation and are contained in the Exhibits file as part of the record.

4. Employees at the Jacobs Ranch Mine have never been unionized by the UMW or any other union.

5. One of the UMW representatives, Dallas Wolf, resides in Gillette, Wyoming, and is International Teller/Organizer for the UMW, who is living in Gillette for the purpose of unionizing the coal miners in the Powder River Basin, including the miners at the Jacobs Ranch Mine.

6. The second listed UMW representative, Bob Butero, resides in Trinidad, Colorado, and is an international representative of the UMW.

7. After Exhibit A was signed by the seven employees listed thereon, it was mailed by Dallas Wolf to the District Manager, Coal Mine Safety and Health, District 9 in Denver, Colorado.

8. Exhibit A was received by the Coal District 9 office and returned to Mr. Wolf for further information. The additional information was provided and received by the Coal District 9 office on or about August 30, 1990.

9. On or about September 6, 1990, the Coal District Manager, District 9, mailed a letter to Mr. Wolf, acknowledging receipt of Exhibit A.

10. The letter to Dallas Wolf from William Holgate, dated September 6, 1990, acknowledging receipt of Exhibit A is attached as Exhibit B and may be admitted into evidence in this case.

11. Dallas Wolf mailed Exhibit A to K-M Jacobs Ranch Mine, on or about August 30, 1990.

12. Exhibit A was received by the Jacobs Ranch Mine and discussed by K-M management at the mine and at the office in Oklahoma City, Oklahoma. It was determined by management that the designation would not be posted at the time, or in any other location because of the view of K-M, which MSHA disagrees with, that Exhibit A is not proper under 30 C.F.R. 40.

13. On or about October 25, 1990, MSHA received a 103(g) complaint regarding the Jacobs Ranch Mine. The complaint alleged that Exhibit A had not been posted at the mine as required by 30 C.F.R. 40.4.

14. Upon receipt of the complaint, Coal Mine Inspector Jimmie Giles proceeded to the Jacobs Ranch Mine and presented a copy of the complaint to mine management, including Ron Crispin.

15. Mr. Crispin informed Mr. Giles that Exhibit A had not been posted. During the visit by Inspector Giles, Mr. Crispin read a statement of position to Mr. Giles. The statement of position is attached hereto as Exhibit C and may be introduced into evidence in this case.

16. Thereupon, Inspector Giles issued a 104(a) citation to the Jacobs Ranch Mine for a violation of 30 C.F.R. 40.4, Citation No. 3242337.

17. Inspector Giles informed the mine operator, through Mr. Crispin, that they would have approximately 15 minutes to abate the Citation by posting Exhibit A.

18. Mr. Crispin conferred with the Oklahoma City office and determined that the operator would not post Exhibit A.

19. After about 20 minutes, Exhibit A had not been posted and Inspector Giles had been notified that the mine would not post it. Inspector Giles the issued Order No. 3242340, a 104(b) order for failing to abate a citation.

20. Mr. Giles then left the mine and returned to his office in Sheridan, Wyoming.

21. As a result of the citation and order, K-M management representatives traveled to McAlester, Oklahoma, for a conference with MSHA sub-district manager, Joseph Pavlovich. No change was made in the citation or order as a result of the conference.

22. On or about November 16, 1990, K-M filed a timely notice of contest with regard to the citation and order issued in this matter. Thereupon, the Secretary of Labor filed a timely response.

B. Findings in Connection with Stipulation

Exhibit M-1 (Ex. A to the Stipulation entered into by the parties) consists of a total of nine pages and

a. designates Bob Butero, International Safety Representative and Dallas Wolf, International Teller, [5] of UMWA as

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[5] Exhibit K-36, page 11.

"representatives" and seven employees as "alternate representatives" to serve as representatives of the miners under the Federal Mine Safety and Health Act of 1977, "for all purposes" (T. 32),

b. was "submitted as required" by 30 C.F.R. 40.3, and

c. prior to the submission of Exhibit M-1, there had been no prior designations, i.e., no miners' representatives under the Mine Act at the subject mine (T. 26-28, 54, 151).

Exhibit C to the Stipulation, Respondent's written statement of position objecting to the designation referred to in paragraph 14 of the Stipulation which was read to the MSHA inspector who issued the Citation, provides as follows:

> Kerr-McGee does not believe it can lawfully be required to accept the designation of a non-employee walk-around representative at the Jacobs Ranch Mine or to recognize any other action by a non-employee. MSHA Inspectors are entitled to, and encouraged to, talk to Jacobs Ranch employees as a part of all inspections. Inspections should proceed on that basis without outside interference. [6]

C. General Findings

The subject coal mine is located in the Powder River Basin of Wyoming. The UMWA, since the summer of 1990, has been actively seeking to unionize the subject mine as well as other mines in the Powder River Basin. Dallas Wolf is an international representative of the UMWA who moved to Gillette, Wyoming, in April 1990, to engage in union organizing activities. The UMWA held

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[6] I find it significant that this was the reason K-M gave at the time for its refusal to post the designation and that on its face, the basis so asserted directly contradicts the fundamental holding of the landmark case, Utah Power & Light Co., supra, that non-employee persons and organizations can serve as miners' representatives for walk-around purposes. The emphasis here is on opposition to "non-employee walk-around" representatives and "outside interference." Nothing is said about "abuse," even assuming arguendo that at this juncture recognizable abuse was a viable legal concept.

several meetings in Gillette which were attended by Jacobs Ranch miners, which meetings were organized by Mr. Wolf. In July 1990, the UMWA sponsored several days of safety training, presented by Robert D. Butero, International Health and Safety representative residing in Trinidad, Colorado. Issues discussed during the safety training included safety and walk-around rights of miners. At the end of the safety training sessions, July 24 and 25, 1990, seven Jacobs Ranch miners signed the designation (Ex. M-1). Mr. Wolf played a key role in the preparation, circulation, and filing of the designation. The use of 30 C.F.R. Part 40 and the designation of miners' representatives was part of UMWA's organizing strategy and was an organizing "tool." [7]

After the designation was signed, it was sent to MSHA and was received on August 18, 1990. Concurrently, Mr. Wolf mailed a copy to the mine.

Subsequently the designation was corrected by additional information and completed forms were sent to and received by MSHA and K-M. (Exs. M-3 and M-4).

Upon receipt of the designation, KM by general management decision determined not to post it even though it was familiar with the UP&L decision granting walk-around rights to non-employees (T. 147). K-M's determination not to post was made several months prior to the appearance of MSHA Inspector Jimmie Giles at the mine when the Citation and Order were issued. K-M made no protest of the designation during this period and the testimony of its Manager of Administration, Ronnie D. Crispin, in this and related connections has considerable significance in this matter:

> Q. Okay. In between the time you decided not to post and the time Mr. Giles wrote his citation, did you send any letters to MSHA explaining why you didn't want to post that designation form?
>
> A. No, we did not.

* * * * *

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[7] In this record K-M at best showed UMWA used Part 40 as a "tool" to create employee interest and to enhance its standing. Beyond that K-M's fear as to UMWA's future action was speculative.

Q. Mr. Crispin, is it your understanding that this designation, Exhibit M-1, is somehow abusive or something that was abused by the union? Is that your understanding of M-1?

* * * * *

A. Personally, I feel, yes, it's an abuse of intent in that.

Q. (My Ms. Miller) Will you explain why you think that with regard to this document.

A. Because it designates United Mine Workers as a Representative.

Q. What's abusive about that?

A. Because, obviously, they do not represent our employees.

Q. In the collective bargaining sense, they don't represent your employees?

A. That's correct.

Q. Is there anything else that you see that's abusive about that document, anything else, or is that the--

A. That's the issue. [8] (T. 148-149)

On or about October 25, 1990, MSHA received a Section 103(g) complaint stating that the Jacobs Ranch Mine had not posted the designation of representative form as required by Part 40 regulations. Inspector Giles then traveled to the mine on that day and presented the complaint to mine management, i.e., Ron Crispin. Mr. Crispin informed the inspector that, indeed, the designation had not been posted and that it would not be posted. Crispin told Inspector Giles that the two miners designated as walk-

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[8] In terms of K-M's intent and purpose in refusing to post the designation, this testimony coincides with the written-out reason given to Inspector Giles when the Citation and Order were issued.

around representatives were union members and were not employed at the Jacobs Ranch Mine. Mr. Crispin further indicated that the mine had not received a notification from MSHA that the designation was a valid one. Inspector Giles then called his supervisor and the Denver District Office to determine the status of the designation form. Giles learned that MSHA did not notify K-M regarding a designation but that the representative of miners provided a copy to the operator, as noted on the form. He then issued the 104(a) citation and, as shown in the stipulation, informed K-M that he would allow them 15 minutes to post the designation, and abate the decision. Mr. Giles hereafter was informed that the designation would not be posted and he then issued the 104(b) order for a failure to abate.

On January 2, 1991, MSHA District Manager, William Holgate, had a letter hand-delivered to K-M. The letter informed K-M of his intention to request that the asessment office begin a daily penalty if the citation was not immediately abated. K-M was given 24 hours to abate and it did so at that time.

Normally, the procedure for an inspection is for the inspector to be accompanied by a representative of the operator and a representative of the miners. Upon arrival at the mine, the MSHA inspector will contact the operator to let him know that he is at the mine and ask if there is a designated representative of the miners available. If so, the inspector will contact that representative; if not, he may ask the miners present if they would like to select someone to accompany the inspector. (Tr. 166). The inspector is supposed to control the inspection and if the representative of the operator or the representative of the miner who is accompanying the inspector does something inappropriate the inspector should interrupt the inspection and explain that the representative is to only accompany the inspector and assist him in the inspection. (T. 167). The inspector would stop a representative from engaging in any union organizing activity and if it persists would prohibit that representative from participating in the inspection. (T. 168).

Based on many years of experience, MSHA subdistrict manager Joe Pavlovich testified to the practical aspects of a walk-around representative's duties:

> A. Basically, what the person does is just travel with an inspector and assist him most of the time. What we end up finding is, we probably train the people in health and safety regulations, as much as anything, through their accompaniment and asking questions and showing them what the correct interpretations of the regulations are and the conditions that we find. (T. 168-169).

Q. Is there a time when someone who is not employed at the mine might be valuable to the inspector.

A. Well, we have had people involved in accident investigations who would not be familiar with the mine, but they are valuable to the inspection work force at the time, usually in their knowledge of accidents or accident types or assistance in mine rescue or whatever we're involved in at the time. (T. 169).

During the course of the inspection, the walk-around representative will have access to certain training records. (See, for example, Exhibit M-17). In spite of testimony to the contrary by Mr. Crispin, that is the only non-public record that is kept by the mine that the inspector and the representative might view. The other documents that would be accessible to a miners' representative are accessible to the general public, and the miners' representative thus does not see anything that he could not otherwise see or review. (T. 171-173).

DISCUSSION AND ADDITIONAL FINDINGS

The position of MSHA is found meritorious and is adopted.

Examinaton of the pertinent provision of the Act and the regulations disclose no restrictions or qualifcations on "persons" or "organizations" in their inherent right to serve as representatives of miners. Specifically, there is no requirement of prior certification by the National Labor Relations Board (see T. 34) nor any intimation of such to be found. The term "representative of miners" includes any individual or organization that represents any group of miners at a given mine and does not require that the representative be a recognized representative under other labor laws. (See Legislative History Conference Report excerpt, Ex. M-6). The language of the regulation is express. It is concluded that UMWA was at material times an "organization" within the meaning of 30 C.F.R. 40.1(b)(1) and was not barred from representing miners as authorized by MSHA's regulations. The interpretations of MSHA to this effect have been consistent. Likewise precedent has been consistent, including the Utah Power & Light decision mentioned previously.

In Secretary of Labor v. Benjamin Coal Company, 9 FMSHRC 17, 51-52 (January 1987), Judge George Koutras stated "... it seems clear to me that in addressing the very concerns raised by the respondent [Benjamin Coal] with respect to the application of the collective bargaining provision of the National Labor Relations Act with respect to the definition of the term "representative," the Secretary, in promulgating Part 40 clearly distinguished the NLRB law and the Mine Act purposes and rejected any notion that a representative of miners can only be based on any 'majority rule.' ... I conclude ... that the fact that the UMWA may not represent the respondent's miners for puposes of NLRB or NLRA collective bargaining purposes does not foreclose its representation of the miners who designated it to act as their representative in the exercise of their rights under the Mine Act."

I find merit in MSHA's position that there is no conflict between the Mine Safety and Health Act and the Labor Management Relations Act in their application here. Although K-M uses the term "representative" in discussing both Acts, the term does not have the same meaning in both Acts. Under the LMRA, a representative is elected by a majority of the workers, pursuant to LMRA regulations. The purpose of the representative is to present the needs of the employees to the employer, concerning terms and conditions of employment. Pursuant to the LMRA "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment ..." 29 U.S.C. § 159(a). The representation, under the Labor Management Relations Act, is pervasive; it covers virtually all aspects of the labor-management relationship, and for a long term. The requirements of the LMRA that both sides are obliged to meet are extensive, and have been the subject of a long legal history. By contrast, under the Mine Safety and Health Act, a representative can be chosen by only two or more miners, pursuant to regulation, solely for the purpose of accompanying the mine inspector during his inspection. [9]

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[9] MSHA seeks a representative of miners at each mine for the purpose of assisting the mine inspector and accompanying the inspector to point out any problems tha miners may have noticed. The representative remains with the inspector during the investigation and his only allowed activity is that of advising and observing the mine inspector. Should the representative engage in any other activity, he will be asked to leave and another representative will join the inspector. In MSHA terms, this person is a "walk-around representative."

"Representative of Miners" is defined at 30 C.F.R. § 40.1(b) as "Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act."

MSHA has determined that any person qualified to be on a mine site may act as miner's representative. The representative need not be an employee of the mine, nor a member, or nonmember, of any labor or other organization. Because the Secretary is charged with administering the Mine Act, a remedial statute, the Secretary's construction of the Act "is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act. In order to sustain construction by the agency that administers the statute, a Court need only find that the agency's interpretation is reasonable. Unemployment Compensation Comm'n v. Aragon, 328 U.S. 143, 154-154 (1946). The Court "need not find that [the administering agency's] construction is the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceeding." Id. at 153. Accord: Udall v. Tallman, 380 U.S. 1, 16 (1965); Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984). As the Tenth Circuit states in a case dealing with the Secretary's interpretation of the similar Occupational Safety and Health Act:

"[The] interpretation given a statute by the administrative agency charged with carrying out the mandate of the statute of the statute should be given great weight. Indeed, the interpretation given a statute by the administrative agency charged with its enforcement should be accepted by the courts, if such interpretation be a reasonable one. And this is true even though there may be another interpretation of the statute which is itself equally reasonable." Brennan v. OSHRC, 513 F.2d 553, 554 (10th Cir. 1975).

In this regard, the Mine Act Senate committee report states: "Since the Secretary of Labor is charged with responsibilty for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretation of the law and regulations shall be given weight by both the Commission and thecourts. S. Rep. No. 95-181, 95th Con., 1st Sess. 49 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess. Legislative History of the Federal Mine Safety and Health Act of 1977 at 637 (1978).

The Secretary's interpretation of the statute and regulation is actually supported by the Tenth Circuit's decision in Utah Power & Light Company v. Secretary of Labor, supra. In that

case, miners at the Deer Creek Mine in Utah designated as a representative of miners for walk-around purposes a member of the United Mine workers who was not employed at the Deer Creek Mine. Although the Deer Creek Mine also recognized the UMW as a representative for collective purposes pursuant to the LMRA, the Court focused on the meaning of "representative" as used in the Mine Act in determining that "the Act clearly spells out the purpose of a miners' representative's participation in an inspection." That participation is solely to aid the inspector in this investigation. The Court did not compare a walk-around representative to a collective bargaining representative for purposes of the LMRA. The statements made by the Court with regard to the meaning of "representative" were in the context of addressing the issue raised by the mine operator, that if non-employees of the mine were allowed to act as walk-around representatives, it may open the door for unions to participate at mines not represented by a labor organization. The Court found no merit in the operator's contention that would cause it to limit walk-around rights. Instead, the Court determined that the Mine Act and the regulations place no limits on who may be chosen as a walk-around representative and hence it is logical to infer that the "no limitation" aspect of the designation extends to members of labor and other organizations. The Court noted that the Secretary's position was amply supported by the history of the Mine Act, and that the Secretary's interpretation of the Act was "reasonable and supportable." (See T. 174).

The Court, in passing, merely noted the argument of the mine operator regarding possible abuse, and dismissed the argument with the one sentence that K-M relies on here. That sentence, when read in the context of the decision, does not give K-M the right to ignore the posting requirements and to ignore an order issued by MSHA. The Court stated:

> UPL's argument ignores the fact that, as with a federal inspector, the Act clearly spells out the purpose of a miners' representative's participation in an inspection. Section 103(f) provides that an authorized miner's representative shall have the opportunity to accompany a federal inspector during the inspection of a mine "for the purpose of aiding such inspection." While we recognize UPL's concern that walk-around rights may be abused by non-employee respresentatives, the potential for abuse does not require a construction of the Act that would exclude non-employee representatives from exercising walk-around rights altogether. The solution is for the operator to take

action against individual instances of abuse when it is discovered. (Emphasis added.)

K-M has shown no individual instance of abuse in this case. Nor has it shown, beyond speculation, that UMWA's organizing strategy, or for that matter the purposes of any of those signatory to the designation, contemplated misuse of Part 40 rights by either "outside" or fifth-column type infiltration of working areas to enlist members, distribute literature, purloin confidential K-M records, etc., under the facade of Mine Act walk-around participation. I am unable to conclude, absent clearer basis and authority to do so, that the exercise of important safety rights granted under one Act of Congress can per se be abusive because such exercise is either controlled or influenced to some degree by an organization engaged in union organizing the rules for which are set forth by an agency created by another Act of Congress. One would reasonably expect that both parties, having various rights under various laws and regulations, would exercise them.

The exercise of rights under the Mine Act by certain K-M employees to desgnate UMWA as their "representative of miners" is found not to be an "abuse" even though UMWA has not been certified as collective bargaining representative for K-M's employees or appropriate units of them.

CONCLUSIONS

1. The exercise of a right given under one law, the Mine Safety and Health Act, as part of a labor organization's program to organize miners under another labor law, is not per se an "abuse." If, in exercising the right, "individual instances" occur where a union engages in improper conduct, then the question of specific abuse arises and must be determined on a case by case basis.

2. In the process of designation of miners' representatives under the Act the subjective intent of the union, organization, or person does not determine whether there is an abuse. The right to designate miners' representatives exists under the Act independent of whether union organizing is ongoing (and is an ulterior motive), and "abuse" thereof must be something beyond the exercise of the right.

3. Conversely, depriving a union, other organization, or person of their full rights under the Mine Act to designate a representative under the Act by failing to post the designation, while being part of a mine operator's own opposition to organizing efforts can at the same time be a violation of the Act.

In conclusion, no merit is found to the defenses and contentions raised by K-M which have been specified previously herein and analyzed. The fact that it refused to post the designation is admitted. Accordingly, the violation as charged in the Citation and Order is found to have occurred.

Assessment of Penalty

K-M is a large mine operator (265-270 employees in 1990); (T. 135) with a history of eight prior violations during the pertinent two-year period preceding the instant violation. (Ex. M-5).

The violation is found to have occurred as a result of a well-deliberated decision by K-M to challenge the validity of the regulation requiring posting of the miners' designation of representatives made in the background of its resistance to the UMWA organizing campaign. In gauging culpability, whether negligence or deliberate action, the reason originally assigned by K-M for refusing to post the designation appears to rest on thin legal ground, and the failure to post did deprive miners of rights guaranteed in the Act and implementing regulations.

The infraction was of a moderate degree of seriousness since it deprived the miners of their rights (T. 55) including their right to know who their representatives were and the scope of their authority so that safety concerns could be communicated to them in advance of inspection. [10]

Finally, it does not appear that K-M, upon notification of the violation, proceeded to promptly abate the same.

In mitigation, it is noted that K-M established that it has a favorable safety record.

Upon consideration of the foregoing, a penalty of $300 is found appropriate for this violation and such is here ASSESSED.

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[10] As the Tenth Circuit Court stated in Utah Power & Light Co., supra, "... knowledge on the part of the miners of the identity, whereabouts, and scope of responsibility of their representatives promotes the purposes of the Act." (See T. 53-54).

ORDER

1. Contestant K-M's Notices of Contest in the two Contest Proceedings are **DENIED**: Citation No. 3242337 and Withdrawal Order No. 3242340 are **AFFIRMED**; the two Contest proceedings are **DISMISSED**.

2. Respondent K-M shall, within 30 days from the date of this decision, pay to the Secretary of Labor the sum of $300 as and for the civil penalty above assessed.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 12 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 91-41-M A. C. No. 11-00040-05507
v.	:	
	:	Aurora Quarry Mine
CONCO-WESTERN STONE COMPANY, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 91-52-M A. C. No. 11-00040-05508-A
v.	:	
	:	Aurora Quarry Mine
ROSS CAMPBELL, EMPLOYED BY CONCO-WESTERN STONE COMPANY, Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for the Secretary;
Joseph C. Loran, Esq., Murphy, Hupp, Foote, Mielke and Kinnally, Aurora, Illinois, for the Respondents.

Before: Judge Maurer

These consolidated cases are before me upon the petitions for civil penalties filed by the Secretary pursuant to sections 110(a) and 110(c), respectively, of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", seeking civil penalty assessments for alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations.

The issues presented herein are whether the respondents have violated the standards as alleged in the petition for assessment of civil penalties, whether the violations were "significant and substantial," and the appropriate civil penalties that should be assessed based on the civil penalty criteria found in section 110(i) of the Act. An additional issue in the section 110(c) case is whether Ross Campbell, as the agent

of the corporate mine operator, knowingly authorized, ordered or carried out the cited violations of the mandatory safety standards alleged in the petition for civil penalty.

These issues were tried before me on June 28, 1991, in Aurora, Illinois, and all parties have filed posthearing briefs which I have duly considered in making the following decision.

Citation/Order No. 3259899 was issued by MSHA Inspector Arthur J. Toscano on February 6, 1990, and alleges violations of 30 C.F.R. § 56.14100(c), 30 C.F.R. § 56.14101(a)(1), and 30 C.F.R. § 56.14101(a)(2).

From February 5 through February 7, 1990, Inspector Toscano had conducted an inspection of Conco-Western Stone Company's Aurora Quarry. On February 6, he encountered a "beat-up" green Ford pick-up truck parked on a ramp in front of the main garage and repair building at the quarry site. He observed that the parking brake was permanently wired up in the off position, the doors did not close or latch, the seat of the truck was bare coil springs with only a piece of rubber covering over it, and there was a large hole in the floor of the truck where the floor pan area had rusted through. The truck also had no muffler. The exhaust pipe ended at the hole in the floor. The inspector next attempted to conduct a service brake check. When he pushed on the brake pedal, it went right to the floor. When he attempted to pump it up by pushing on the pedal two or three more times, it came up a little bit.

At this time the radiator was also out of the truck. My impression is that this truck was probably taken out of service de facto on an economic basis with or without the inspector's action, but the fact remains that it wasn't tagged out of service or placed in a designated area posted for that purpose prior to the inspection. Furthermore, Foreman Randy Brey, standing in for the Superintendent, Ross Campbell, who was on vacation, told the inspector that when and/or if a replacement radiator was purchased, the truck would be returned to service. Brey further informed him that the truck had been used in the condition the inspector found it in until the radiator was removed. In fact, the truck had been used up until the day before the inspection in all likelihood.

Respondents, however, admit only that the parking brake was inoperative. They contest the existence of the violation with respect to the service brakes and also deny that the truck's "defects" made its continued operation hazardous to persons in the area and further deny the degree of negligence alleged and the inspector's finding of a "significant and substantial" violation. They affirmatively assert that the vehicle had been taken out of service prior to the inspection.

Respondents also argue that the inspector failed to follow his own regulations for testing the service brakes. He declined to do so because he claims it wouldn't have been safe to move the truck, let alone perform a 15-20 m.p.h. brake test on it. I cannot find any fault with the inspector's reasoning here, especially since he could visually observe that the front service brake system was disconnected and totally inoperable. The truck was designed with a four wheel braking system and he determined that it would be hazardous to operate the truck without service brakes on all four wheels. I concur.

Randy Brey also testified. On the day of the inspection, he was "acting like a foreman" because Ross Campbell was on vacation. He states that it was Ross Campbell, the superintendent, who was responsible at the quarry site for the safety and health of the miners.

Brey is very familiar with the truck in question. It has been in service at the quarry for the 17 and 1/2 years that he has worked there. It was used as a maintenance vehicle and carried tools, parts, welding equipment, etc. It was driven for short distances mostly, generally no more than a half-mile at a time and never off the site.

This witness was aware of and corroborated the inspector's testimony concerning the generally poor condition of the truck; i.e., the doors that wouldn't close, the hole in the floorboard, loud engine exhaust into the truck, and "bad" brakes. However, he insisted that he was not aware that it had "no" brakes, he had only heard that it had "bad" brakes. This he learned from the men that drove it every day, since he had not driven it in 6 months or so at the time of the inspection.

Inspector George Lalumondiere testified that after Citation/Order No. 3259899 was written, he was assigned to do a special investigation into a possible "knowing violation" (a section 110(c) investigation). Based on the information he gathered from the quarry employees and from Ross Campbell himself, he felt that although Campbell denied having actual knowledge of it, had he (Campbell) used prudent care, he had every reason to know of the condition of the truck because he was the superintendent and the person responsible for the safety and health of the employees, and he saw the truck daily in operation around the mine site.

A sampling of some of these witness statements taken from miners during the section 110(c) investigation provide a basis for his opinion. John Raue relates that the truck was in terrible shape; no brakes, no windows in the doors or back of the truck, doors that wouldn't stay shut and floorboards that were rusted completely out of the truck (Petitioner's Exhibit No. 2). Mike Mertens related that the truck had no brakes, no

floorboards, doors that wouldn't stay closed, worn out ball joints and tie rod ends and was just in terrible shape. When he complained to Ross Campbell about it, Campbell told him it was better than walking (Petitioner's Exhibit No. 5).

Campbell himself admits that the exhaust system was bad, there was a hole in the floor, the door wouldn't latch, and the parking brake was not working. He also admits that all of these things should have been fixed. He does, however, dispute that he was aware of any problem with the truck's service brakes. As far as he was concerned, they worked.

After the inspection and citation of February 6, 1990, the truck was discarded. It was never repaired or used again after that.

Basically, with the exception of the disagreement over the status of the service brakes, the evidence is unrefuted and really undisputed that the truck had myriad other safety-related discrepancies. It looked like the inspector, Brey and the other miners, including even Superintendent Campbell say it looked. With regard to the service brakes, my impression is that they were probably marginally operative; but only by pumping the brake pedal and then since only the rear set of brakes was even connected, they were most likely not effective in stopping the vehicle once it had any momentum. It is also my impression that but for the radiator being out of the vehicle, they would have been using it in just the condition it was in on the day of the inspection. I therefore find and conclude that the truck had not been taken out of service, except for the absence of the radiator necessarily shutting it down for the time being. The truck was not marked or tagged out for repairs. It was also not in any designated area set aside for equipment that had been taken out of service.

Because of the totality of circumstances involving the truck, I concur with the Secretary that the truck presented a safety hazard to the miners who drove or rode in or on it as well as to the miners who were pedestrians in the quarry site area all in violation of 30 C.F.R. § 56.14100(c).

Specifically with regard to the brakes on the vehicle, I conclude and find that the credible testimony of the inspector establishes that the front service brakes were disconnected and therefore inoperable and the parking brake was admittedly inoperable, all in violation of 30 C.F.R. § 56.14101(a)(1) and (2). I conclude and find that any reasonable interpretation of the intent of this standard requires that the brakes perform the function for which they are normally designed when they are on the truck. This truck was designed by the Ford Motor Company to operate under normal conditions with wheel brakes on all four wheels and a parking brake. Moreover, the inspector tested the

remaining rear service brakes by pumping the brake pedal and found them to be in his opinion inadequate to stop the vehicle. I therefore find that it was not necessary and would in fact have been imprudent on his part to risk the life and limbs of anyone else conducting a diagnostic braking test with this truck. Respondent's argument that he should have performed the testing described in 30 C.F.R. § 56.14101(b) is without merit and is rejected.

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).

With the exception of the violation of 30 C.F.R. § 56.14101(a)(2), the parking brake violation, I find all the remaining violations (the other two) to be of a significant and substantial nature. That finding is deleted from the parking brake violation and the ordered civil penalty will reflect that. The lack of adequate service brakes (by itself a significant and substantial violation) combined with all the other admitted safety-related deficiencies of this vehicle seriously compromised the safety of all those who had to operate the vehicle or be in the vicinity where it was being operated. I conclude and find therefore that its operation on the quarry site presented a reasonable likelihood of an accident which would reasonably and likely be expected to result in at least injuries to the driver as well as any other occupants or pedestrian quarry personnel exposed to the hazard. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984).

Turning now to the individual respondent, the evidence in this case clearly supports the charges that the respondent, Ross Campbell, was an agent of a corporate mine operator and that he knowingly authorized the violations of the mandatory standards discussed herein. The condition of the truck was so obvious that he should have known of it and I find he did know of it. He observed the truck daily in use and even used it himself on occasion. Miners had complained to him about the truck's condition and in any event it was his own responsibility as superintendent to keep the truck in compliance with the pertinent mandatory standards.

The Commission has defined the term "knowingly," in Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8 (1981), 689 F.2d 632 (6th Cir. 1982), cert denied, 461 U.S. 928 (1983) as follows:

"Knowingly", as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence . . . We believe this interpretation is consistent with both the statutory language and the remedial intent of the coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. 3 FMSHRC 16.

The facts of this case clearly meet this definition.

These "S & S" violations were also serious because by allowing this piece of equipment to deteriorate to the extent it had by the time the inspector found it, the miners had been permitted to work in the presence of serious safety and health hazards for quite some time. These conditions could have led to reasonably serious injuries. On the other hand, I consider the violation involving the parking brake to be neither "significant and substantial" nor serious.

I concur in the inspector's original finding of "moderate" negligence.

Considering all the applicable criteria contained in section 110(i) of the Act, I find the following civil penalties to be appropriate:

Docket No. LAKE 91-41-M

STANDARD VIOLATED	PENALTY
30 C.F.R. § 56.14100(c)	$500
30 C.F.R. § 56.14101(a)(1)	$500
30 C.F.R. § 56.14101(a)(2)	$100

Docket No. LAKE 91-52-M

STANDARD VIOLATED	PENALTY
30 C.F.R. § 56.14100(c)	$300
30 C.F.R. § 56.14101(a)(1)	$300
30 C.F.R. § 56.14101(a)(2)	$ 50

ORDER

Conco-Western Stone Company is **ORDERED** to pay civil penalties of $1100 within 30 days of the date of this decision.

Ross Campbell is **ORDERED** to pay civil penalties of $650 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

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DEC 13 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 90-284-M A.C. No. 04-04602-05527 A
v.	:	Docket No. WEST 90-326-M A.C. No. 04-04602-05539 A
L. KENNETH TEEL, PRESIDENT OF CALIFORNIA LIGHTWEIGHT PUMICE, INC., Respondent	:	Docket No. WEST 90-356-M A.C. No. 04-04602-05536-A Battle Mountain Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 90-325-M A.C. No. 04-04602-05526 A
v.	:	Battle Mountain Mine
GEORGE W. WEINBECK, EMPLOYED BY CALIFORNIA LIGHTWEIGHT PUMICE, INC., Respondent	:	

DECISION

Appearances: J. Phillip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for Petitioner;
L. Kenneth Teel, Pro Se, for Respondent - Teel.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA") alleges Respondents, as employees of California Lightweight Pumice, Inc. ("CLP") violated Section 110(c) of the Federal Mine Safety and Health Act, 30 U.S.C. § 801, et seq. the ("Act").

A hearing on the merits was held in San Bernardino, California, on October 30, 1991.

The parties waived closing arguments and the filing of post trial briefs.

Threshold Issues

Prior to the hearing, CLP filed a notice of its filing of a petition under Chapter 11 of the Bankruptcy Code, Title 11, U.S.C. The corporation asserts that under 11 U.S.C. § 362, it is entitled to an automatic stay of the instant cases.

As a threshold matter, the motion of CLP for a stay is without merit. CLP is not a party to these cases. The Secretary is proceeding under Section 110(c) of the Act against L. Kenneth Teel as an employee and President of CPL. Further, the Secretary is proceeding against George W. Weinbeck as Production Manager and Supervisor of CPL.

Section 110(c), 30 U.S.C. § 820(c) of the Act provides as follows:

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

In addition, Section 362(b) of the Bankruptcy Code specifically provides this exception:

> (b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay-
>
> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

If CLP had been a party herein, an automatic stay would not have been appropriate since CLP would be within the above exception. Shippers Interstate Service, Inc. v. National Labor Relations Board, 618 F.2d 9, (7th Cir. 1980), Heiney v. Lion Coal Co., 4 FMSHRC 572, 574-575 (1982).

A further threshold issue is the proof required in a case arising under Section 110(c) of the Act.

In construing this section, the Commission has stated that the word "knowingly" as used in this portion of the Act does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowingly or having reason to know. A person has reason to know when he has such information that would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence. United States v. Sweet Briar, Inc., 92 F. Supp. 777, 779 (D.S.C. 1950, quoted approvingly in Secretary v. Kenny Richardson, 3 FMSHRC 8 (1981), affirmed, Richardson v. Secretary of Labor and FMSHRC, 689 F. 2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).

It is accordingly appropriate to analyze the evidence as it relates to whether the individuals herein "knowingly" violated the regulations.

A further predicate for an agent's liability under section 110(c) is a finding that the corporate operator violated the Act. Kenny Richardson, supra, 3 FMSHRC at 9.

A final threshold issue, raised by Respondent Teel, is whether these cases should be dismissed because of "double jeopardy". Specifically, Mr. Teel argues the company paid almost $20,000 in fines and the Secretary should not be permitted to proceed against employees.

I reject Respondent's arguments. In a civil proceeding such as involved here Congress can fashion such remedies it deems necessary and they need only be rationally related to a legitimate governmental interest. Richardson, supra, 689 F.2d at 633. Further, double jeopardy (Fifth Amendment) relates to criminal trials. It is not involved in these cases.

In this case, Citation No. 3069893 alleges L. Kenneth Teel violated 30 C.F.R. § 56.11001. [1]

The citation reads as follows:

> Safe access was not provided into the parts trailer in that the company was using a pallet for stairs into the trailer. The unsafe access was being used by employees on a daily bases (sic). Management was aware that this condition existed. Photo number 11 shows the violation and the hazard.

ARLE W. BROWN, an MSHA inspector for 16 years, identified the legal identity report submitted by CLP to MSHA (Tr. 19-21; Ex. P-1). The report indicates Kenneth Teel is president of CLP and George Eugene Weinbeck is a supervisor. (Tr. 21).

The Company produces a lightweight aggregate used in building materials. It eventually enters interstate commerce. (Tr. 22).

Mr. Brown issued Citation No. 3069893 under section 104(b)(2) of the Act and served it on Gale Ashley, CPL's manager. (Tr. 23).

During the regular inspection, Mr. Brown went into the back part of the mine where the company stored parts and time cards. Instead of a stairway, they used a leaning unsecured 4 foot X 4 foot pallet to provide access to the trailer. The trailer was a working place as time cards were stored there. (Tr. 24, 26; Ex. P-4). CLP abated the violation by constructing a regular stairway. (Tr. 26). Someone might stumble on the pallet and break an ankle. (Tr. 28). From talking to people, the inspector learned Mr. Teel knew the trailer was there. In addition, Mr. Teel had used the pallet himself to climb into the trailer.

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[1] § 56.11001 Safe access.

Safe means of access shall be provided and maintained to all working places.

The inspector did not know who owned the storage trailer. (Tr. 28). He further agreed he didn't see any employee enter, leave or punch a timecard in the trailer. (Tr. 29).

L. KENNETH TEEL, President of CLP, testified. He indicated the trailer was used to store filters and parts. Further, the van was owned by Capistrano Bulk Transport. In addition, only the production manager and Mr. Teel had keys and access to the trailer.

In Mr. Teel's opinion, the use of the pallet to provide access was not unsafe. The trailer was not used to house time cards. (Tr. 31-34). Mr. Teel agreed that he personally had used the parts trailer many times. The company paid a civil penalty in this matter. (Tr. 33).

Discussion

The safe access regulation, § 56.11001, has been previously construed to the effect that each means of access to a working place must be safe. The Hanna Mining Company, 3 FMSHRC 2045, 2046 (1981); Homestake Mining Company, 4 FMSHRC 146, 151 (1982).

It is apparent that an unsupported pallet leaning against a trailer for support is not safe. (See photograph Ex. P-4). It is further uncontroverted that both Messrs. Teel and Ashley had access to the trailer.

The evidence establishes that Respondent Teel violated this regulation. Further, Mr. Teel, CPL's president, knew of the violative condition since he used the pallet to enter the trailer.

Accordingly, Citation 3069893 should be affirmed and a civil penalty assessed.

In this case, Citation No. 3463959 alleges L. Kenneth Teel violated 30 C.F.R. § 56.3131. [2]

The order reads as follows:

The pit wall perimeter had loose and unconsolidated material and rocks that had not been stripped back for a distance of 10 feet nor was it sloped to the angle of repose. Several rocks were directly above a haulage road. (The rocks were about 2 feet in diameter). This is an active pit exposing employees to the hazards of falling rocks and material. The pit wall is about 50 feet high.

ARTHUR L. ELLIS, a MSHA inspector experienced in mining, issued Order No. 3463959 under Section 104(a) and 107(a) of the Mine Act. (Tr. 37, 38).

When the inspector arrived at the mine site, a loader was across the road. A sign stated the mine had been closed. After a short time, George Weinbeck arrived and explained that the BLM [3] had closed down the mine. Mr. Ellis advised Gene Ashley that he desired to make a regular inspection. (Tr. 39). Ashley explained they had been working until the afternoon of the day before. At that time BLM had closed it down and locked the gates.

Mr. Ashley stated he would accompany the inspector but he left and did not return. Mr. Ellis again attempted to make his

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[2] § 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.

[3] Bureau of Land Management manages the property for the U.S. Government. The land is leased by CPL.

inspection and his supervisor advised him to obtain a key from BLM and proceed with the inspection. (Tr. 40, 41).

Mr. Ellis observed the pit and the plant. He issued a 104(a) and a 107(a) order to be sure that no one would work the pit until the hazard was corrected. (Tr. 41). Mr. Ellis talked to Mr. Teel who told him he was aware of the rocks and it would take 5 to 10 minutes to remove them. Mr. Teel also told him to mail the company his enforcement documents. (Tr. 42). The pit wall was about 50 feet high. (Tr. 43). Mr. Ellis issued a termination order on July 6, 1989. The rock and loose material had been removed about 10 feet around the perimeter of the pit walls. (Tr. 44).

Mr. Ellis agreed Mr. Teel was at the office in Capistrano Beach when he talked to him by telephone. (Tr. 45, 46).

L. KENNETH TEEL testified the material in this particular pit was wet and fine. The entire surrounding pit and high wall area was unstable. (Tr. 46, 47). The company had terraced back but the native soil was unstable. He indicated the soil was like "hour-glass." It was a daily thing to attempt to remove and keep the benched area clean. Once a dozer was up there, the rocks would continue to fall down. According to Mr. Teel, when the citation was issued, Mr. Ellis saw some large rocks but an equipment operator in an enclosed cab could not have been injured. (Tr. 47, 48). Mr. Teel did not feel this was an unsafe condition. Further, it was something that was corrected on a daily basis. (Tr. 47). The miners do not have to get out of their trucks when they enter the pit. (Tr. 49). Mr. Teel testified he was only aware of the condition after the citation was issued. Mr. Teel's office is in Orange County and the mine site is in Ingo County (California). According to Mr. Teel it is 200 miles from the mine site to his office in Orange County. He vaguely remembered talking to Mr. Ellis by telephone.

CLP was closed down by BLM because they had not met all the terms of their mining and reclamation plan. (Tr. 50). Mr. Teel indicated the haul truck drivers would normally drive in a circle around the pit and position their trucks to drive forward out of the pit. (Tr. 5).

ARTHUR L. ELLIS (recalled) indicated the company had been working the afternoon before the inspection.

The inspector felt the situation had to be corrected before anyone traveled under the highwall along the highway. A boulder

could come down and crash through one of the trucks. The hazard here was caused by rocks and unconsolidated material falling on the workers. (Tr. 53). Mr. Ellis had seen a loader operator mingling or walking around underneath the pit area. (Tr. 54). Mr. Ellis agreed this was the only time he had seen an unsafe condition in this pit. However, he had written citations for the same thing at a different pit in this mine. (Tr. 56). When Mr. Ellis talked by telephone with CPL's President, Mr. Teel, he indicated very clearly that he was aware of the condition that had been cited.

After BLM closed the mine, it remained closed when Mr. Ellis issued his termination order. At that time, Mr. Ellis did not observe any employees. However, he saw a loader and a haul truck in the pit area but not in the pit itself. (Tr. 57, 58).

In Mr. Ellis' opinion, the described condition had existed for several days and they would have been working while this condition existed. (Tr 58, 59). Gale Ashley and George Weinbeck said they had worked the pit the previous afternoon. (Tr. 60).

Discussion

The regulation, § 56.3131, requires, in effect, that in places where persons work or travel, loose material shall be sloped to the angle of repose or stripped back 10 feet from the top of the pit or quarry wall.

Mr. Teel states he was in his office some 200 miles from the pit and, therefore, did not know of the condition described by Mr. Ellis. I reject Mr. Teel's asserted lack of knowledge of the hazardous condition. Mr. Teel agrees Mr. Ellis saw "a couple of large rocks." Mr. Ellis when recalled as a witness described the hazard as the falling of rocks and loose unconsolidated material on workers below. Further, he stated it would be very possible for these boulders to come down and crash through one of the trucks. (Tr. 53). I further reject Mr. Teel's testimony since he himself describes this pit and high wall as being more or less in a continuing state of flux. He described it as "wet," "awfully fine," "unstable," "hour-glass sand." (Tr. 47). In short, the record establishes that the violation § 56.3131 was "knowingly" authorized by Mr. Teel.

The mine was closed before the 107(a) order was issued. However, Mr. Ellis issued the 107(a) order in order to be sure no one would work in the pit until the hazard was corrected. (Tr. 41). His actions properly addressed the hazardous conditions.

In this case, Citation No. 3463076 alleges L. Kenneth Teel, an employee of CPL, violated 30 C.F.R. § 56.3200 [4]

The citation, issued under § 104(a) and 107(a) of the Act, provides as follows:

> A hazardous condition has developed in the Phase I pit in that a bench failure has created an approximate 80' highwall with loose unconsolidated material along the face. Additionally numerous large boulders were along the outer edge of the crestline. Employees were working and traveling near the bottom of the highwall.

RODRIC M. BRELAND, a MSHA Assistant District Manager, is experienced in mine safety.

On August 28, 1989, Mr. Breland issued a 107(a) imminent danger order alleging a violation of 30 C.F.R. § 56.3200. The order, served on Gene Ashley, alleges a bench failure existed on an 80-foot high wall. There was loose unconsolidated material along the face. Also, numerous large boulders were along the outer edge of the crestline. Employees were working and traveling near the bottom of the high wall. (Tr. 61-63).

On August 28, Mr. Breland received a call from BLM representatives. They were concerned about hazardous activity at the site. They were particularly concerned about equipment and material going over the edge. MSHA has a history of problems at this operation with the maintenance of high walls. (Tr. 64).

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[4] § 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.

The order described this as a Phase I pit, which is the same one described by Mr. Ellis in his previous testimony.

Mr. Breland was 250 miles from the pit and in a telephone call Mr. Ashley acknowledged that the conditions existed. Namely, they were working on a high wall 80 to 100 feet high. Also, there was equipment above and below the high wall. (Tr. 65). Mr. Breland then issued a 107(a) order over the telephone and drove to the site, arriving the morning of August 29.

When Mr. Breland arrived, he found a good-looking face in the pumice area but the alluvium above it was very "sandy like." (Tr. 66-67). The material had sloughed in several areas to the edge of the pumice wall. Also there were large unconsolidated boulders all along the face. You could see where a loader had been operated directly beneath it. You could also see where a cat had worked that area on the edge of the upper part of the wall. (Tr. 67, Ex. P-8, P-9).

It is not uncommon for operators to get out of their vehicles.

The boulders, by their size, could do substantial damage to a piece of equipment below or a fatality could result if a boulder struck a miner. (Tr. 70).

A termination order was issued on August 20, 1989. The pit had been benched down from the top and no hazard existed at that time. (Tr. 71, Ex. P-10).

Mr. Breland was sure that Mr. Teel was aware of the condition. There had probably been at least three violations of the same standard. MSHA's Denver Tech Support had looked at the property and made some recommendations.

The company was advised that benches were required.

In Mr. Breland's opinion, a condition of imminent danger with a high degree of negligence existed. There was also aggravated conduct. (Tr. 72).

The order was not terminated until August 20, 1991, two years later, because it took that long to establish a bench face that was safe. (Tr. 80).

L. KENNETH TEEL indicated that nearly every day they clean off the bench areas with a dozer. Later the loader operator

would come in at the bottom of the pit and remove any of the material that had fallen into it. At that point the pumice would be removed. (Tr. 83).

In Mr. Teel's opinion, the pit was not in an unsafe condition. (Tr. 84). This pit was the only one approved for mining at the time.

The company paid a civil penalty for this violation. (Tr. 84).

Mr. Teel became aware of the condition of this pit when Mr. Ellis issued his citation.

In Mr. Teel's view, the inspections by MSHA and BLM came about because of an argument in Bankruptcy Court over CPL's mineral lease. (Tr. 86). Further, the pumice is stable once the overburden is removed. (Tr. 87). The loose unconsolidated material in Phase I pit was caused by earthquake faults. The bench failure was caused by nature.

RODRIC BRELAND (recalled) the bench in this particular high/wall had not been properly constructed. The angle of repose discussed by Mr. Teel had nothing to do with the sandy material. (Tr. 87).

Discussion

The hazardous condition described by Mr. Breland is virtually uncontroverted. Workers were exposed to the described hazardous conditions.

Mr. Teel testified he knew of the condition of the Phase I pit when Mr. Ellis issued his order in the prior case. The evidence shows the order by Mr. Ellis was issued July 6, 1989. (Ex. P-5). The order by Mr. Breland was issued more than a month later on August 28, 1989.

The foregoing evidence establishes Mr. Teel "knowingly" authorized the violation.

Citation No. 3463076 should be affirmed and a penalty assessed.

Citation No. 3463783

This citation, issued under Section 104(d)(2) of the Act, alleged a violation of 30 C.F.R. § 56.3130. [5]

The citation reads as follows:

> The pit walls were not being mined in a manner to maintain the walls and bench stability. The walls were about 80 to 100 feet high with no benches except at the crest line. The bench at the crest line on the east wall had sloughed and filled with loose material. The entire pit must have benches that are maintained. This pit is known as the Phase I pit. This is an unwarrantable violation.

ARTHUR L. ELLIS, a previous witness, observed the bench failure on the crest line on the east wall. The bench had filled with material and was slipping over down into the bottom of the pit. The pit was 80-100 feet deep. Mr. Ellis also noticed loader tracks down at the bottom of the pit. There were no other benches in the pit. (Tr. 96).

The hazard here involved the fall of loose, unconsolidated material on the people below. The citation was modified to permit benches to be developed. (Tr. 97). The citation was terminated on August 20, 1991. (Tr. 100).

The witness indicated Mr. Teel was aware of the need for benching. (Tr. 100, 101). This was a serious violation which Mr. Teel disregarded. Possible injury or death could occur. (Tr. 101).

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5 § 56.3130 Wall, bank, and slope stability.

> Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks, and slopes.

Mr. Ellis agreed Mr. Ashley is the manager of the mine and makes all of the decisions regarding employees, type of equipment and type of mining. He was hired to manage the mine in a safe condition. However, Mr. Teel, as President of CPL, was totally in charge. (Tr. 102, 103).

The parties stipulated that the company paid a civil penalty in connection with this violation. (Tr. 104).

Mr. Teel offered a list of the amount of fines it paid. (Ex. R-1). Mr. Teel indicated that he had not had a salary from the company for six months. (Tr. 106, 107).

Discussion

The evidence establishes the corporate operator violated the contested citation. Further, the evidence is uncontroverted that Mr. Teel, President of the company, was aware of the need for benching.

Citation No. 3463783 should be affirmed and a civil penalty should be assessed.

WEST 90-325-M

In this case the Secretary of Labor is proceeding on Order No. 3069865 against George W. Weinbeck. The Secretary alleged that at all times involved herein Respondent Weinbeck was acting as Production Manager and Supervisor of CPL.

Respondent Weinbeck was advised by certified mail of the hearing scheduled in San Bernardino, California. The return receipt is attached to the notice of hearing in Docket No. WEST 90-284-M.

Respondent Weinbeck failed to appear at the hearing and a default was entered against him for failure to prosecute his contest. (Tr. 92, 93).

Accordingly, MSHA Order No. 3069865 and the proposed penalty therefor should be affirmed.

Civil Penalties

The statutory criteria to access civil penalties are contained in Section 110(d), 30 U.S.C. § 820(i).

The initial criterion is the operator's history of previous violations. CPL has an excessive prior adverse history but this proceeding is against Kenneth Teel. It is not shown that, as an individual, Mr. Teel has a prior history.

All of the citations and orders herein indicate Mr. Teel knew of the violative conditions. He was accordingly negligent in failing to remedy the condition.

The record indicates Mr. Teel has not received any salary from the bankrupt corporation for the last six months. CPL is his sole source of income. However, there is no showing of the precise effect the assessment of penalties will have on Mr. Teel.

The gravity concerning Citation No. 3069893 was low. The pallet was only minimally used.

The remaining citations involve high gravity. The circumstances were such that a fatality could have occurred. With the exception of Citation No. 3463076, Mr. Teel rapidly abated the violative condition and has thereby demonstrated good faith.

The Judge believes the penalties set forth in the order of this decision are appropriate for Mr. Teel as President of CPL.

For the foregoing reasons I enter the following:

ORDER

1. WEST 90-326-M (L. Kenneth Teel): Citation No. 3069893 is **AFFIRMED** and a civil penalty of $75 is **ASSESSED.**

2. WEST 90-284-M (L. Kenneth Teel): Citation No. 3463959 is **AFFIRMED** and a civil penalty of $150 is **ASSESSED.**

3. WEST 90-356-M (L. Kenneth Teel): Citation No. 3463076 is **AFFIRMED** and a civil penalty of $150 is **ASSESSED.**

Citation No. 3463783 is **AFFIRMED** and a civil penalty of $150 is **ASSESSED.**

4. WEST 90-325 (George E. Weinbeck): Citation No. 3069865 and the proposed penalty of $400 are **AFFIRMED.**

John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 19 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	
	:	Docket No. LAKE 91-15
OLD BEN COAL COMPANY, Respondent	:	A.C. No. 11-00590-03802
	:	
	:	Docket No. LAKE 91-16
	:	A.C. No. 11-00590-03803
	:	
	:	Docket No. LAKE 91-58
	:	A. C. No. 11-00590-03814
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	:	Docket No. LAKE 91-59
	:	A. C. No. 11-00590-03815
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	:	Docket No. LAKE 91-70
	:	A. C. No. 11-00590-03816
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	:	Docket No. LAKE 91-109
	:	A.C. No. 11-00590-03822
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	:	Mine No. 26
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	:	Docket No. LAKE 91-88
	:	A. C. No. 11-02392-03822
	:	
	:	Docket No. LAKE 91-107
	:	A. C. No. 11-02392-03824
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	:	Mine No. 25
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	:	Docket No. LAKE 91-57
	:	A. C. No. 11-00589-03769
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	:	Docket No. LAKE 91-87
	:	A. C. No. 11-00589-03771
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	:	Docket No. LAKE 91-99
	:	A.C. No. 11-00589-03773
	:	
	:	Docket No. LAKE 91-112
	:	A.C. No. 11-00589-03775
	:	

: Docket No. LAKE 91-426
: A.C. No. 11-00589-03781
:
: Mine No. 24

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for Petitioner;
Gregory S. Keltner, Esq., Old Ben Coal Company, Fairview Heights, Illinois for Respondent.

Before: Judge Weisberger

Statement of the Case

These cases were consolidated for purposes of hearing, and subsequent to notice, the cases were heard in St. Louis, Missouri, on October 16-17, 1991. At the hearing, Robert Stamm, James Holland, Arthur Wooten, and Mark Eslinger, testified for Petitioner; Jerry Lane Bennett, Roger Griffith, Jerry Conner, Alfred Lynch, Robert Allen McAtee, and George Dawe, testified for Respondent. The parties waived their right to submit post-hearing findings of fact and briefs, and in lieu thereof presented closing oral argument.

Docket No. LAKE 91-15

A. Citation No. 3220508

I.

On August 22, 1990, Robert Stamm an MSHA inspector asked the union escort who accompanied him on an inspection of the 12 CM2 working section to check the brakes of a battery powered vehicle (golf cart) used to transport miners to and from the working section. Stamm asked the escort to pull the brake handle and he said that there was no resistance on the handle. Stamm said that he observed that the parking brakes "... would not secure the vehicle for motion when parked" (Tr.16). Upon examination, he observed that the linkage for the parking brakes was not connected. He said that it did not appear that the golf cart was out of service, and no one told him that it was out of service. Also, Stamm indicated that there was nothing blocking the wheels of the golf cart. Stamm issued a Citation alleging a violation of 30 C.F.R. § 75.1725(a).

II.

Section 75.1725(a) supra provides as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately".

Respondent argues that section 75.1725(a) supra does not specifically require that vehicles be provided with parking brakes, and that, in either event, the vehicle in question was safe, inasmuch, as when observed by Stamm, it was parked in a crosscut that was "more or less close to being level" (Respondent's Exhibit R-A, Page 13), and was perpendicular to the ribs. Thus, Respondent argues that should the vehicle have rolled, it would have been stopped by one of the ribs.

Also, Jeffrey Lane Bennett, Respondent's safety inspector, indicated that with the exception of underpasses, the terrain of the mine is level. He indicated that there are not more than 6 or 8 underpasses where a parked vehicle can roll. In essence he opined that a vehicle parked in an area of an underpass would not roll excessively, as in each of these areas there is a 20 foot incline, a 20 foot level area, followed by another 20 foot incline. He further opined that a vehicle would not parked in such an area, as it would block the main travelway. I find Respondent's arguments without merit for the reasons that follow.

In essence, Section 75.1725(a), supra requires that equipment in "unsafe condition" be removed from service. There is no evidence in the record that the golf cart in question was not removed from service. Hence, in order to ascertain whether Section 75.1725(a) supra has been violated, it must be determined whether or not the golf cart was in an "unsafe condition".

In making this determination reference is made to the common usage of the term "safe". Webster's Third New International Dictionary, (1986 edition) ("Webster's") defines "safe" as "2. Secure from threat of, danger, harm or loss:", Webster's defines "free from" as "(a) lacking: without." "danger" is defined in Webster's as "3. liability to injury, pain, or loss: PERIL, RISK... ." Since the parking brakes did not work due to the fact that the linkage was disconnected, the vehicle would immediately drift or roll if the operator of the vehicle would take his foot off the brake pedal when the vehicle is on an incline.

Although there was no immediate risk of injury inasmuch as the golf cart was parked in a level area, it is clear that should the golf cart be parked in an area of the mine that is not 100 percent level, it might roll by itself or be hit by another vehicle and then roll, possibly causing a ninjury to persons in the area. Hence, the golf cart being operated without parking brakes, was not free from risk, as its operation, in some

circumstances, could have led to an injury. Accordingly I find that Section 75.1725(a) supra has been violated by Respondent.

III.

According to Stamm, in essence, should the golf cart in question be parked in an area that is not level, it would be reasonably likely that a miner getting out of the vehicle would be injured by the vehicle rolling over him. Stamm stated, in essence, that, accordingly, should the parking brakes not be repaired, an injury could result with continued operation of the golf cart. Stamm said that he has read reports of investigations of accidents wherein injuries, including a fatality, have occurred when parking brakes have been inoperable in golf carts, and scoop cars. He indicated on cross-examination that, in evaluating the likelihood of an injury as a consequence of parking brakes not being operable, he was "speaking ... in terms of possibilities". (Tr. 36)

In analyzing whether the facts herein establish that the violation was significant and substantial, I take note of the recent decision of the Commission in Southern Ohio Coal Company, 13 FMSHRC 912, (1991), wherein the Commission reiterated the elements required to establish a significant and substantial violation as follows:

> We also affirm the judge's conclusion that the violation was of a significant and substantial nature. A violation is properly designated as significant and substantial "if, based on the particular facts surrounding that 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:
>
> > In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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.
>
> See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021

(December 1987) (approving Mathies criteria). 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)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986)." (Southern Ohio, supra at 916-917).

Petitioner has established a violation of Section 75.1725(a) supra as discussed above, II. infra. Also, it is clear that the violation herein i.e., the lack of an operative parking brake, did in some measure contribute to the hazard of a miner being injured by being hit or run over by the vehicle in question. However, the record fails to establish that the third element set forth in Mathies, supra i.e. a reasonable likelihood that the hazard contributed to will result in an injury, as it has not been established that there was a "reasonable likelihood that the hazard contributed to would result in an event in which there is injury", U.S. Steel Mining Co., 6 FMSHRC 1834-1836 (August 1984). In this connection I note that, when cited by a Stamm, the golf cart was parked perpendicular to the ribs in a dead-end cross-cut. Also the grade of the floor was level. Petitioner did not contradict the testimony of Bennett that in the mine in question, the floor is level except for 6 or 8 areas containing underpasses. There is no evidence that in the normal course of mining the vehicle in question would have been stopped or parked in terrain that would have allowed it to drift or roll. Hence I conclude that the violation herein was not significant and substantial.

IV.

Stamm opined that the violation herein resulted from Respondent's moderate negligence, as, had the brakes been checked before the golf was placed in operation, Respondent would have known that the brakes were not in safe operating condition. In essence, Stamm said that, in questioning management, "it did not come out" that the brakes were checked. (Tr. 20) Respondent did not rebut or impeach the testimony of Stamm in this regard, nor did it introduce in evidence the existence of any mitigating circumstances. I thus find that Respondent was negligent, in that it should have known of the lack of parking brakes and should have fixed them or taken the vehicle out of operation. Also, I find that should an injury have occurred as a result of the violation herein, it could have been of a reasonably serious nature. However taking into account the relatively level of terrain of the mine in question, I conlcude that the possibility of the vehicle rolling and causing injury was somewhat remote.

Considering the other statutory factor of Section 110(i) of the Act stipulated to by the parties, I conclude that a penalty herein of $75 warranted.

B. Citation Nos. 3220561, 3220562, 3220565

Petitioner indicated that it vacated No. 3220561, 3220562, and 3220525 on the ground that, upon review, it was determined that each of the vehicles in question, which had initially been cited in violation 75.1725(a) supra, did have a braking system. Based on Petitioner's representations, I find that the vacation of these citations is proper.

Docket Nos. LAKE 91-426, LAKE 91-59, and LAKE 91-16

A. Docket No. LAKE 91-426

I.

On February 11, 1991, James Holland an MSHA Inspector, conducted an inspection of the face of the first north entry, at Respondent's No. 24 mine. Holland indicated that he did not see any warning device after the last row of roof bolts, and that inby that point there was approximately 15 feet of unsupported roof. Holland also indicated that there were no physical barriers installed, and Respondent has not challenge this testimony. He issued a citation alleging a violation of 30 C.F.R. § 75.208 which provides as follows: "Except during the installation of roof supports, the end of permanent roof support shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel beyond permanent support".

Roger Griffith, a safety inspector employed by Respondent accompanied Holland on February 11, 1991. He stated that as he was approaching the face, he saw a tag with a piece of reflecting tape attached to the last row of roof bolts on the right side, inby a curtain which had also been hung on the right side at the next to last row of bolts. He indicated that the height of the bolted roof was approximately 8 feet, and he observed the tag when he was approximately 6 to 10 feet away.

According to Respondent's counsel the whereabouts of specific tag in question, is not known. However, according to Griffith the words "unsupported top", the initials of an examiner, and a date had been placed on the specific tag in question, but otherwise it was the same as exhibit R-3. He also indicated that the specific tag in question had a piece of reflecting tape on it that was "somewhat similar" in size to that found on exhibit R-3. (Tr.125) However, he indicated that in the mine atmosphere a tag such as exhibit R-3, gets dirty and turns dark in color.

Griffith stated that, at the No. 24 Mine, tags such as exhibit R-3 are used to provide a warning of unsupported top or other hazardous conditions. He indicated that tags with reflective tape are "readily visible". (Tr.124) Griffith also indicated in this connection that a union walkaround who accompanied him and Holland on February 11, 1991, asked him "how can he (Holland) go ahead and issue a citation even though we had an examiner's tag hanging there" (Tr.102).

It is clear that, in the area in question, these was no physical barrier installed to impede travel beyond permanent support. Hence the issue for resolution is whether the end of permanent supports were, as required by Section 75.208 supra, "posted with a readily visible warning". "Post" as a transitive verb including its use with the suffix **ed** is defined in "Webster's" as follows: (1) to affix (as a paper or bill) to a post, wall, or other usual place or public notices: PLACARD ... [signs are _____ed throughout the state] ..." The record indicates that there was some physical evidence present which would alert a miner to the presence of unsupported roof e.g., the curtain, the last row of volts, the contrast in color between areas that were hand rock dusted and the ribs and roof in the unsupported area that was not dusted, and the presence of gob material on the floor under the unsupported roof. However, these are insufficient to comply with section 75.208 supra, which requires that a warning be affixed to some portion of mine. This language clearly contemplates the use of some device, as opposed to the reliance on evidence of the physical conditions in the mine.

Further, Section 75.208 supra mandates that the warning device, must be "readily visible". Although Griffith saw the device in question from a distance 6 to 8 feet, Holland, who has approximately 16 years experience inspecting mines, and in addition, a total of approximately 6 years experience working in mines, testified that he did not see the tag in question. There is nothing in the record to impeach the credibility of Holland, or to question the veracity of his testimony that he did not see the device. Since the device was not seen by an inspector trained to observe conditions in a mine, I conclude that it was not "readily visible". In this connection I do not place much weight on Griffith's testimony that the walkaround asked him how Holland could issue a citation "even though we had an examiner's tag hanging there" (Tr. 102). Inasmuch, as the declarant did not testify in person, his demeanor could not be observed. Hence, this hearsay testimony is inherently unreliable.

For the above reasons I conclude that the Respondent herein

did violate Section 75.208 as alleged.[1]

II.

Holland indicated that in his opinion the violation herein was significant and substantial. In reaching this determination the only factor he considered was that he was aware of 6 injuries including a fatality that had occurred in face areas inby unsupported roof. He opined that in the absence of a readily visible warning, a miner by accident, either in a scoop, or on foot to take a methane reading at the face, could go beyond permanent support, and thus could get seriously injured. On cross-examination, he was asked to describe the analysis he went through in concluding that the violation was significant and substantial. He answered as follows: "The condition that exists where soembody could get seriously injured before it can be corrected". (Tr.80). [sic]

I do not place much weight on the opinion of Holland, inasmuch as it was not based on the proper evaluation to be used in determinating whether the violation was significant and substantial (See Mathies, supra). The absence of either a physical barrier, or a posted readily visible warning impeding travel beyond permanent support violated section 75.208 supra, and also contributed to the hazard of a person inadvertently going under unsupported roof, and thus being subject to the risk of becoming injured from a roof fall. However, due to the presence of various clues providing notice to a miner of the end of the supported roof area and commencement of unsupported roof e.g., the last row of roof bolts, the presence of the curtain, and the contrast between rock dusted and non rock dusted areas, I conclude that it has not been established that there was a reasonable likelihood that the hazard herein contributed to by the violation would have resulted in an injury producing event (U.S. Steel, supra) According I conclude that it has not been established that the violation herein was significant and substantial. (See Mathies, supra U. S. Steel supra).

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[1]I ascribe no merit to Respondent's argument that section 75.208 supra does not require certain dimensions of a warning device, nor does it require that such a device contain or be made of reflectable material. I find that the basis of the violation herein was not that the device was not of a sufficient size nor that it was not reflectable, but rather that the device that was used was not "readily visible".

III.

The gravity of the violation herein i.e. that as a consequence thereof a person might have been inadvertently subjected to a hazard of being injured by a roof fall, and the negligence of the Respondent in committing this violation are mitigated somewhat when taking into account the fact that a warning device had been posted that was visible at least to Griffith. Also there were other physical clues present to warn a person of the demarcation between the end of the supported roof and the commencement of unsupported area. I find that a penalty of $100 is appropriate for this violation.

B. Docket No. LAKE 91-59

1. Citation No. 3538629

On November 2, 1990 Inspector Stamm conducted an inspection of in Mine No. 26 and found that a visible warning or physical barrier was not posted at the end of permanent roof supports outby the working face of the 47th south entry of the 12CM-2(007-0) working section. A cut had been extracted 17 feet inby the last row of roof bolts. The inspector issued Citation No. 3538629 alleging a violation of 30 C.F.R. 75.208.

Respondent does not contest the violation. Also taking into account the facts concerning this citation as set forth in the parties' stipulations (paragraph 9-A, Joint Exhibit 1), and the facts testified to by Stamm in a deposition taken September 25, 1991, (Exhibit R-E), I conclude that Respondent did violate section 75.208 supra.

According to Stamm, in essence, the violation is to be considered significant and substantial inasmuch as a person "may possibly" go inby the last row of bolts and thus be subject to unsupported roof (Exhibit R-E page 9). He indicated that once a person is under unsupported roof, there is a reasonable likelihood of a serious injury in the event of a roof fall.

I find that Stamm did not use the proper standard in evaluating whether the violative condition herein was significant and substantial. Consistent with my decision in Docket No. LAKE 91-46 infra A., I find the violation was not significant and substantial. Also consistent with the decision in LAKE 91-426, infra A., I find a penalty of $100 appropriate for this violation.

2. Citation No. 3538761

I.

On November 2, 1990, Arthur Wooten, an MSHA inspector, conducted an inspection at Mine No. 26, and found that a readily visible warning device or a physical barrier was not installed to impede travel beyond permanent roof support at the 53 north 0 point face area of the 12-8 working section. According to Wooten, an area of approximately 10 feet by 15 feet containing 4-6 inches of loose cap coal was unsupported. The inspector issued Citation No. 3538761 alleging a violation of 30 C.F.R. 75.208.

Respondent's does not contest this violation. Based on the testimony of Wooten, who indicated that when he examined the area in question there was no visible warning to impede travel beyond permanent roof support, I find that Respondent herein did violate section 75.208 supra.

II.

Wooten opined that the violation herein was significant and substantial. He indicated in his deposition, of September 25, 1991, in essence, that in order for a violation to be significant and substantial the violation must be one that "could cause" serious injury if it isn't corrected, people have to be in the area, and there has to be a reasonable likelihood an injury. (Exhibit R-C, Page 14). According to Wooten, the situation presented herein will cause an injury of a reasonably serious nature. He indicated that these was a possiblity that someone could go into the area of unsupported roof and thus be exposed to cap coal, and an injury of a reasonably serious nature. He indicated that there were 6 to 8 people in the area.

Jerry Conner, a safety inspector employed by Respondent, accompanied Wooten. Conner indicated that the entry in question was rock dusted 2 feet outby the last row bolts, and there was a curtain on the right side on the last bolt. On cross-examination he indicated that the purpose of rock dusting is not to warn miners of the last open crosscut but rather to seal coal from air. He also indicated that the purpose of a curtain is to blow air to the face, and that it is not used as a warning device to keep miners away from the face.

Alfred Linch, Respondent's manager of safety, indicated that prior to 1988 when section 75.208 supra was promulgated, he trained employees to recognize unsupported face by the presence of gob on the floor, and by the end of ventilation controls. He said that rock dusting is not normally done inby the last set of roof bolts. Accoringly, a clue is this provided as to where the unsupported portion of the roof begins. He said that the last definite indicator of supported roof is the last row of bolts,

and that beyond that point it is dangerous. He also indicated that miners were taught that the face is inby the last open crosscut.

The presence of significant amounts of cap coal in the unsupported roof increased the hazard of a person being seriously injured should he go under this unsupported roof. However, in evaluating whether the violation herein was significant and substantial, it must be determined whether there was a reasonably likelihood that this hazard contributed to by the violation would have resulted in an injury i.e. whether there was a reasonable likelihood that, as a consequence of the lack of a barrier or posted visible warning, that a miner would have entered the unsupported area. My determination in this regard is the same as I set forth above in Docket No. LAKE 91-426, infra A., for the reasons stated there.

Consistent with my Decision in LAKE 91-426 infra A., I find that a penalty of $100 is appropriate for the violation found herein.

C. Docket No. LAKE 91-16

The parties stipulated as follows:

> On August 31, 1990 Inspector Wolfgang Kaak conducted an inspection in Mine No. 26 and found the face of the 9th W entry of working section 12cm-8, I.D. 005, was not posted with a readily visible warning device. The last row of permanent supports, roof bolts, was about 15 feet inby the 5815 survey tag and the face was then an additional 10-12 feet without any permanent supports. The section was idle at this time but, two repairmen and one examiner were on the section. The inspector issued Citation No. 3538909 for a violation of 30 C.F.R. 75.208. (Joint Exhibit 1, Par.10)

Based on the facts set forth in paragraph 10 of the parties' stipulations (Joint Exhibit 1), and based on the fact that Respondent does not contest Citation No. 3538909, I find that Respondent did violate Section 75.208 A, supra. I find, consistent with my decision in LAKE 91-426, infra, A., and find that the violation was not significant and substantial, and that a penalty of $100 is appropriate.

Docket Nos. LAKE 91-57 (Citation Nos. 2819363, and 2819364), LAKE 91-99, LAKE 91-107, and LAKE 91-109

A. Docket No. LAKE 91-57, (Citation Nos. 2819363 and 2819364)

The parties stipulated as follows:

On October 16, 1990, Inspector Mark Eslinger conducted an inspection in Mine No. 24 and found that a golf cart was being charged at the 12CM3 intake escapeway. Two repairmen were working on the section and Steve Vercellina, (Marcilleno) Underground mine manager, was also present on the section (sic). The golf cart was located in the 7th west entry off the 1-10 main north. The inspector issued Citation No. 2819363 for an alleged violation of 30 C.F.R. 75.1105. (Joint Exhibit 1, Par. 17)

B. Docket No. LAKE 91-99

The parties stipulated as follows:

On December 12, 1990 Inspector Robert Cross conducted an inspection in Mine No. 24 and found that battery powered golf cart No. 18 was being charged at no. 43 crosscut into the no.2 north belt drive transformer. The inspector issued Citation no. 3536795 for an alleged violation of 30 C.F.R. § 75.1105.

C. Docket No. LAKE 91-109

The parties stipulated as follows: "On January 3, 1991 Inspector Michael Pike conducted an inspection on mine no. 25 and found that battery powered gofer located in proximity to "E" shaft was being charged. The inspector issued Citation No. 3537125 for an alleged violation of 30 C.F.R. § 75.1105." (Joint Exhibit 1, Par. 15)

D. Docket No. LAKE 91-107

The parties stipulated as follows:

On January 3, 1991 Inspector Michael Pike conducted an inspection on mine no. 25 and found that golf cart no. 1 located at no. 26 crosscut on the 14th east travelway of the longwall no. 4 (ID 004) was being charged. The inspector of the longwall no. 3538804 for an alleged violation of 30 C.F.R. § 75.1105. (Joint Exhibit 1, Par. 16)

Respondent and Petitioner further stipulated that the only issue to be decided in Docket Nos. LAKE 91-99, 91-109, 91-107 and 91-57 (Citation Nos. 2819363 and 2819364), is whether 30 C.F.R. § 75.1105 is applicable, and further whether the vehicles involved in these citations were charging stations. The parties do not contest the facts that arose during the conduct of the inspection.

The parties, in addition, stipulated as follows:

> Petitioner and Respondent stipulate that Citation No. 2819363, LAKE 91-57, is representative of the cases before this court and the parties are bound by the courts decision on LAKE 91-57 for LAKE 91-99, LAKE 91-109, LAKE 91-107 and LAKE 91-57. The parties do not waive their right to appeal the courts decision on whether 30 C.F.R. § 75.1105 is applicable. (Joint Exhibit 1, Par.20).

E. Citation No. 2819363 (Docket No. LAKE 91-57)

1. Introduction

Mark Eslinger, a supervisory engineer for MSHA, testified that when he observed the golf cart in question on October 16, 1990, a charger located on the golf cart and "enclosed in metal" (Tr. 218), was plugged into an outlet which was located in a crosscut off the intake escapeway. The golf cart's batteries, located under the seat of the cart, were plugged into the charger. Eslinger tested the air current, and it was revealed that air was flowing down the intake, and was not being vented directly to the return.

According to Eslinger, hydrogen gas which it was released in the charging process is "very explosive" (Tr.207). Thus, according to Eslinger, if the air in the area where batteries are being charged is not vented to the return, in the event of an electrical short, a fire could result endangering persons inby.

The mine in question has designated battery charging station where batteries, removed from equipment, are charged by chargers located at the station. Batteries that are charged at the station and the chargers at the station are larger than the chargers and batteries located on the golf cart.

Eslinger issued Citation No. 2819363 alleging a violation of 30 C.F.R. § 75.1105.

2. Regulation

30 C.F.R. § 75.1105, as petinent, provdes as follows:

> Underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fire-proof structures or area. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return.

3. The golf cart as a battery charging station.

In essence, according to Robert Allen McAtee, Respondent's safety manager for the Old Ben Division, and not contradicted by Eslinger, the installations referred to in the first sentence of Section 75.1105 supra are primarily permanent in nature. Hence, Respondent argues that accordingly the term "battery charging stations", is limited to those that are permanent in nature. However, there is no indication in the legislative history of Section 311(c)[2] of the Federal Mine Safety and Health Act of 1977 (the 1977 Act) of any intent to limit the term "battery charging station" to only those that are permanent.

The wording of Section 311(c) of the 1977 Act is identical to that found in Section 311(c) of the Federal Coal Mine Health and Safety Act of 1969 ("the 1969 Act"). The Report on the Committee on Labor and Public Welfare which accompanied S.2917, the Senate version of the bill that subsequently became the 1969 Act, in the section by section analysis of the bill's provisions, evidences congressional intent with regard to section 212(c)[3] to "...reduce the possible fire hazards with accompanying inherent dangers to human life and property." (S. Rep. No. 91-411, 91st Cong., 1st Sess. (1969), reprinted in Legislative History Federal Coal Mine Health and Safety Act at 78). ("Legislative History")) Further, the explicit Congressional concern with regard to the specific hazard section 311(c) supra is to guard against is expressed as follows: "In the event a fire should occur in one of these installations the type of equipment enclosed is of such a nature that considerable smoke and fumes are emitted and therefore should be coursed directly into the return aircourse before endangering human life." (Legislative History, supra at 78).

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[2]Section 75.1105 supra contains the same language as section 311(c) of the 1977 Act

[3]Section 212(c) contains language identical to that found at section 311(c) of the the 1969 Act.

Hence, the gravamen of congressional concern was not for the hazards encountered in permanent installations, but rather the need to vent air directly into the return from the type of equipment whose nature is such that "considerable smoke and fumes are emitted." This concern would clearly encompass the situation presented herein, i.e., a battery being charged on a mobile vehicle. According to Eslinger, such a procedure emits hydrogen, an explosive gas, in the same fashion that such gas is released when batteries are charged at a "permanent station". There is insufficient evidence in the record to permit a conclusion that the hazard of such an emission is less when batteries are charged on a vehicle, than when batteries are charged at a permanent station.

Further, the Conference Report on the 1969 Act in its section by section analysis, states with regard to Section 311(c) that it "...provides for fire-proof structures or areas that house certain underground equipment. It also requires that all other underground structures be of a fire-proof construction. Also, air current use to ventilate these structures or areas shall be coursed directly into the return." (Legislative History supra at 1134). Hence the expressed Congressional concern is for those structures or areas that house certain equipment. Webster's defines "house" as follows: "...3: to serve as a shelter, 4: CONTAIN". Hence the common meaning of the term house does not have any connotation of permenance. Thus, I conclude that there is an absence of any Congressional intent to limit the scope of Section 311(c) to only permanent installations.

The first sentence of Section 75.1105 supra requires as pertinent, that "battery-charging stations" be housed in fire proof structures or areas. Neither the 1977 Act, nor the 1969 Act, nor the regulations set forth in volume 30 of the Code of Federal Regulations, define any of the relevant terms of section 75.1105 supra such as "battery charging stations", or "electrical installations". Hence, reliance is placed on the common meaning of these terms. Websters defines "station" as ...2: the place or position in which something or someone stands or is assigned to stand or remain." "Stand" is defined as: "...(9b) to occupy a place or location." Webster's defines "occupy " as ...2a: to fill up (a place or extent)." Hence the common usage of the term "station" does not include a connotation of permanence. Thus, I conclude that a golf cart, when parked, i.e., standing in a certain place and having its battery charged, is considered a "station", and as such is within the purview of the first sentence of Section 75.1105 supra.

4. The golf cart was an area enclosing an electrical installation.

The second sentence of Section 75.1105 supra requires, that "air currents used to ventilate structures or areas enclosing

electrical installations shall be coursed directly into the return."

The Senate Report, Legislative History supra at 78, in its analysis of 212(c) of the Senate bill which became Section 311(c) of the 1969 Act states as follows:

> This section provides for certain underground equipment that could cause fires if not functioning properly to be placed in fireproof structures. Air that is used to ventilate the structure and which might contain noxious fumes must be passed directly to the return air.
>
> Experience has shown that such a requirement will reduce the possible mine fire hazards with accompanying inherent dangers to human life and property. In the event a fire should occur in one of these installations the type of equipment enclosed is of such a nature that considerable smoke and fumes are emitted and therefore should be coursed directly into the return aircourse before endangering human life.

Thus, as explained in the Senate Report, Legislative History, supra, at 78, the "installations" that were of a concern to Congress are those that enclose the type of equipment that are of "such a nature that considerable smoke and fumes are emitted..." Hence, since hydrogen, an explosive gas, is released when batteries are hooked up to a charger on the golf cart, it is consistent with Congressional concern to hold that the smoke and fumes thus produced should be coursed directly to the return.

It next must be analyzed whether the golf cart in question, when parked for the purpose of having its batteries charged by the charger on the cart, is considered an "electrical installation" within the purview of the second sentence of Section 75.1105, supra. Reliance is placed on the common usage of the term "installation". "Installation" is defined in Webster's as follows: "... 2(a): something that is installed for use". "Install" is defined in Webster's as follows: "... 3: to set up for use or service". "Set up" is defined in Webster's as follows: "...5(b): to assemble the parts of an erect position for use or for operation." Hence, once the golf cart in question is set up to be used to facilitate the charging of batteries i.e., the cart is parked and the on-board charger, is hooked-up to and charging the batteries, it is clearly an installation.

An alternative analysis, is that the second sentence of Section 75.1105, supra is to be read in connection with first sentence (See, Clinchfield Coal Co., 4 FMSHRC 465, at 467 (Judge Melick, 1982), and that the term "electrical installations" in the second sentence refers to those set out in the first sentence. Hence, air currents ventilating an area enclosing an

electrical installation i.e., a battery charging station, shall be coursed directly into the return. (See U.S. Steel, 5 FMSHRC 1577, at 1579 (Judge Broderick) (1983). Thus, since the golf cart in question was being used as a battery charging station (See E,(2) infra), the air currents in the area in which it is located shall be coursed directly to the return (Section 75.1105, supra). Since it is not contested that the air in the air currents in the area where the golf cart was parked was not being coursed to the return it is clear that section 75.1105 has been violated.

I find that a penalty of $20 is appropriate for each of the two citations in Docket No. LAKE 91-57, and for each of the violative conditions cited in Docket Nos. LAKE 91-99, LAKE 91-107, and LAKE 91-109.

Docket Nos. LAKE 91-57 (Citation No. 3538517), LAKE 91-70, (Citation No. 3220619) and LAKE 91-87 (Citation 3220799)

A. Docket No. LAKE 91-57

The parties stipulated as follows:

On October 2, 1990 Inspector Robert Montgomery conducted an inspection in mine No. 24 and found that the oxygen content in the No. 1 West Bleeder entry from the No. 3 crosscut inby to the upper corner was less than 19.5 volume per centum. The lowest measurement 18.2 volume per centum at the No. 9 crosscut an air sample bottle was collected. There are air operated pumps in this entry. This is the active bleeders for the long wall P 16 off the North entries. The inspector issued Citation No. 3538517 for an alleged violation of 30 C.F.R. § 301. (sic) (Joint Exhibit 1, Par.21)

B. Docket No. LAKE 91-87

The parties stipulated as follows:

On November 27, 1990 Inspector Robert Cross conducted an inspection in the No. 24 Mine and found that the 1st west bleeder off the 2 main north entry was not being ventilated by a direct current of air containing not less than 19.5 per centum of oxygen. At No.6 crosscut the oxygen content measured 18.8 per centum. An air samples was collected to substantiate this citation. The inspector issued Citation No. 3220799 for an alleged violation of 30 C.F.R. § 75.301. (Joint Exhibit 1, Par.22)

C. Docket No. LAKE 91-70

I.

The parties stipulated as follows:

> On September 14, 1990 Inspector Robert Stamm conducted an inspection in Mine No. 26 and found that the 16 north active longwall 2 bleeder entry was not being ventilated by a direct current of air containing not less than 19.5 per centum of oxygen. At a location 60 feet outby survey station 710 feet the oxygen content measured 18.6 per centum. The inspector issued Citation No. 3220619 for an alleged violation of 30 C.F.R. § 301. (Joint Exhibit 1, Par.23)

The cited standard, 30 C.F.R. § 75.301, provides in part as follows:

> All active workings shall be ventilated by a current of air containing not less than 19. volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases. ...

Essentially, it is not contested that the various oxygen readings cited in the citations at issue, were obtained in bleeder entries which are part of the bleeder system. The readings obtained are not at issue, and the only issue for resolution is whether the area in which readings were taken i.e. within a bleeder entry is to be considered, "active workings".

The parties further stipulated as follows:

> Petitioner and Respondent stipulate that LAKE 91-87 and 91-70 are representative of all the cases involving whether 30 C.F.R. § 75.301 is applicable. The parties further stipulate that the courts decision shall be applicable to LAKE 91-57, Citation No. 3538517, LAKE 91-87 and LAKE 91-70. The parties reserve the right to appeal the courts decision on whether 30 C.F.R. § 75.301 is applicable.

II.

Testimony adduced by petitioner's witness Robert Stamm, and Respondent's witness Jeffrey Bennet tends to establish that, once a week, at least one of the bleeder entries is traversed by a miner in order to obtain methane readings at an evaluation point located in bleeder entry. Also, one of the bleeder entries in question contained water pumps. Eslinger indicated that one of

Respondent's pumpers had told him that he went into the entry daily to check the pumps. Thus, it is Petitioner's position that the entries in question should be considered active workings, as miners are required, on a regular basis, to traverse them in order to work. Petitioner further argues that, accordingly, if these entries are not to be considered active workings, and the quality of the air is not to be checked, then the miners traversing these entries would be subject to the hazards of exposure to inadequate oxygen or, harmful gases. Also, Petitioner argues that if miners do not go into these entries to maintain water pumps, then accumulated water might not be pumped out. Accordingly, there is a risk that water in the entries might accumulate to the point where the water would be of such a quantity as to prevent methane gas from escaping from the gob, thus creating a potentially explosive atmosphere.

The issue raised in this case has already been litigated before three of the Commission judges. In U.S. Steel Corp., 6 FMSHRC 291 (1984), Judge Koutras was presented with the issue as to whether carbon dioxide readings an excess 0.5 percent taken at a bleeder evaluation point were violative of of Section 75.301, supra. Judge Koutras, concluded that the Operator's argument was sound and logical that "... when read together with the other standards found in part 75, a bleeder entry is not active workings ... ." (6 FMSHRC, supra at 307) Further, Judge Koutras found, in essence, that the fact that a certified examiner must travel to the bleeder evaluation points once a week to make an inspection, does not place these point within the purview of Section 75.301 supra. In Rochester and Pittsburgh Coal Co., 11 FMSHRC 1318 (1989), I was presented with the same issue and concluded that Judge Koutras' decision was well founded, and chose to follow it, concluding that a bleeder system is not a part of the active workings of a mine. In Rusthon Mining Co., 11 FMSHRC 1506 (1989), this same issue was presented to Judge Melick who decided to follow U.S. Steel, supra, and Rochester and Pittsburgh Coal Co., supra and found that "... bleeder evaluation point No. 9 here cited is not within the [active workings] of the subject mine". (Rusthon, supra at 1507).

I choose to follow my previous decision in Rochester and Pittsburgh Coal Co., supra, inasmuch as it was based on the well founded decision of Judge Koutras in U.S. Steel Corp., supra and was followed by Judge Melick in Rusthon, supra. I do not find Southern Ohio Coal Co. v. FMSHRC, (Civ. No. 90-1827, unpublished decision, August 14, 1991, 4th Cir.) cited by Petitioner to be relevant to a disposition of the issues at bar. In Southern Ohio Coal Co., supra the issue presented was whether the operator violated 30 C.F.R. § 75.400 which precludes an accumulation of coal in "active workings". The Court, in Southern Ohio, supra, analyzed the evidence of record, and found that there was substantial evidence to support the finding of the Commission

that the area cited was one where miners regularly work or travel, and was thus in an "active working". In Southern Ohio, supra the Court was not presented with the specific issue herein i.e. whether a bleeder entry is to be considered within the purview of "active workings." Hence it is not relevant to a disposition of the issues presented herein.

Inasmuch as areas cited for non-compliance with section 75.301 supra, were in bleeder entries and not within active workings, Respondent herein did not violate Section 75.301 as charged. Therefore, in Docket No. LAKE 91-57, Citation No. 3538517 is to be VACATED, in Docket No. LAKE 91-70, Citation No. 3220619 is to be VACATED, and in Docket No. LAKE 91-87, Citation No. 3220799 is to be VACATED.

Docket No. LAKE 91-58 (Citation Nos. 3538568 and 3538569)

At the hearing Petitioner moved for approval of the parties' agreement to settle the issues raised by the issuance of these citations by having them amended to cite a violation of 30 C.F.R. § 75.1714-3(a), and affirming the proposed penalty of $20 for each violations cited in these citations. The motion is granted based on the representations made by counsel at the hearing on the motion. It is concluded that the parties' settlement and the penalties agreed upon are appropriate under the Act.

Docket No. LAKE 91-88

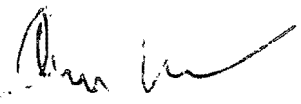
At the hearing, Petitioner indicated that Citation Nos. 3539422 and 3539428 were VACATED. Based upon the representations of counsel, I conclude that the vacation of these citations was proper, and accordingly Docket No. LAKE 91-88 is to be DISMISSED.

Docket No. LAKE 91-112

At the hearing, Petitioner indicated that the parties had agreed to settle this case by reducing the proposed penalty from $345 to $75. Based on the representations and documentation submitted at the hearing, and considering the specifics of the violation set forth in the issued citation, I conclude that the proffered settlement is appropriate under the terms of the Act. Accordingly the motion to approve settlement is GRANTED.

ORDER

It is ORDERED that Citation Nos. 3220508, 3539435, 3538629, and 3538761, be amended to reflect that the violations alleged therein were not significant and substantial. It further ORDERED Citation Nos. 3538517, 3220619, 3220799, 3539422, and 3539428 be VACATED. It is further ORDERED that Docket Nos. LAKE 91-70, LAKE 91-87, LAKE 91-88 be DISMISSED. It is further ORDERED that Citation No. 3538909 be amended to reflect the fact that the violation alleged therein was not significant and substantial. It is further ORDERED that Respondent pay $690 within 30 days of this decision as civil penalty for the violations found herein.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DEC 19 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JOHN VAN ALLEN, Complainant	:	DISCRIMINATION PROCEEDING Docket No. SE 91-543-DM Noralyn Mine & Mill
v.	:	
IMC FERTILIZER, INC., Respondent	:	

DECISION

Appearances: Glenn M. Embree, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia for the Complainant;
Daintry E. Cleary, Esq., Holland & Knight, Tampa, Florida, for the Respondent.

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor on behalf of John Van Allen, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging that IMC Fertilizer, Inc., (IMC) suspended Mr. Van Allen on February 9, 1990, in violation of section 105(c)(1) of the Act. [1/] More particularly

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[1/] Section 105(c)(1) of the Act provides as follows:
"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be

it is alleged that Van Allen, employed by IMC as an electrician, refused on February 9, 1990, to install a NEMA Type 1 electrical junction box in an unsafe location. [2]/ Van Allen maintains that as a result of such refusal he was unlawfully suspended from work for 35 hours. He seeks expungement from his employment records of reference to this suspension and back pay and interest for lost wages. The Secretary also seeks a civil penalty of $1,500 for the alleged violation.

Van Allen has had several years of vocational training including a 2-year program at a technical school in electrical subjects. He is a licensed electrician in Polk County, Florida, and in the City of Lakeland, and has been performing electrical work for about 9 years. As an electrician for IMC, he was sent on February 9, 1990, to install a junction box on a high voltage motor in the Noralyn Mill Flotation Plant. A junction box is an enclosure that provides mechanical protection for electrical connections. In this case it was used to enclose a capacitor and wire leads exiting the motor and connecting with the conduit and wiring.

In the flotation plant impurities are separated from the phosphate product. It is a five to six story structure with open and partially steel grated floors. The mine product enters the plant at an upper level and sand and other impurities settle to the bottom of the flotation tanks while the phosphate ore floats to the top. When the plant is in operation large volumes of water are used and water pours through the gratings to the area below -- including the area in which the junction box was to be installed. The area is also periodically cleaned with water from high pressure hoses. There seems to be general agreement that the area is therefore usually wet.

On February 9, 1990, the plant was on a maintenance day and not in operation. At the assigned location the motor was also locked out by Van Allen so that it could not have been accidently energized. Van Allen then removed the existing NEMA Type 4 junction box. He then noticed that the replacement box he was provided was not what he deemed to be of the correct NEMA classification. It was a NEMA Type 1 box having openings in its

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fn. 1 (continued)
instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."

[2]/ NEMA (National Electrical Manufacturers Association) classifications explained in Exhibit C-2 provide a uniform industrywide system of classification for electrical enclosures.

corners and was not waterproof. According to Van Allen if water and feed material were to accumulate around the open lugs and if a ground should become broken, an employee touching the motor or box could be electrocuted.

Van Allen testified that he had been trained in the NEMA classifications and observed that a NEMA Type 1 box is an indoor box which should not be exposed to rain, dust, or water conditions. A NEMA Type 4 box on the other hand is designed for outdoor use and for wet conditions. Concerned about the use of a NEMA Type 1 box under the circumstances, Van Allen contacted electrical foreman Rainer Theiss, and advised him that the NEMA Type 1 box was not suitable for the noted location and that he needed a NEMA Type 12 box. [3]/ Theiss did not then order Van Allen to install the Type 1 box but told him only to continue to prepare the box for installation.

Subsequently, when Van Allen went to the electrical shop for parts, he met with Steve Davis, the IMC maintenance superintendent in Davis' nearby office. After explaining the problem to Davis, Davis agreed that Van Allen could use anything to make the NEMA Type 1 box safe in Van Allen's opinion, apparently suggesting the use of tape and a sealant. Van Allen admits that he could thereby have made the box waterproof but agreed to do this only on a temporary basis until such time as a NEMA Type 4 or Type 12 box could be obtained and installed. According to Van Allen, he would thereby "give them the opportunity to get their plant back into operation and a correct box [could] be later installed." Van Allen refused to do this however, when Davis purportedly stated that it would have to be on a permanent basis.

Curtis Wilson, an electrician's helper, was assisting Van Allen when the issue arose. After Van Allen refused to install the NEMA Type 1 box, he told Wilson to locate electrical foreman Theiss. According to Wilson when Theiss later arrived, Theiss told Van Allen that it was the correct box and ordered him to install it. Van Allen refused and asked for a "safety man,"

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[3]/ It is not disputed that a NEMA Type 12 box, just as a NEMA Type 4 box, would provide water protection under the NEMA classifications. See Exhibit C-2. None of the classifications would appear on their face to be applicable to the enclosure at issue herein since it was for a 2300 volt motor and the cited standards are limited to enclosures for electrical equipment of "1000 volts maximum." It is also noted that compliance with NEMA standards is not required at this plant, that the Federal Mine Safety and Health Administration (MSHA) does not enforce the NEMA standards and nothing in the cited standards prohibits the installer of a Type 1 enclosure from providing his own sealant and waterproofing.

purportedly a procedure under the union contract. Van Allen then agreed to "prep" the box but still refused to install it.

Wayne Scott, another IMC electrician, accompanied Theiss to this meeting with Van Allen. He overheard Van Allen state that he would perform any other work but would not install the NEMA Type 1 box. Jim Mathis, another IMC electrician, also heard the conversation between Van Allen and Theiss. Mathis added that Van Allen also stated during the conversation that if Theiss insisted that he install the box, he wanted a "safety man." Theiss then told Mathis to leave the area and he did.

On February 22, 1990, Harry Verdier, an inspector for the Federal Mine Safety and Health Administration (MSHA), examined the NEMA Type 1 junction box that had later been installed at the location at issue and observed that it had been caulked in an apparent attempt to waterproof it. He cited the box under the mandatory standard at 30 C.F.R. § 56.12030 because he thought in a curious shift in the burden of proof, that it could not be proven to be waterproof. [4]/ Even though he apparently believed the box not to have been waterproof he nevertheless did not believe that the cited box created either an "imminent danger" or a "significant and substantial" hazard but rather concluded that an injury or illness was "unlikely" (See Exhibit C-5A). [5]/

IMC Maintenance Superintendent Steve Davis is a graduate electrical engineer and has significant experience in electrical installations and maintenance. According to Davis, a junction box is merely an enclosure for the leads from the motor and to the conduit from the electric starter. It provides mechanical protection for the wires. According to Davis, there was no need for a waterproof NEMA Type 4 or 12 box at the cited location and he noted that in any event whatever type box was used it would be mounted onto the motor with only a sealant for waterproofing. Thus it is implied that if a sealant was adequate for mounting, it should also be adequate to waterproof the box itself-- as was done here. Davis also opined that the cited box was satisfactory in any event since it was caulked, sealed and watertight. He also noted that if water should accumulate in a junction box nothing would happen in any event because the connections inside were protected with waterproof tape.

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[4]/ 30 C.F.R. § 56.12030 provides that "[W]hen a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized."

[5]/ The citation was subsequently settled by agreement in which IMC neither admitted nor denied the violation (Exhibits R-6 and R-7).

Davis testified that around 11:00 a.m., on February 9, Theiss called advising him that Van Allen was refusing to install a junction box and had become belligerent insisting that he would not install "this piece of shit." Davis testified that before making a decision on the issue, he wanted to talk to Van Allen and determine for himself what the problem was. Subsequently Van Allen came into his office and restated his refusal to install the NEMA Type 1 box. Davis testified that he told Van Allen that with their taping standards, it would be weather proof and told him to therefore go ahead and install the box. Van Allen continued in his refusal and asked for the "third step of the grievance procedure." Davis then conferred with electrical superintendent Jim Adair, also an electrical engineer. Adair suggested that Van Allen be permitted to make the box watertight to his own satisfaction.

Davis then returned to his office and presented Van Allen the option that "if you feel like it needs to be a watertight box, I'll buy you the materials or whatever you want to make this a watertight box." According to Davis, Van Allen responded that "he did not know if that was good enough" and continued his refusal to install the box. According to Davis, both Jim Adair and Bob Myers, another electrical engineer he consulted, found that using the NEMA Type 1 box would be safe under the circumstances. Davis testified that after obtaining these additional opinions, he again met with Van Allen and told him that he was being suspended for his refusal to install the junction box.

Rainer Theiss, IMC electrical foreman testified that February 9, was a scheduled repair day and that the electrical power was accordingly disengaged. According to Theiss, Van Allen first contacted him by telephone advising him in reference to the Type 1 box that "I don't mount that piece of shit." When they later met, Van Allen told him that it was not the right box and that he would not mount it. Theiss acknowledged that Van Allen expressed that it was a safety concern and admitted that he did not know the difference between the NEMA Type 1 and NEMA Type 4 classifications.

Marvin Wolgast the IMC industrial relations manager testified that Van Allen was given six points for discipline as a result of his refusal to install the junction box and, as a result of a three-point prior disciplinary record, was subject to suspension.

In order to establish a prima facie violation of section 105(c)(1) the Complainant must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his suspension was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980) rev'd on other

grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated by the protected activity. Failing that, the operator may defend affirmatively against the prima facie case by proving that it was also motivated by unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra, (the so-called Pasula-Robinette test). See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983).

Within this general framework, it is also well-established that in certain circumstances a miner's refusal to work constitutes protected activity. Pasula, supra, Robinette, supra; Miller v. FMSHRC, 687 F.2d 1994 (7th Cir. 1982); Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988). The genesis for the recognition of certain work refusals as protected activity is the Senate Report on the 1977 Act, which endorsed a miner's right to refuse "to work in conditions which are believed to be unsafe or unhealthful." S. Rep. No. 91, 95th Cong., 1st Sess. 35 (1977).

In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." Robinette, 3 FMSHRC 812; Gilbert v. FMSHRC, 866 F.2d at 1439. The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. Robinette, 3 FMSHRC at 807-12; Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993. A good faith belief "simply means honest belief that a hazard exists." Robinette at 810. This requirement's purpose is to "remove from the Act's protection work refusals involving frauds or other forms of deception." Id. The Commission has rejected a requirement that miners who refuse to work must objectively prove that hazards existed. The miner must simply show that his perception was a reasonable one under the circumstances. Haro v. Magma Copper co., 4 FMSHRC 1935 (November 1982); Robinette, supra. In determining whether the miner's belief was reasonable under the circumstances, the judge is to look to the miner's account of the conditions precipitating the work refusal, and to the operator's response in order to evaluate the relevant testimony as to "detail, inherent logic and overall credibility." Robinette, 3 FMSHRC at 812. The perception of a hazard must be viewed from the miner's perspective at the time of the work refusal. Secretary on behalf of Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529 (September 1983); Haro, supra. The Commission has eschewed the setting of a bright line threshold of severity in determining "how severe a hazard must be in order to trigger a miner's right to refuse work" Pratt v. River Hurricane Coal Co. at 1533, instead it has preferred to resolve that issue on a

case-by-case basis. Id., See also, Price v. Monterey Coal Co., 12 FMSHRC 1505 (1990).

At issue herein is a work refusal based on an asserted safety hazard to miners other than the complainant himself. In Secretary on behalf of Philip Cameron v. Consolidation Coal Co., 7 FMSHRC 319 (March 1985), aff'd sub nom. Consolidation Coal v. FMSHRC, 795 F.2d 364 (4th Cir. 1986), the Commission held that "in certain limited circumstances," the protection of section 105(c) of the Mine Act does attach to a work refusal premised on hazards to others:

> Therefore, we hold that a miner who refuses to perform an assigned task because he believes that to do so will endanger another miner is protected under section 105(c) of the Mine Act, if, under all the circumstances, his belief concerning the danger posed to the other miner is reasonable and held in good faith. Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1418 (June 1984), citing Secretary on behalf of Robinette v. United Castle Co., 3 FMSHRC at 807-12. We emphasize, however, the need for a direct nexus between performance of the refusing miner's work assignment and the feared resulting miner's work assignment and the feared resulting injury to another miner. In other words, a miner has the right to refuse to perform his work if such refusal is necessary to prevent his personal participation in the creation of a danger to others. Of course, as with other work refusals, it is necessary that the miner, if possible, "communicate, or at least attempt to communicate, to some representative of the operator his belief in the . . . hazard at issue," Sammons v. Mine Services Co., 6 FMSHRC 1391, 1397-98 (June 1984) (emphasis added), quoting Secretary on behalf of Dunmire and Estle v. Northern Coal Co., supra, 4 FMSHRC at 133, and that the refusal not be based on "a difference of opinion -- not pertaining to safety considerations -- over the proper way to perform the task at hand." Sammons, 6 FMSHRC at 1398.

I find, under the circumstances of this case, that while Van Allen could otherwise have properly asserted a work refusal premised on a hazard to others, his work refusal was not a reasonable one nor one made in good faith and therefore was not protected by section 105(c) of the Act. Consequently, IMC did not violate the Act by suspending Van Allen under the terms of its disciplinary policy. I reach this conclusion initially on the basis that the "hazard" presented to Van Allen was not sufficiently serious or imminent to support the credibility of a reasonable and good faith belief in a hazard sufficient to warrant his continued refusal to comply with orders to install the NEMA Type 1 junction box.

While the Respondent's experts denied there would have been any hazard the Complainant himself described what appears to be an unlikely scenario necessary to create a hazard in the following colloquy:

> THE COURT: And what would happen if water got into the box during operation of the plant?
>
> THE WITNESS: A mixture of water and feed on a delta system, it could build up to one side of the capacitor that was mounted -- would be mounted inside of it.
>
> THE COURT: You say feed, f-e-e-d?
>
> THE WITNESS: Yes, sir, phosphate feed.
>
> THE COURT: That's the material that you say is dripping down from the upper parts of the structure?
>
> THE WITNESS: Correct.
>
> THE COURT: All right. And it's mixed with water?
>
> THE WITNESS: Correct.
>
> THE COURT: All right. And that could do what?
>
> THE WITNESS: It could cause it to wash into the box, build up to one side, and hit the open lugs of the capacitor.
>
> THE COURT: Open lugs, did you say?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: What would happen then?
>
> THE WITNESS: At that point as long as the frame ground was good in the motor, really nothing, as long as it only had one leg.
>
> If somebody came and broke that frame ground for any reason, then he would become the potential. He would get between the 2300 and go to ground. And it could -- I would say would --
>
> Q. (By Mr. Embree). It would do what?
>
> A. It would do a lot of damage to him, if not kill him. It would probably become fatal to him. (Tr. 52-53).

The necessary combination of events to create a hazard is even more remote when considering the credible testimony of IMC expert, electrical engineer Davis. Davis testified that any water dripping into the Type 1 box would drain right through because of its holes and that the leads inside would customarily be sealed with waterproof tape. Indeed even the MSHA inspector called as a witness by the Complainant, who cited the subsequently installed Type 1 box as not being waterproof, concluded that the condition was not "significant and substantial" and that injuries were "unlikely."

However, even assuming, arguendo, that Van Allen initially entertained a good faith and reasonable belief in a potential hazard, upon communicating such information to IMC officials the perceived danger was addressed by IMC. According to Van Allen himself, he could have made the NEMA Type 1 box waterproof and presumably safe to his satisfaction in order to enable the plant to resume operations. Indeed Maintenance Superintendent Davis offered Van Allen the opportunity to get whatever supplies he deemed necessary to make the box safe. Van Allen's refusal to do this shows clearly that his continued work refusal then was neither reasonable nor made in good faith. The Commission has made clear that a work refusal cannot be based on a mere difference of opinion not pertaining to safety considerations, over the proper way to perform the task at hand i.e. providing a water proof junction box. Sammons, 6 FMSHRC at 1398.

Under the circumstances, it is clear that Van Allen did not then entertain a good faith or reasonable belief in a hazard to warrant his continued work refusal. Accordingly, the Complaint herein must be dismissed.

ORDER

The Complaint of Discrimination is dismissed.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 20 1991

UNITED MINE WORKER OF AMERICA, ON BEHALF OF **DENNIS M. BLOUIR** Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. PENN 91-1395-D
v.	:	PITT CD 91-08
U.S. STEEL MINING COMPANY, INCORPORATED, Respondent	:	Cumberland Mine

ORDER OF DISMISSAL

Before: Judge Weisberger

Complainant has filed a statement in which he indicates his intention to withdraw the complaint. Accordingly, pursuant to 29 C.F.R. § 2700.11, this case is **DISMISSED**.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

DEC 20 1991

NICHOLAS RAMIREZ, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 91-1618-D
	:	MSHA Case No. HOPE CD 91-07
JOSHUA INDUSTRIES, INCORPORATED, Respondent	:	No. 32 Mine

DECISION AND FINAL ORDER

Before: Judge Melick

By decision dated November 25, 1991, the Respondent herein was held to be in default. Accordingly, if it has not already done so, Respondent is directed within 30 days of the date of this decision, to pay Complainant $3,123.62 in back pay plus interest in accordance with this Commission's decision in Clinchfield Coal Co., 10 FMSHRC 1493 (1988).

Gary Melick
Administrative Law Judge
703-756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
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DEC 23 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 90-173-M A.C. No. 34-01477-05504
v.	:	Corbin Mine
DANACO EXPLORATION INTERNATIONAL, Respondent	:	

DECISION

Appearances: V. Denise Duckworth, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, TX 75202 for Petitioner;
Donald Cook, Pro Se, for Respondent.

Before: Judge Morris

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

A hearing on the merits was held in Oklahoma City, Oklahoma, on October 23, 1991. The parties waived the filing of post trial briefs.

Stipulation

Danaco agrees the Administrative Law Judge has jurisdiction to hear the case. (Tr. 78).

Citation 3447756

This citation alleges Danaco violated 30 C.F.R. § 56.12001.[1]

---

[1] § 56.12001 Circuit overload protection.

Circuits shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity.

DANIEL R. LAMBERT, is an MSHA inspector experienced in electrical matters. On June 18, 1990, he inspected Danaco. The quarry operated three conveyors and a rock breaker. (Tr. 7-11, 40). Mr. Lambert found the fuse for the 7 1/2 horsepower air compressor was too large. This determination was made by referring to Article 430-51 of the National Electrical Code (NEC). (Ex. C-5). The NEC, used by the mining industry, sets forth the proper size device to put in the circuit for the size of the motor. A 30-amp time-delay fuse was being used and a 19.25-amp would have been proper. A maximum size fuse of 24.75 could be used in accordance with the NEC. (Tr. 11-13). As a result, the circuits were not protected against excessive overload. A short circuit from a ground fault could create a fire, burns, shock and an electrocution hazard existed. (Tr. 14).

Donald E. Cook, an owner of Danaco, confirmed that the fuse for the motor to the air compressor was too large as it was a 30 amp fuse. (Tr. 77). For this reason, the citation should be affirmed since the circuits were not protected against excessive overloads as required by § 56.12001.

A portion of Mr. Cook's evidence deals with the fact that this equipment was equipped with C11.3B heaters. If the heater, which acts as a thermostat, is subject to excessive current it will heat up and automatically shut off the equipment. (Tr. 71, 72, 77).

Mr. Cook argues it is better to have the equipment shut off than to deal with the whole circuit with "live juice" in it. (Tr. 77).

The regulation § 56.12001 requires "fuses" of the "correct type." The effect of the heaters is not relevant when considered in relation to the contested regulation.

Since the circuit was not protected against overload, the citation should be affirmed and a civil penalty assessed.

Citation No. 3447757

In examining the long conveyor belt, Inspector Lambert found a fuse that was too large. Instead of the 30 amp time-delay fuse, a 19.25 amp fuse (or the closest round number of 20-amp) should have been used. The largest size fuse permitted would have been 24.75. (Tr. 17-20).

In Mr. Lambert's opinion, the circuits were not protected against excessive overload in violation of 30 CFR § 56.12001. [2]

DONALD COOK, Danaco's owner, indicated he had C11.3Bs in the equipment. Its 10.4 amps was adequate for the equipment's size and safe. (Tr. 77).

The situation here is similar to the previous citation. A 30 amp fuse was in place whereas Danaco should have used a 20-amp fuse. The circuits were not protected against excessive overload and I reject Mr. Cook's contrary opinion. Mr. Cook's use of the heaters as a safer means of protection cannot prevail as a defense as to the violation of this regulation.

Citation No. 3447757 should be affirmed and a civil penalty assessed.

Citation No. 3447758

This citation alleges a violation of 30 CFR § 56.12041. [3]

Mr. Lambert issued this citation when he determined that the starter switch was too small for the size motor being used for the hydraulic pump of the rock cutter. (Tr. 22-28). The starter was rated at 25 horsepower and it was being used on a 30 horsepower motor. Printed on the starter was "25 H.P." and size number 2. Printed on the motor name plate was "30 H.P."

The starter makes and breaks the electrical circuit to the motor. Danaco's failure to comply with the limitations on the equipment violates custom and practice in the industry.

By way of a defense Mr. Cook denied the starter was inadequate. He indicated he is familiar with Danaco's electrical equipment. He was using a GE No. 2 magnetic starter. It is rated for a maximum of 45 amps and goes to a 25 horsepower motor.

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2 Cited supra fn 1

3 § 56.12041 Design of switches and starting boxes.

Switches and starting boxes shall be of safe design and capacity.

GE recommends it and the NEC will accept it. The part number is C21.4B heaters. That is a 20 amp heater. If there is an excess of 20 amps being put through the starter, the heaters will warm up, expand like a thermostat and shut the entire heater off. This makes the circuit safe without dealing with live current. (Tr. 71, Exh. R-1).

Inspector Lambert indicated the starter switch was too small. But GE recommends it up to 45 amps. Any GE No. 2 starter on the front reads "maximum amps 45." (Tr. 72).

Mr. Cook believed he had half the capacity left after he used 20 amps. (Tr. 73).

I credit Mr. Cook's testimony as he should be familiar with Danaco's electrical equipment. Further, his testimony as to the GE No. 2 starter is uncontradicted. Finally, I concluded such GE equipment capacity was of a "safe capacity" as required by § 56.12041.

Citation No. 3447758 should be vacated.

Citation No. 3447760

This citation alleges Danaco violated 30 C.F.R. § 56.12032.[4]

Mr. Lambert issued this citation when he observed a missing cover plate for a 120 volt lighting outlet. The missing cover plate was located in a circuit breaker panel. The missing plate exposed wiring associated with the circuit breakers.

The cover plate prevents a person from contacting exposed wires. The circuit breakers were similar to those found in most homes but the voltage here was higher.

DONALD E. COOK testified the electrical panel with 6 or 8 circuit breakers is similar to those found in most homes today. If too much current goes through them, they automatically kick off. The wires were not exposed. The circuit breaker was measured at 3 1/2 inches by 2 1/2 inches. (Tr. 68, 70).

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[4] § 56.12032 Inspection and cover plates.

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Mr. Cook agrees the cover plate was missing and technically a cover is required, but it was unlikely anyone would stick a finger on anything "hot." If a miner reached up high to flip the switch he would be standing on a rubber mat. (Tr. 69).

All of the circuit breakers were exposed. (Tr. 70).

The witnesses both agree there was no cover plate on the panel. These facts establish a violation of § 56.12032.

At the hearing, Mr. Cook produced an electrical plug used in the panel. He demonstrated that only a minimal hazard would be involved since it would be difficult to touch the live wires when the electrical plug was in the panel. Danaco's evidence does not excuse the violation. However, it is a factor to be considered in assessing a civil penalty since the uncontroverted evidence reduces the gravity.

Citation No. 3447761

This citation alleges a violation of 30 C.F.R. § 56.12004. [5]

Mr. Lambert issued this citation when he found the conductor (wiring) size was insufficient in accordance with NEC 430-21. (Tr. 33-40, Ex. C-7).

In Mr. Lambert's opinion, the NEC permits full load current plus 125% to determine the necessary amperes. (Tr. 34-35).

Mr. Lambert knew the horsepower of the motor by looking at the nameplate on the motor.

In Mr. Lambert's view, the electrical wiring was insufficient. (Tr. 36).

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[5] 56.12004 Electrical conductors.

> Electrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temperature resulting from normal operations will not damage the insulating materials. Electrical conductors exposed to mechanical damage shall be protected.

According to Mr. Cook, the inspector assumed the motor was 30 horsepower. However, Mr. Cook measured the amperage [6] at full load. The amperemeter indicated it was a 20-horsepower motor. As a result it was well within the limits of the equipment. (Tr. 73, 74).

Mr. Cook used an amperemeter to determine what the motor was drawing. (Tr. 74). The tag on the motor showing the horsepower at 30 was incorrect as the motor had been rebuilt by W.W. Electric in Oklahoma City. (Tr. 75). If it was a 30-horsepower motor it could have a 40-amp full load. If it was a 20-horsepower motor, a full load would be 27 according to the NEC. The amperemeter showed Mr. Cook that all of his connections, starters and wires were legal.

Mr. Cook checked the motor with an amperemeter when he installed it two years ago. He and Inspector Lambert also checked it with an amperemeter on the day of the inspection. (Tr. 74, 78).

The pivotal issue presented here is the horsepower of the motor. Inspector Lambert relied solely on the motor nameplate which showed "30 horsepower."

While Mr. Cook did not unequivocally know the horsepower of the motor he relied on the amperemeter measurement which indicated the motor was 20 horsepower. Mr. Cook checked the motor with an amperemeter when it was installed two years ago, as well as at the time of the inspection.

A motor plate of 30 horsepower would apparently be a contradiction with a designation of "full load amp 27."

Mr. Cook's testimony is unrebutted that the motor had been rebuilt. Further, the amperemeter showed 27 or 28 amps when it was installed two years ago and again at the time of the inspection. (Tr. 78, 79).

In short, I conclude the motor was a 20 horsepower. As a result, the electrical conductors were of "a sufficient size and current-carrying capacity" for the motor as required by § 56.12004.

Citation No. 3447758 should be vacated.

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[6] Amperage: the strength of a current of electricity expressed in amperes. A dictionary of Mining, Mineral and Related Terms, 1968, page 36.

Civil Penalties

Section 110(i) of the Act mandates consideration of six criteria in assessing civil penalties.

Danaco, described as a quarry and a rock breaker with three conveyors, appears to be a small operator and the penalties provided in this order are appropriate.

Inspector Lambert testified the proposed penalties would not affect Danaco's ability to continue in business.

The parties agreed Danaco had a low incidence of prior adverse history. (Tr. 5, 6).

Danaco was negligent in that the incorrect fuses and the missing cover plate in the electrical panel were obvious conditions. Further, the operator should have observed these defects.

The gravity involving the missing fuses was high since an excessive overload could be placed on the electrical system. If a short circuit occurred, fire, shock and electrocution could result.

The gravity involving the missing cover plate is low since it is unlikely that anyone could contact any exposed energized wires.

The operator abated the violative conditions. Danaco is accordingly entitled to statutory good faith.

For the foregoing reasons I enter the following:

ORDER

1. Citation No. 3447756 is **AFFIRMED** and a penalty of $20 is **ASSESSED.**

2. Citation No. 3447757 is **AFFIRMED** and a penalty of $20 is **ASSESSED.**

3. Citation No. 3447758 is **VACATED.**

4. Citation No. 3447760 is **AFFIRMED** and a penalty of $15 is **ASSESSED.**

5. Citation No. 3447761 is **VACATED.**

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 24, 1991

CLIFFORD MEEK, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. LAKE 90-132-DM
v.	:	MSHA Case No. UC MD-90-06
ESSROC CORPORATION, Respondent	:	

DECISION

Appearances: Robert J. Tscholl, Esq., Canton, OH, for Complainant;
John C. Ross, Esq., Canton, OH, for Respondent.

Before: Judge Fauver

This is a discrimination complaint under section 105(c)(1) 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 further findings in the Discussion below:

FINDINGS OF FACT

1. Respondent, Essroc Corporation, [1] has a cement division known as Essroc Materials, Inc., which owns and operates a grinding plant in Stark County, Ohio (hereafter the "Middlebranch Plant") where it grinds mined materials such as limestone and clay, and stores and ships cement, for sales in or substantially affecting interstate commerce. This plant was purchased by Essroc from United States Cement Company on or about February 27, 1990. Upon acquisition, with minor exceptions Essroc used the same plant, equipment, facilities, workforce, management personnel, line of products, etc., as U.S. Cement had used. Only two Middlebranch Plant employees of U.S. Cement were not employed by the Essroc Middlebranch Plant: John Bickel, an injured employee who remained with USC, and the Complainant, Clifford Meek, who was the only USC

[1] Hereafter "Essroc" refers to Essroc Corporation acting through its subsidiary Essroc Materials, Inc.

Middlebranch Plant employee whose application for employment with Essroc was denied.

2. Essroc's acquisition of the Middlebranch Plant was part of its purchase of approximately 70% of the assets of USC, including USC plants in Bessemer, Pennsylvania, Lowellville, Ohio, Toledo, Ohio, and Middlebranch, Ohio.

3. USC's Middlebranch Plant Manager, Marvin Bragg, and Plant Supervisor, Dale Lewis, became the Plant Manager and Plant Supervisor of the Essroc Middlebranch Plant.

4. In mid 1989, Coplay Cement Company (Essroc's predecessor)[2] began acquisition negotiations with USC. By early January, 1990, it was evident that the acquisition of selected assets of USC would take place.

5. Michael Roman, USC's Vice President of Industrial Relations, who was to become Essroc's Manager of Human Resources for the Great Lakes Division, directed USC plant managers at Bessemer, Pennsylvania, Lowellville, Ohio, Middlebranch, Ohio, and Toledo, Ohio to evaluate their hourly employees on forms provided by Essroc.

6. Marvin Bragg, Plant Manager of the USC's Middlebranch Plant, who was to become Essroc's Middlebranch Plant Manager, filled in the evaluation forms on his hourly employees and sent them to Roman. The forms are dated January 26, 1990. Bragg's evaluation form on Meek rated him "Poor" on "Attitude Toward Work & Company," with the following comments:

> This employee has ability to do a lot but is unwilling, his attitude is very close to being insubordinate, also cannot get along with other employees.

7. On January 31, 1990, USC's Middlebranch Plant hourly employees were requested by management to attend a safety meeting with MSHA Inspector Richard L. Jones, around 7:00 a.m. Jones had asked management to arrange the meeting. About 10 or 11 employees attended. Jones said the purpose of the meeting was to discuss any safety or health concerns. A number of employees were nervous about raising such matters, for fear that their remarks would get back to management. The inspector assured them that their remarks would be protected by the Mine Act, and that the company could not retaliate against them. Several employees raised safety concerns, including safety defects in the crane and dust control problems.

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[2]Coplay Cement created Essroc as its subsidiary to own and operate the facilities acquired from USC.

Meek pointed out some electrical hazards. At one point, Meek asked the inspector why the company appeared to know in advance when the inspector was coming for an inspection. As an illustration, Meek described a recent event that gave him concern about prior knowledge of inspections. The inspector became upset at Meek's question and took it as an accusation that he was violating the law. He raised his voice in anger and verbally confronted Meek. Meek decided to leave the meeting at that point. As Meek and his helper were leaving the building, Meek saw the Plant Supervisor, Dale Lewis, and stated, referring to the inspector, "That guy's nuts." Tr. 35.

8. Later that morning, Inspector Jones went to Dale Lewis' office, where he saw Lewis and the Plant Manager, Marvin Bragg. They asked him how the meeting went and he said it was fine with the exception of one employee. The inspector went on to complain about Meek, saying that he accused him of taking a bribe and that he had a bad attitude. After Meek filed a discrimination complaint for not being hired by Essroc, the inspector wrote an account of his meeting with the employees and his conversation with the supervisors. The inspector's written statement differs substantially from the testimony of a number of witnesses in this case. The inspector was subpoenaed by Complainant to testify at the hearing of this case, but MSHA, contrary to the Act, refused to comply with the subpoena. Rather than await enforcement of the subpoena in a United States District Court, Complainant offered in evidence the inspector's written "notes" about his meeting with employees and his later conversation with plant management. The inspector's statement was not contemporaneous with his inspection, was not under oath, and was not subject to questioning under oath. His statement is not convincing to me as compared to the testimony of witnesses at the hearing who were subject to examination and cross-examination.

9. I find that the inspector became angry at Meek and communicated his anger to Meek's supervisors, Lewis and Bragg, in criticizing Meek for his complaint about possible prior knowledge of MSHA inspections.

10. Bragg was concerned about the inspector's angry reaction, and called Michael Roman, USC's Vice President of Industrial Relations. Roman also became concerned, and sent Jim Clark, a USC safety director, to the Middlebranch Plant, to see if he could help assuage the inspector and see that the inspector was not retaliatory toward USC because of Meek's alleged remarks.

11. The inspector conducted an inspection and issued 15 citations. One was a "significant and substantial" citation, which resulted in the crane being shut down for repairs for about a day and a half.

12. After the citations were issued, Dale Lewis, the Plant Supervisor, contacted James Gallentine, an hourly employee, on or about January 31, 1990. He asked him what Meek had said to Inspector Jones at the employees' meeting with the inspector. Lewis told Gallentine that Lawrence Ousky, USC's President, was upset about Meek's remarks to the inspector and wanted to have Meek fired for making the inspector angry.

13. That night, when Meek began his shift, Gallentine took him aside and warned him: "Watch your back. Larry Ousky wants you fired." Tr. 35. Meek asked him "How do you know this?" and Gallentine replied, "Dale Lewis told me. I ain't supposed to tell you so don't say anything. Just watch your back." Tr. 35.

14. Based on Gallentine's warning, Meek started carrying a concealed tape recorder to record any contacts with management. He recorded four of these. Two recordings he found irrelevant, and erased, two he found relevant and retained. They were put in evidence as Sides A and B of a tape cassette, Exhibit C-1.

15. One of Meek's recordings (Side A and the beginning of Side B of Exhibit C-1) is USC Plant Manager Bragg's meeting with hourly employees on February 27, 1990. Bragg told the employees that Essroc was purchasing the plant from USC, that they were being terminated by USC and would have to file a job application with Essroc if they wanted to work at the plant. They were told to apply for the same job they had with USC, if they wanted to work for Essroc, and to return for a meeting the next day.

16. Early the next day, Bragg telephoned Meek and told him it was not necessary for him to come to the February 28 meeting, because Essroc was not going to approve his job application.

17. Meek decided to attend, anyhow, and again carried a concealed tape recorder. When Roman and Bragg saw him in the meeting room (before the meeting), they asked him to talk with them privately, in the foyer. Meek secretly taped this conversation, on Side B of Exhibit C-1, transcribed at pages 54-59 of the transcript. I incorporate Sides A and B of Exhibit C-1 as Findings of Fact as to the statements made by the persons recorded.

18. In mid February, 1990, a team of three Essroc supervisors (David J. Coale, Director of Human Resources, David Repasz, a plant manager of a Coplay Cement plant, and Joseph Gaffney) met with two USC supervisors (Michael Roman and Marvin Bragg) to review the evaluations at the Middlebranch Plant and to select the USC employees to be hired by Essroc at that plant.

19. By the time of the above meeting, it was known by Bragg and Essroc that Bragg would be Essroc's Plant Manager of the Middlebranch Plant, and it was known by Roman and Essroc that Roman would be Essroc's Manager of Human Resources for the Great Lakes

Division, which would include the Middlebranch Plant.

20. Marvin Bragg and Michael Roman were key figures in Essroc's selection of Middlebranch Plant hourly employees, since Bragg would be Essroc's Middlebranch Plant Manager, and Roman would be Essroc's Manager of Human Resources over a multi-plant region that would include the Middlebranch Plant.

21. The key recommendations concerning Essroc's rejection of Clifford Meek's application for employment were those of Marvin Bragg, who told the Essroc supervisors that Meek had repeatedly stated publicly that he could not work for Bragg and who, in Bragg's opinion, had a poor attitude, and of Michael Roman, who supported Bragg's negative recommendation. Bragg and Roman supported their recommendation not to hire Meek with four documents selected from Meek's personnel file and the written evaluation form Bragg had filled out for Essroc.

22. Two of the documents that Bragg and Roman presented at the mid February meeting, selected from Meek's personnel file, are Separation Notices signed by Andy Coccoli, a former USC Plant Manager of the Middlebranch Plant, dated February 13, 1987, and April 24, 1987. These documents contain the following checked items:

From the February 13, 1987, form:

Rating (Check ONE opposite EACH item)	
SKILL:	Good ☐; Fair ☐; Poor ☐
APPLICATION:	Good ☐; Fair ☐; Poor ☐
CONDUCT:	Good ☐; Fair ☐; Poor ☑
PRODUCTION:	Good ☐; Fair ☐; Poor ☐

From the April 24, 1987, form:

Rating (Check ONE opposite EACH item)	
SKILL:	Good ☐; Fair ☐; Poor ☐
APPLICATION:	Good ☐; Fair ☐; Poor ☐
CONDUCT:	Good ☐; Fair ☐; Poor ☑
PRODUCTION:	Good ☐; Fair ☐; Poor ☐

23. Andy Coccoli testified that he did not check these items on Meek's separation notices and, to the contrary, he found Meek to be an excellent employee in all areas, including skills, performance, attitude, cooperativeness, etc., and would not have marked anything "poor" concerning Meek. Each form has a printed question, "Would you re-employ? (Give reason)." The February 13 form has a typed answer, "Yes." The April 24 form has no answer. I credit Coccoli's testimony, and find that the above separation notices were check-marked "Poor" by someone other than Coccoli, in

an effort to disparage Meek. This tampering with a supervisor's signed documents raises a serious cloud over the integrity and credibility of USC's evaluation of Meek.

24. A third document that Bragg and Roman presented at the mid February meeting, selected from Meek's personnel file, is an Employee Evaluation Report on Meek prepared by Bragg and concurred in by his subordinate Dale Lewis, Plant Supervisor, dated January 18, 1989. This report rates Meek as "Poor" on "Cooperation," "Attitude," and "Initiative" and "Good" on "Work Habits" and "Attendance." It gives him a qualified, recommendation for "Continued employment," stating:

> Must improve. This employee has made statements to other employees that he is not afraid to go to jail for assault referring to Dale Lewis and myself [Marvin Bragg].

25. The last document that Bragg and Roman selected from Meek's personnel file to present at the mid February meeting is a Separation Notice, September 25, 1989, signed by Bragg which rated Meek as follows:

Rating (Check ONE opposite EACH item)	
SKILL:	Good ☐; Fair ☑; Poor ☐
APPLICATION:	Good ☐; Fair ☐; Poor ☑
CONDUCT:	Good ☐; Fair ☐; Poor ☑
PRODUCTION:	Good ☐; Fair ☑; Poor ☐

The printed question on this form: "Would you re-employ? (Give reason)" was left blank by Bragg.

26. In the case of the four USC personnel documents referred to above, USC retained Meek in its employment or reemployed him after layoff after the date of each document, and did not discipline him, reprimand him, or caution him in any way because of such documents. USC did not present any of the documents to Meek while he was employed by USC, and did not advise him he was being evaluated.

DISCUSSION WITH FURTHER FINDINGS

Successor in Interest

The evidence shows continuity of the business operations of the Middlebranch Plant from USC to Essroc with Essroc's use of the same plant, equipment, and essentially the same workforce and supervisory personnel. Although 30% of USC's assets at other locations were not included in the acquisition by Essroc, the Middlebranch Plant was virtually a 100 percent takeover by Essroc. Based upon these factors, I find that Essroc, through its subsidiary Essroc Materials, Inc., is a successor in interest to USC as the owner and operator of the Middlebranch Plant. Secretary

of Labor on Behalf of Corbin v. Sugartree Corp., 9 FMSHRC 394 (1987), aff'd, sub nom. Terco, Inc., v. FMSHRC 839 F.2d 236 (6th Cir. 1987); Munsey v. Smitty Baker Coal Co., 2 FMSHRC 3463 (1980), aff'd in relevant part sub nom. Munsey v. FMSHRC, 701 F.2d 976 (D.C. Cir. 1983), cert. denied, 464 U.S. 851 (1983).

Scope of Protected Activity

Section 105(c)(1) of the Act[3] protects miners and applicants for mining employment from retaliation for exercising rights under the Act, including the right to complain to MSHA or a mine supervisor about an alleged danger or violation of the Mine Act.

The basic purpose of this protection is to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, 95th Cong. 2d Sess. 1977, reprinted in the Legislative History of the Federal Mine Safety and Health Act of 1977 at 623 (Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess. (1978)).

This provision is a key part of remedial legislation, which is

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[3] Section 105(c)(1) provides:

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

to be liberally construed to effectuate its purposes.

Meek's complaint to an MSHA inspector that the mine operator appeared to have advance knowledge of MSHA inspections was a protected activity under this section. Advance knowledge could be coming from an inspector or sources other than the inspector, e.g., a supervisor, clerk, or other person in the inspector's office, so that a miner's report of actions by the mine operator that appear to show advance knowledge could lead to disclosure of a violation of the Act if the complaint were properly investigated. Miners are entitled to raise such concerns with MSHA or their employer without fear of retaliation, in the plain interest of helping to assure the efficacy and integrity of mine inspections of their safety and health work conditions.

Did Essroc Discriminate Against Complainant?

Having found that Complainant was engaged in a protected activity, I turn to the question whether Essroc's denial of employment was motivated in any part by his protected activity.

To establish a prima facie case of discrimination under § 105(c) of the Act, a miner or applicant for mining employment has the burden to prove that he or she was engaged in protected activity and 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 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F. 2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (1981).

"Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect. * * * 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983), quoting NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965). In "analyzing the evidence, circumstantial or direct, the [adjudicator] is free to draw any reasonable inference" (id.).

The reasons given by Essroc for not hiring Meek are the recommendations of Bragg and Roman at the meeting in mid February, 1990, based upon Bragg's representation that Meek had stated that he could not work for Bragg and that Meek had a poor attitude, negative evaluations from his personnel file, and Bragg's evaluation form filled out for Essroc.

At the time of that meeting, Bragg, Roman, and Essroc knew that Bragg would soon become Plant Manager of Essroc's Middlebranch Plant and that Roman would soon become Essroc's Manager of Human

Resources for the Great Lakes Division which would include the Middlebranch Plant. Under its "team approach," Essroc relied on Bragg and Roman to pick their own team to work in the Middlebranch Plant. I find that Bragg and Roman were de facto management agents of Essroc in evaluating USC's Middlebranch Plant employees who applied for employment with Essroc and in recommending to Essroc who should be hired and not hired. Their role as de facto agents of Essroc, and Essroc's successorship to USC, found above, serve to impute to Essroc any motivation of Bragg or Roman toward Complainant in their recommendation, at the February meeting, that Essroc not hire Meek at the Middlebranch Plant.

The issue of discrimination by Essroc thus turns on the question of the motivation of Bragg and Roman.

Bragg stated in an affidavit (he did not appear a witness) that, on February 23, 1990, at a meeting with the plant employees, Meek stated that "he could not work for me [Bragg]." I credit Meek's testimony that he did not make such a statement. Bragg's subordinate Dale Lewis, Plant Supervisor, was at the meeting, and he testified that he never heard Meek say "that he didn't want to work for Marvin [Bragg]." Tr. 365.

Bragg's affidavit further stated that, on February 27, 1990, at a meeting with USC plant employees, Meek "again made the statement that if the same manager was in place for Essroc, he could not work at the Middlebranch facility because I would be in charge." This statement is contrary to fact, as demonstrated by Meek's tape recording of the meeting. At that meeting, Meek was cordial to Bragg, showed a clear desire to work for Essroc at the plant supervised by Bragg, and made no statement indicating that he could not or would not work for Bragg.

Bragg's affidavit also states that, on February 28, 1990, at a meeting among Bragg, Roman and Meek, "Mr. Roman asked Mr. Meek if he had said he would not work for me [Bragg] for Essroc. Mr. Meek replied that he had made such a statement." The tape of this meeting is contrary to Bragg's affidavit. Meek did not state that he had ever said he could not or would not work for Bragg, or any words to that effect.

I find that Bragg's affidavit is contrary to fact, and I credit Meek's testimony as to what Meek stated at the meetings on February 23, 27, and 28, 1990. I do not credit Bragg's statement in his affidavit that the MSHA incident had nothing to do with the decision not to hire Meek.

Roman testified that the MSHA incident was not discussed at the meeting with the Essroc supervisors (mid February, 1990) and was not a factor in the decision not to hire Meek. He also signed an affidavit, stating that, on February 28, 1990, at the meeting referred to in Bragg's affidavit, "I [Roman] asked Mr. Meek if he

had stated that he would not work for Marvin Bragg and he replied that he had said this." The tape recording of this meeting is contrary to Roman's affidavit. I find that Roman's affidavit on this point is contrary to fact, and I credit Meek's testimony as to what he said at the February 27, 1990, meeting.

I do not credit the affidavits of Bragg and Roman or the testimony of Roman as to what was said by Meek at the February 23, 27, and 28, 1990, meetings. To the contrary, I find that Complainant did not state that he could not work for Marvin Bragg, or any words to that effect, and that Bragg manufactured an allegation of such statement to induce Essroc not to hire Complainant. Roman participated in this misrepresentation by supporting Bragg's recommendation to Essroc. They used this opportunity to persuade Essroc not to hire him.

I find that USC management, including Bragg, Roman and Ousky, wanted to fire Complainant because of his protected activity in complaining to Inspector Jones. Bragg and Roman carried out this intention by recommending to Essroc not to hire Complainant. They knew, at the time they heard of Meek's complaint to the MSHA inspector, that all USC employees would shortly be terminated by USC and considered by Essroc.

Bragg's and Roman's discriminatory motivation toward Meek because of his protected complaint to the MSHA inspector is imputed to Essroc. Essroc's adverse action motivated by this discriminatory motivation (rejecting his application for employment) was a violation of § 105(c) of the Act.

Did Essroc Establish an Affirmative Defense?

An operator may rebut a prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by the protected activity. Failing that, the operator may defend affirmatively against the prima facie case by proving that it was also motivated by unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. In a "mixed motive" case, although the miner must bear the ultimate burden of persuasion, the operator, to sustain its affirmative defense, must prove by a preponderance of the evidence that the adverse action would have been taken even if the miner had not engaged in the protected activity. Boich v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 1983).

Essroc has not shown that, had Marvin Bragg and Michael Roman not known of Meek's complaint to Inspector Jones, they would still have recommended that Essroc not employ him at the Middlebranch Plant. The record shows that, over the years, any negative evaluations in Meek's file at USC did not result in discipline of him, even a reprimand or caution to him, or any action not to reemploy him after layoffs. The reliable evidence does not show

that, independent of Meek's complaint to Inspector Jones, his application for employment by Essroc would not have been accepted as were the applications from all other USC Middlebranch Plant hourly employees.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.

2. Essroc is a successor in interest to USC in its acquisition and operation of the Middlebranch Plant.

3. Essroc violated § 105(c) of the Act by refusing to employ Complainant at its Middlebranch Plant because of his activity protected by that section.

4. Complainant is entitled to employment by Essroc at its Middlebranch Plant with back pay, interest,[4] and litigation costs, including a reasonable attorney fee.

ORDER

1. Respondent shall, within 30 days of this decision, employ Complainant at its Middlebranch Plant with the same position, pay, seniority, and all other conditions and benefits of employment that would apply had Respondent employed Complainant at such plant when the other USC Middlebranch Plant hourly employees were employed by Respondent following its acquisition of the plant from USC in February, 1990.

2. Within 15 days of this decision, the parties shall confer in an effort to stipulate the amount of Complainant's back pay, interest, and litigation costs including a reasonable attorney fee. Such stipulation shall not prejudice Respondent's right to seek review of this decision. If the parties agree on the amount of monetary relief, Complainant shall file a stipulated proposed order for monetary relief within 30 days of this decision. If they do not agree, Complainant shall file a proposed order for monetary relief within 30 days of this decision and Respondent shall have ten days to reply to it. If appropriate, a further hearing shall be held on issues of fact concerning monetary relief.

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[4]Interest is computed at the IRS adjusted prime rate for each quarter. See Arkansas-Carbona Company, 5 FMSHRC 2042, 2050-2052 (1983).

3. This decision shall not be a final disposition of this proceeding until a supplemental decision is entered on monetary relief.

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
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DEC 26 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 91-106 A.C. No. 29-00095-03559
v.	:	York Canyon Underground Mine
THE PITTSBURG & MIDWAY COAL MINING CO-YORK CNYN COMPLEX, Respondent	:	

DECISION

Appearances: Ernest Burford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
John W. Paul, Esq., Englewood, Colorado, for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. the "Act." The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges the operator of the York Canyon Underground Mine with six 104(a) S&S, violations of mandatory regulatory standards found in 30 C.F.R. Part 77.

The operator filed a timely answer contesting the alleged 104(a) S&S violations and the appropriateness of the proposed penalties.

Pursuant to notice, a hearing on the merits was held before me on September 18, 1991, along with other cases involving the same parties and attorneys.

Stipulations

At the hearing, the parties read into the record the following stipulations:

1. The Pittsburg and Midway Coal Company has engaged in the mining and selling of coal in the United States and its mining operations affect interstate commerce.

2. Pittsburg Midway Company is the owner and operator of the York Canyon Mine, MSHA ID number 29-00095.

3. Pittsburg Midway Coal Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

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

7. The proposed penalty will not affect the operator's ability to remain in business.

8. The operator demonstrated good faith in abating the violations.

9. Pittsburg & Midway Coal Company is a large operator of a coal mine with at least one million tons of production in 1990.

10. The certified copy of the MSHA assessed violations history accurately reflects the history of this mine for the two years prior to the date of the citation.

ISSUES

The primary issues presented by the parties were whether or not the six 104(a) citations were properly designated significant and substantial violations and the appropriateness to the proposed penalties.

Citation No. 3242500 - (Back-up alarm)

In this citation MSHA charges Respondent with a 104(a) S&S violation of 30 C.F.R. § 77.410. The violative condition alleged reads as follows:

> The #631D Caterpillar Scraper in operation out-by the coal prep plant was not equipped with an adequate automatic device that when such equipment is put in reverse will give audible alarm.

At the hearing, the Respondent withdrew its contest to Citation No. 3242500 including its designation as a significant & substantial violation of 30 C.F.R. § 77.410 and to MSHA's proposed civil penalty of $112.

Based upon the record, it is found that there was a violation of this mandatory safety standard; that a discrete safety hazard existed and that there was a reasonable likelihood, evaluated in terms of continued normal mining operation, that the hazard contributed to would result in serious injury.

Accordingly, it is found the violation is a significant and substantial violation and the full amount of MSHA's $112 proposed penalty is assessed.

Citation No. 3242463 (Berm on service road)

After taking considerable testimony from the witnesses on Citation No. 3242463 (berm on service road) the parties agreed the violation was not S&S and Petitioner moved to withdraw the S&S designation. The motion was granted since it was clear from the evidence presented that there was no reasonable likelihood that the hazard contributed to, evaluated in terms of continued normal mining, would result in an event in which there would be serious injury.

Citation Nos. 3242494, 3242496, 3242498 (Circuit breakers)

At the hearing, the Petitioner also modified the three citations involving failure to properly identify circuit breakers from S&S to non-significant and substantial violations as there was insufficient evidence to establish a reasonable likelihood that the hazard contributed to would result in serious injury.

Citation No. 3242493 (Guarding on pump shaft)

Considerable testimony was taken on this citation, particularly on the issue of whether this violation was properly designated S&S. During the time allowed for filing of post-hearing briefs, the Secretary was permitted to amend the citation to delete the S&S designation and to change paragraph 10A of the citation pertaining to "gravity" from "reasonably likely" to "unlike-

ly." This amendment was permitted in light of the evidence adduced at the hearing. The preponderance of the evidence established that there was not a reasonable likelihood that the hazard contributed to, evaluated in terms of continued normal mining, would result in serious injury.

Assessment of Penalty

Section 110(i) of the Act mandates consideration of six criteria in assessing civil penalties. This statutory criteria has been considered in assessing the penalties assessed in the Order below.

Pittsburg & Midway Coal Company is a large operator of a coal mine with at least one million tons of production in 1990. The certified copy of the MSHA assessed violations history received with evidence accurately reflects the history of this mine for the two years prior to the date of the citation. The operator demonstrated good faith in abating the violations.

Exposure to the hazard caused by the violations was very low, the gravity was low and the violations resulted from the operator's negligence which was low to moderate in degree.

The penalties assessed below will not affect the operator's ability to remain in business.

ORDER

Citation No. 3242500 including the finding that the violation is significant and substantial, is **AFFIRMED** and a civil penalty of $112 is **ASSESSED.**

Citation Nos. 3242463, 3242493, 3242494, 3242496, and 3242498 are **MODIFIED** to delete the S&S designation and a penalty of $100 is **ASSESSED** for each of the violations.

Respondent is ordered **TO PAY** to the Secretary of Labor a civil penalty in the sum of $612 within thirty (30) days of the date of this Decision and, upon receipt of payment, this matter is dismissed.

August F. Cetti

August F. Cetti
Administrative Law Judge

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