

DECEMBER 1992

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*these cases were originally issued as November 18, 1992
they should read December 18, 1992

DECEMBER 1992

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

Secretary of Labor, MSHA v. Wyoming Fuel Company, Docket Nos. WEST 91-598-R, WEST 92-335. (Judge Morris, October 28, 1992).

Secretary of Labor, MSHA v. Paul Shirel and Donald Guess employed by Pyro Mining Company, Docket Nos. KENT 92-73, KENT 91-1340. (Judge Melick, November 17, 1992).

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

Roy Lee Stroud, v. CBM Mining, Inc., Roy Collier and James Booth, Docket No. KENT 91-986-D. (Judge Maurer, October 23, 1992).

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 2, 1992

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

v.

FORD CONSTRUCTION COMPANY

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:
:

Docket No. WEST 90-346-M

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), and involves the validity of two citations issued by the Secretary of Labor to Ford Construction Company ("Ford") for alleged violations of 30 C.F.R. § 56.14130(g),¹ which requires the wearing of seat belts. Commission Administrative Law Judge John J. Morris vacated the two citations. 14 FMSHRC 373. (February 1992)(ALJ). The Secretary filed a timely petition for discretionary review. For the reasons set forth below, we reverse the judge's decision.

I.

Factual and Procedural Background

Ford provides earth moving and construction contract services to mining companies. In this case, Ford was in the process of preparing a settling pond for Meridian Gold Company. During an inspection, Jaime Alvarez, an inspector with the Secretary of Labor's Mine Safety and Health Administration ("MSHA"), observed the operator of a large piece of earth moving equipment, a 637D Caterpillar scraper, operating the equipment without wearing the seat belt installed in the equipment. He issued a citation pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a violation of 30 C.F.R.

¹ Section 56.14130(g) provides:

Wearing Seat belts. Seat belts shall be worn by the equipment operator except that when operating graders from a standing position, the grader operator shall wear safety lines and a harness in place of a seat belt.

§ 56.14130(g), and designated it as being of a significant and substantial nature ("S&S").² That citation provided:

The operator of the CAT-637-D (Co. No. 8-7) scraper was observed driving this vehicle on steep up and down grades on a bumpy roadway which would easily cause him to be knocked or bumped out of the driver's seat because he was not wearing his seat belt as required.

During that same inspection, Inspector Alvarez observed the operator of a D8H Caterpillar bulldozer operating the equipment without wearing the seat belt. Accordingly, he issued another citation pursuant to section 104(a) of the Mine Act alleging a second violation of 30 C.F.R. § 56.14130(g). Inspector Alvarez did not designate this citation as being S&S.

The judge vacated the scraper citation based on his determination that section 56.14130(a) did not require seat belts to be installed in the cited equipment.³ 14 FMSHRC at 378-80. The judge appeared to compare the terminology used in the standard with the definition of "scraper" in the Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Minerals and Related Terms at 971 (1968) ("DMMRT"). Id. The judge determined that, although it "may well be that the term 'scraper' fits within one of the six paragraphs enumerated in section 56.14130(a)," the record is "silent on that issue" and he concluded that the citation should be vacated. 14 FMSHRC at 380.

The judge, similarly, vacated the bulldozer citation based on his determination that the seat belt standard did not apply to the cited equipment. 14 FMSHRC at 382-83. The judge stated that "section 56.14130(a) is equipment specific as to what pieces and types of equipment are subject to the requirements" and that "[d]ozers are not included in the specific list of types of equipment covered by the seat belt requirements." 14 FMSHRC at 383.

² The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

³ Section 56.14130(a) provides:

Equipment included. Roll-over protective structures (ROPS) and seat belts shall be installed on--

- (1) Crawler tractors and crawler loaders;
- (2) Graders;
- (3) Wheel loaders and wheel tractors;
- (4) The tractor portion of semi-mounted scrapers, dumpers, water wagons, bottom-dump wagons, rear-dump wagons, and towed fifth wheel attachments;
- (5) Skid-steer loaders; and
- (6) Agricultural tractors.

The judge concluded that, because the standard did not require the installation of seat belts on either piece of equipment, the citations issued for the failure to wear seat belts could not stand.

The Commission granted review of the Secretary's petition for discretionary review, which challenges the judge's factual conclusions that the scraper and dozer were not covered by the requirements of 30 C.F.R. § 56.14130, as being without substantial evidence in the record. She also asserts that the plain language of the standard includes the scraper and dozer within its coverage and that the preamble to the standard supports her position.

II.

Disposition of Issues

The judge correctly determined that subsection (g) of section 56.14130, requiring that equipment operators wear seat belts, is only applicable if subsection (a) of the standard requires the installation of seat belts on the particular type of equipment being operated. Thus, in order to establish a violation of subsection (g), the Secretary must show both that a seat belt was required to be installed on the equipment and that the operator was not wearing the seat belt.

A. The Scraper

The judge stated in his decision that Ford may have been required to install seat belts on the scraper. Nonetheless, he vacated the citation based on his determination that the record did not adequately demonstrate that the term "scraper" was included within one of the categories set forth in section 56.14130(a), requiring the installation of seat belts. The judge reasoned that because the cited equipment was not expressly listed in subsection (a), the standard requiring the wearing of seat belts was not applicable. We agree with the Secretary that the judge misconstrued the meaning and scope of the standard.

Subsection (a)(4) of section 56.14130 provides that seat belts shall be installed on the "tractor portion of semi-mounted scrapers...." A tractor is defined as a "self-propelled vehicle which may be mounted on crawler tracks, on wheels with large pneumatic tires, or on a mixture of both." DMMRT at 1156. A "scraper" is defined as a:

steel tractor-driven surface vehicle, 6 to 12 cubic yard capacity, mounted on large rubber-tired wheels. The bottom is fitted with a cutting blade which, when lowered, is dragged through the soil. When full, the scraper is transported to the dumping point ...

DMMRT at 971 (Emphasis added). As the definition makes clear, scrapers are tractor-driven. Considering these definitions, it is clear that the language of subsection (a)(4) describes a scraper, as that term is ordinarily used. The designation "semi-mounted scraper" does not denote a unique classification

of "scraper" but simply describes the ordinary configuration of a scraper, i.e. two components, tractor and bowl.⁴ Thus, scrapers, more particularly the tractor portion where the operator sits, are required to have seat belts.

The regulatory history of this standard provides added support for the Secretary's position. The predecessor to the current seat belt standard described scrapers as "self-propelled scrapers." In 1988, MSHA issued new standards for machinery and equipment at surface metal and nonmetal mines. Department of Labor, Mine Safety and Health Administration, "Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines," 53 Fed. Reg. 32496 (August 25, 1988). The preamble to the new standards expressed a clear intent to include scrapers within its coverage.⁵ It stated that the different terminology used in the new standard did not narrow the breadth of the standard and that "the final standard retain[ed] the existing standard's scope." 53 Fed. Reg. at 32511. A table was included which provided, in relevant part, that the term "tractor portion of semi-mounted scrapers" in the new regulation was to have the same meaning as did the term "self-propelled scrapers" used in the prior regulation. Id. It is undisputed that the cited scraper was self-propelled. Thus, while new terms were employed to describe a scraper, it remained within the standard's coverage.

The record in this case contains sufficient evidence to establish that the cited equipment fits within section 56.14130(a)(4). The inspector's testimony concerning the size of the cited equipment, its function and its ability to articulate describes the type of equipment covered by the standard. Tr. 12-16. Thus, the judge failed to properly construe the scope and meaning of the standard and, therefore, erred in failing to recognize the cited equipment as being within the list of equipment requiring seat belts. The judge's finding that seat belts were not required in the scraper is not supported by substantial evidence. Since there is no dispute that the operator of the cited scraper was not wearing his seat belt, we reverse the judge's decision to vacate the citation.⁶

⁴ The bowl, often called the pan, scrapes the ground and scoops up overburden or other material. See Missouri Rock, 11 FMSHRC 136 (February 1989).

⁵ It would have been helpful to the judge for the Secretary to have placed in the record the relevant portions of the preamble to the Federal Register notice since that information is not reprinted in the Code of Federal Regulations.

⁶ Concern for safety alone should have resulted in use of the seat belt.

B. The Bulldozer

The judge based his decision to vacate the second citation on the ground that the record did not adequately demonstrate that the term "dozer" was included within one of the categories set forth in subsection (a) of the cited standard. 14 FMSHRC at 383. He reasoned that, because the cited equipment did not require seat belt installation, there was no requirement to wear seat belts. We believe, as in the case of the scraper, that the judge misconstrued the meaning and scope of the standard.

Although the language of the standard itself does not include the specific term "dozer" or "bulldozer" in the six categories of equipment requiring the installation of seat belts, subsection (a)(1) provides that seat belts shall be installed on "crawler tractors and crawler loaders." A "bulldozer" is defined as a "tractor on the front end of which is mounted a vertically curved steel blade" DMMRT at 150. A "crawler" is defined as:

One of a pair of an endless chain of plates driven by sprockets and used instead of wheels, by certain power shovels, tractors, bulldozers, drilling machines, etc., as a means of propulsion. Also any machine mounted on such tracks.

DMMRT at 275 (emphasis added). It is clear that bulldozers are "crawler tractors" and are within the scope of the standard requiring the installation of seat belts.

The Secretary's position is again further supported by reference to the regulatory history. The preamble to the standard stated that the new terminology used in subsection (a) did not limit the breadth of the standard but rather retained "the existing standard's scope." 53 Fed. Reg. 32511 (1988). As in the case of the scraper, a table in the preamble provided that the terms crawler tractors and crawler loaders in the new standard were to have the same meaning as the terms used in the prior standard, which specifically included the term "dozer." Id. Thus, while new terms were employed to describe a dozer, such equipment clearly remained within the standard's coverage.

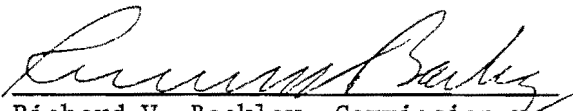
The record contains sufficient evidence to establish that the cited dozer was adequately described to place it within the coverage of the standard. The inspector's testimony concerning the equipment's size and its function together with his testimony as to its common names, "caterpillar," and "dozer," provide a sufficiently specific description to place it within the scope of the standard. Tr. 12-13, 48-50. Thus, the judge failed to properly construe the scope and meaning of the standard and, therefore, erred in failing to recognize the cited equipment as being within the list of equipment requiring seat belts. The judge's finding that dozers are not included in the categories of equipment that require seat belts is not supported by substantial evidence. Since it is undisputed that the operator of the cited dozer was not wearing his seat belt, we reverse the judge's decision to vacate the citation.

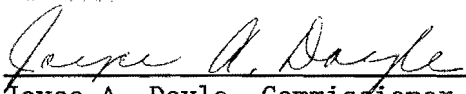
III.

Conclusion

For the foregoing reasons, we reverse that part of the judge's decision vacating citation Nos. 3458357 and 3458425, issued because equipment operators failed to wear seat belts. We remand this proceeding to the judge to determine whether the scraper citation was properly designated as being S&S and to assess civil penalties for both citations.


Arlene Holen, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 7, 1992

| | | |
|----------------------------|---|-------------------------|
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | Docket Nos. KENT 90-100 |
| | : | KENT 90-215 |
| v. | : | KENT 89-242-R through |
| | : | KENT 89-252-R |
| GATLIFF COAL COMPANY, INC. | : | |

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

DECISION

BY: Holen, Chairman; Backley, and Doyle, Commissioners

This consolidated contest and civil penalty proceeding, which arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) (the "Mine Act" or "Act"), involves the emergency communication standard set forth at 30 C.F.R. § 77.1701.¹ This matter is before the Commission for a second time. The Commission's initial decision reversed the administrative law judge's decision and held that the standard had been violated. 13 FMSHRC 1370 (September 1991). On remand, Commission Administrative Law Judge Gary Melick determined that the violation was neither significant and substantial

¹ The standard provides:

Section 77.1701 Emergency communications; requirements.

(a) Each operator of a surface coal mine shall establish and maintain a communication system from the mine to the nearest point of medical assistance for use in an emergency.

(b) The emergency communication system required to be maintained under paragraph (a) of this section may be established by telephone or radio transmission or by any other means of prompt communication to any facility (for example, the local sheriff, the State highway patrol, or local hospital) which has available the means of communication with the person or persons providing emergency medical assistance or transportation in accordance with the provisions of paragraph (a) of this section.

("S&S") nor an unwarrantable failure to comply.² 13 FMSHRC 1641, 1647 (October 1991). The Secretary of Labor timely challenged those determinations and the Commission granted review. For the reasons that follow, we reverse the judge's finding that the violation was not S&S, affirm that the violation was not an unwarrantable failure and remand for reassessment of an appropriate civil penalty.

I.

Factual Background and Procedural History

Gatliff Coal Company, Inc. ("Gatliff") owns and operates a surface coal mine, known as Gatliff No. 1, Job 75, in Whitley County, Kentucky. On August 1, 1989, a truck driven by Gatliff employee Boyd Fuson went off an elevated roadway on the mine property and tumbled down a 120 foot embankment. Two Gatliff employees drove from the mine property to the nearest telephone to summon help. Fuson died as a consequence of the accident.

Because there was no company radio at Job 75 at the time of the accident, the Mine Safety and Health Administration (MSHA) issued Gatliff a section 104(d)(1) order charging a violation of 30 C.F.R. § 77.1701.

Gatliff typically maintains three company radios at the mine site. The radios are two-way 40 watt radios with sufficient range to reach the Gatliff mine office and are located in the foreman's truck, the mechanic's truck and the lube truck. Tr. 151. Gatliff's standard emergency notification procedure consists of communication via the two-way radios back to the mine office, where there is a telephone. On the night of the accident, however, no company radios were on the job site. Tr. 156.

Before the judge, Gatliff asserted that, although no two-way radio was present at Job 75 at the time of the accident, a CB radio was present. Gatliff argued that use of the CB radio would have enabled the miners to make contact with a nearby Gatliff mine site (Job 74) that did have such a two-way radio on its lube truck. The judge found that the CB radio constituted an "alternate" emergency communication system. 13 FMSHRC 368. The Commission rejected that conclusion:

The CB system was undeniably a voluntary system adopted by the miners utilizing their personal CB radios. Tr. 54, 154, 162, 219. The operator initially introduced CBs but effectively abandoned

² The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which, in pertinent part, distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...." The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, which, in pertinent part, distinguishes those violations of mandatory health or safety standards "caused by an unwarrantable failure of [an] operator to comply with such mandatory health or safety standards...."

their use in favor of two-way radios. Tr. 219. The operator did not enforce the use of CBs and there is no evidence that the operator told employees that the CB system was an alternate emergency system.... The fact that the CBs were the miners' personally owned equipment, not Gatliff's, and that miners were free to decide whether to bring CBs to work, is also inconsistent with the standard's requirement that the emergency communication system be operator established and maintained. That the operator knew that its employees were routinely using CBs, did not disapprove of their use, and aided this practice to the extent of providing cable and antennae for them does not amount to sufficient involvement to constitute operator establishment and maintenance of the system. ... [B]ecause the CB system was neither operator established, nor operator maintained, it did not satisfy the requirements of section 77.1701.

13 FMSHRC 1375.

Upon remand, the judge determined that the violation was not S&S and that it did not result from the operator's unwarrantable failure.

II.

Disposition of Issues

A. Whether the violation was significant and substantial

The Commission established its test for determining whether a violation is significant and substantial in Mathies Coal Co., 6 FMSHRC 1 (1984). There the Commission set forth the elements the Secretary must prove to demonstrate that a violation is significant and substantial:

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

Id. at 3-4.

The judge, after setting forth the Commission's Mathies test for evaluating whether a violation is significant and substantial, focused his analysis upon the third element of the test and the Commission's decision in

U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984). In addressing the likelihood of injury in terms of continued mining operations, he stated:

Ordinarily, according to the undisputed evidence, Gatliff maintains as its standard operating procedures, three 40-watt two way radios at each mine site sufficient to call the mine office where there is a telephone. It is further undisputed that these communication systems would meet the cited regulatory requirements. On the night at issue however, for reasons not fully explained, none of the three vehicles having such radios was at this particular location at the mine. It may reasonably be inferred, therefore, that the absence of such a radio was an aberrant situation and would not ordinarily have existed under normal mining operations.

13 FMSHRC 1647.

The judge also relied upon the presence of a CB radio at the mine site:

It is also undisputed that alternative means of communication was available at the time at issue from the mine to the nearest point of medical assistance in the event of an emergency. This system was provided by CB radio and two-way radio on the lube truck to the mine office. Under all the circumstances, I do not find that the violation was "significant and substantial" or of high gravity.

Id.

The Secretary contends that the judge erred in his S&S analysis (1) by factoring into his conclusion that the absence of the two-way radio was an aberrant situation that would not ordinarily have existed under normal mining operations, (2) by holding that the violation would not continue into the future, and (3) by relying upon the presence of the CB radio as an available alternative means of communication in the event of an emergency. Sec. Br. at 6, 8. For the reasons stated below, we agree that the judge erred in his determination that the violation was not S&S.³

³ We note that the Secretary also urged that the judge's non S&S finding should be reversed on the basis that the emergency communication standard is one of a class of standards that are applicable only when an underlying emergency (such as the truck accident in this instance) has already occurred and therefore, for such standards, the occurrence of the underlying emergency should be presumed. This argument was not presented below and consequently the administrative law judge was not afforded an opportunity to pass on it. For the reasons stated in Beech Fork Processing, Inc., 14 FMSHRC 1316 (August 1992) we do not consider this aspect of the Secretary's challenge. See also section (continued...)

In U.S. Steel, the Commission said:

a determination of "significant and substantial" must be made at the time the citation is issued (without any assumptions as to abatement), but in the context of "continued normal mining operations."

6 FMSHRC at 1574.

The Mathies test requires evaluation of the violation at the time of citation, including an examination of the risk of serious injury, given the presence of the violative condition in normal mining operations. In contrast, the judge determined that under continued normal operations the absence of the two-way radio was an aberrant situation. 13 FMSHRC at 1647. He misapplied the third element of the Mathies test in inferring that the violative condition would cease. Accordingly, the judge erred.

In his S&S analysis the judge also relied upon the presence of an employee-owned CB radio at the mine site on the evening of the accident. The judge characterized the radio as an:

... alternative means of communication [that] was available at the time at issue from the mine to the nearest point of medical assistance in the event of an emergency.

13 FMSHRC at 1647.

As the Commission stated in its earlier decision, use of CB radios was a voluntary system adopted by the miners utilizing their personally owned radios. There was no evidence in the record that the operator instructed employees to consider CB radios an alternate emergency communication system, nor were the miners trained in the use of CB radios as an emergency communication system. We noted further that the miners were free to decide whether to bring CBs to work and, thus, the CBs did not meet the standard's requirement that the emergency communication system be operator established and maintained. 13 FMSHRC at 1375. The miners did not use the CB at the time of the emergency, but instead drove off the mine property to reach a telephone. The Commission having concluded that the CB radio was not an operator established and maintained emergency communication system, it was error for the judge to consider the CB radio to be an alternate emergency system.

Applying the Mathies analysis to these facts, we conclude that the violation was significant and substantial. First, there was a violation of

³(...continued)

113(d)(2)(A)(iii) of the Act, 30 U.S.C. § 823(d)(A)(iii), which provides, in pertinent part, that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass."

30 C.F.R. § 77.1701; no operator established two-way radio was present at the mine site. Second, there was a discrete safety hazard or measure of danger to safety created by the violation; the absence of the two-way radio created a delay in responding to the accident because miners had to leave the property to seek help. The record demonstrates that the third and fourth elements, a reasonable likelihood that the hazard contributed to would result in an injury and a reasonable likelihood that the injury would be of a reasonably serious nature, were established. Accordingly, we hold that, under these circumstances, the violation was significant and substantial.

B. Whether the violation resulted from the operator's unwarrantable failure

The Commission has explained that unwarrantable failure is:

aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). This determination was derived, in part, from the ordinary meaning of the term "unwarrantable failure" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). Emery, supra. 9 FMSHRC at 2001. This determination was also based on the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and on judicial precedent.

Drummond Co., Inc., 13 FMSHRC 1362, 1366-1367 (September 1991).

In addressing whether the violation was unwarrantable, the judge stated:

[I]n light of the evidence that ordinarily three two-way radios are present at the mine and that the absence of a radio on the night at issue was anything other than the result of inattention or inadvertence, and that the miners were not left without a means of emergency radio communication, I cannot find that the violation was the result of "unwarrantable failure," or more than simple negligence.

13 FMSHRC at 1647.

The Secretary, citing Emery, 9 FMSHRC 1997, 2003-04, asserts that conduct constitutes unwarrantable failure if the operator "knew or should have known" that the conduct would result in a violation. Sec. Br. at 11. Noting that the Commission earlier held that the two-way radio was the only

established and maintained means of emergency communication, the Secretary contends that:

... the foreman, who had full management responsibility for overseeing events at the site, 'knew or should have known' that his conduct would violate [the standard] and would leave the miners with no adequate means of summoning assistance if, as indeed happened, one of them suffered a serious injury.

Sec. Br. at 11. On this basis the Secretary asserts that the foreman's removal of the two-way radio from the mine site was unwarrantable. Id. at 12.

Gatliff, like the Secretary, points to Emery for its authority. The operator takes issue with what it views as the Secretary's out-of-context use of the "should have known" language in Emery, noting that the Secretary's position would equate unwarrantable failure with ordinary negligence. Gatliff notes that in Emery the Commission distanced itself from the interpretation urged by the Secretary. Gatliff Br. at 6, citing Emery, 9 FMSHRC at 2004.

The judge erred in considering the presence of a miner's CB radio as an alternative means of emergency communication. Consequently, he also erred in viewing the CB radio as a mitigating factor in evaluating whether the violation was unwarrantable. Nonetheless, the judge's finding that the absence of the two-way radio was attributable to ordinary negligence is supported by the record.

While it is true that the foreman drove off the mine property in the truck with the two-way radio in it, there is no evidence in the record that this was due to anything beyond inadvertence. Indeed, at trial no evidence was elicited on the foreman's state of mind, or on the custom, practice or circumstances surrounding the removal of the two-way radio from the mine site. See Tr. 148-156.

Although the foreman's actions may have been negligent, the Commission has explained that negligence and unwarrantable failure are not synonymous terms:

The terms "unwarrantable failure" and "negligence" are distinguished in the Mine Act. A finding by an inspector that a violation has been caused by an operator's unwarrantable failure to comply with a mandatory health or safety standard may trigger the increasingly severe enforcement sanctions of section 104(d). 30 U.S.C. § 814(d). Negligence, on the other hand, is one of the criteria that the Secretary and the Commission must consider in proposing and assessing, respectively, a civil penalty for a violation of the Act or of a mandatory health or safety standard. 30 U.S.C. §§ 815(b)(1)(B) & 820(i). Although the same or similar factual circumstances may be included in the Commission's consideration of unwarrantable failure and negligence, the concepts are

distinct. See Quinland Coals, Inc., 7 FMSHRC 1117, 1122 (August 1985); Black Diamond Coal Co., 9 FMSHRC 1614, 1622 (September 1987). Nevertheless, as explained in Emery, [9 FMSHRC 1997] and Youghiogheny & Ohio, [9 FMSHRC 2007] aggravated conduct constitutes more than ordinary negligence for purposes of a special finding of unwarrantable failure. "Highly negligent" conduct involves more than ordinary negligence and would appear, on its face, to suggest an unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence.

Eastern Associated Coal Corp., 13 FMSHRC 178, 186 (February 1991).

There is substantial evidence in the record to support the judge's conclusion that the foreman's actions constituted no more than ordinary negligence. Thus, we affirm that the violation was not unwarrantable.

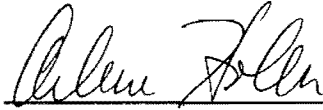
C. Civil Penalty

Following the Commission's earlier remand, the judge, after finding the violation to be neither S&S nor unwarrantable, modified the order to a section 104(a) citation and assessed a civil penalty of \$50. Although we have affirmed the judge's holding that the violation was not unwarrantable, we have reversed his finding as to S&S. Accordingly, this matter is remanded for reassessment of the civil penalty in light of our determination that the violation was S&S.

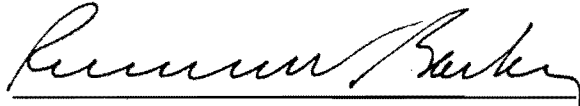
III.

Conclusion

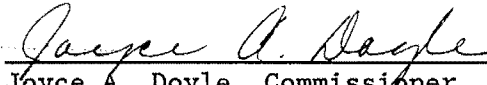
For the foregoing reasons, we reverse the judge's finding that Gatliff's violation of 30 C.F.R. § 77.1701 was not significant and substantial, affirm the judge's determination that the violation was not unwarrantable, and remand for the assessment of an appropriate civil penalty.



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner

Commissioner Nelson, concurring in part and dissenting in part:

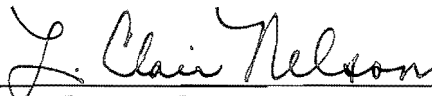
I must dissent solely with regard to the majority's affirmation of the ALJ's determination that the violation did not constitute unwarrantable failure. Such affirmation seemingly results more from concern with fine points in preceding decisions than with concern for basic fundamentals expressed in the Mine Act with regard to miner safety.

Our governing statute states at the outset (in Section 2(d) and (e)) that the operator of a mine -- with the assistance of the miners -- has primary responsibility to prevent the existence of unsafe conditions and practices in the mine. Section 2(g) authorizes the Secretary of Labor to promulgate mandatory safety standards to protect the safety of every miner.

Here we have a mandatory safety standard requiring the operator to establish and maintain a communication system for use in an emergency. The essential component of the communication system established for use at this mine site, i.e., a two-way radio, was removed from the site by a foreman and never returned during some nine hours prior to the occurrence of an accident resulting in a fatality.

The majority observes that evidence in the record indicates only that the foreman acted inadvertently in removing the two-way radio from the mine site where the accident occurred nine hours later. (In fact, it is abundantly clear that the absence of a two-way radio persisted through one shift and into another shift, unless the shift periods exceeded eight hours.)

My observation is to the effect that the record clearly demonstrates highly negligent conduct on the part of the mine operator in failing to provide requisite attention to the training of supervisory employees in order to assure compliance with an extremely important safety standard requiring the presence of an emergency communication system at this mine site. The absence of a fundamentally essential component of the requisite emergency communication system for a period of at least nine hours sufficiently establishes, in my view, highly negligent conduct constituting unwarrantable failure on the part of this operator.


L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K Street NW, 6th Floor
Washington, D.C. 20006

December 17, 1992

| | | |
|------------------------------|---|--------------------------|
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | |
| on behalf of JOSEPH A. SMITH | : | |
| | : | |
| v. | : | Docket Nos. PENN 92-57-D |
| | : | PENN 92-58-D |
| THE HELEN MINING COMPANY | : | |

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

ORDER

BY THE COMMISSION:

On November 18, 1992, Helen Mining Company ("Helen") filed an Application for Stay ("Application") of Administrative Law Judge Roy J. Maurer's September 17, 1992, assessment of a civil penalty and award of back pay in this matter. 14 FMSHRC 1626, 1645 (September 1992)(ALJ).¹ In the alternative, Helen requests that the Commission permit it to deposit the civil penalty and back pay award into an interest-bearing escrow account. Helen stated in its Application that it intended to appeal the judge's decision to the United States Court of Appeals for the District of Columbia Circuit². It requests that the stay or escrow arrangement remain in effect until such time as a final appellate determination in these proceedings has been reached.

The Secretary responded to the Application on November 23, 1992. She states that she does not oppose the escrow relief requested by Helen so long as Helen deposits the back pay award in the amount of \$45,450.37, plus interest due on that amount under the terms of the judge's order, and the civil penalty in the amount of \$10,000 in bona fide interest-bearing escrow accounts. The Secretary further requests that, in the event the judge's order is upheld on appeal, any applicable pre- and/or post-judgment interest be included in the awards to Complainant Joseph A. Smith and the Secretary,

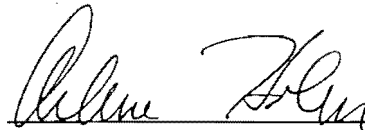
¹ Helen filed a Petition for Discretionary Review of the judge's decision with the Commission, but no two Commissioners voted to grant the petition. As a consequence, the judge's decision became the final decision of the Commission 40 days after it was issued. 30 U.S.C. § 823(d)(1).

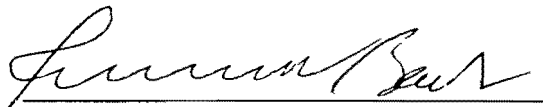
² Helen filed its petition for review in the D.C. Circuit on November 18, 1992.

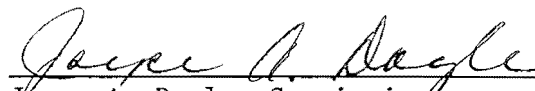
respectively. Counsel for the Secretary has advised the Commission, by telephone, that Complainant Joseph A. Smith agrees with the Secretary's position.

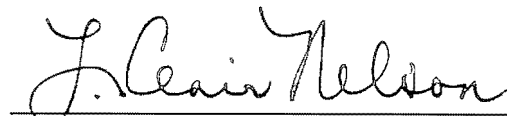
Helen filed its Application pursuant to Rule 18 of the Federal Rules of Appellate Procedure, which provides that an "[a]pplication for a stay of a decision or order of an agency proceeding pending direct review in a court of appeals shall ordinarily be made in the first instance to the agency." An escrow arrangement has the effect of maintaining the status quo in this litigation during appeal. Section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), provides that if a final decision of the Commission is appealed to a court of appeals, the court shall have exclusive jurisdiction of the proceeding once the record of the proceeding before the Commission is filed with the court. The record in the present proceeding is due to be filed with the D.C. Circuit on January 7, 1993. The Commission, therefore, has jurisdiction to consider Helen's Application at this time.

Under the facts presented and given the Secretary's and the complainant's lack of opposition to Helen's Application to place the civil penalty and back pay award, plus interest, into escrow accounts, Helen's Application is granted to the extent that the escrow accounts shall be established subject to the conditions set forth in the Secretary's response to the Application.


Arlene Holen, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 1 1992

| | | |
|-------------------------------|---|---------------------------|
| SECRETARY OF LABOR, |) | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Master Docket No. 91-1 |
| Petitioner |) | Docket No. KENT 91-1175 |
| v. |) | A.C. No. 15-14583-03545D |
| |) | |
| JAMBOREE COALS, INCORPORATED, |) | No. 3 Mine |
| Respondent |) | |
| |) | Docket No. KENT 91-1174 |
| |) | A.C. No. 15-16784-03510D |
| |) | |
| |) | No. 4 Mine |

ORDER OF DISMISSAL

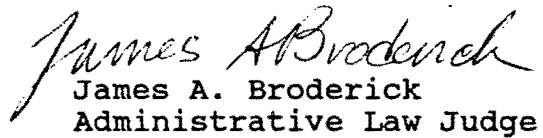
Before: Judge Broderick

On November 27, 1992, the Secretary filed a motion to dismiss these proceedings on the grounds that on August 2, 1991, the Respondent and Jack Fannon, President of Respondent entered into plea agreements, agreeing to plead guilty to charges of conspiracy to defraud the United States in connection with the civil violations charged herein. Respondent contracted with Triangle Research to handle its dust sampling program. Triangle's principal and agent admitted falsifying the samples submitted to MSHA and admitted that on numerous occasions they blew air on the filter surfaces of manufactured dust samples. Harry White and Ronald Ellis of Triangle have been convicted of defrauding the government and have been sentenced to prison. Respondent provided Triangle with signed blank dust data cards which were submitted to MSHA with the samples.

On May 8, 1992, Judge Joseph M. Hood of the Eastern District of Kentucky sentenced Jamboree Coals to pay a fine of \$5,000 and to 2 years probation. Jack Fannon was sentenced to 2 years probation and 3 months of home detention. As part of the plea agreement the Secretary agreed to move to dismiss pending civil penalty proceedings against Respondent for violations of the laws governing the dust sampling program.

I conclude that under the circumstances dismissal of these proceedings effectuates the purposes of the Mine Act.

Accordingly, these proceedings is DISMISSED.


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 1 1992

| | | |
|-----------------------------|---|--------------------------|
| SOLID MINING COMPANY, INC., |) | CONTEST PROCEEDINGS |
| Contestant |) | |
| v. |) | Docket No. VA 91-254-R |
| |) | through VA 91-259-R |
| SECRETARY OF LABOR, |) | |
| MINE SAFETY AND HEALTH |) | Mine No. 1 |
| ADMINISTRATION (MSHA), |) | |
| Respondent |) | |
| |) | |
| SECRETARY OF LABOR, |) | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Docket No. VA 91-498 |
| Petitioner |) | A.C. No. 44-05926-03537D |
| v. |) | |
| |) | Mine No. 1 |
| SOLID MINING COMPANY, |) | |
| Respondent |) | |

ORDER OF DISMISSAL

Before: Judge Broderick

On November 27, 1992, the Secretary filed a motion to dismiss these proceedings on the grounds that on August 2, 1991, the Respondent and Paul Fletcher, President of Respondent entered into plea agreements, agreeing to plead guilty to charges of conspiracy to defraud the United States in connection with the civil violations charged herein. Respondent contracted with Triangle Research to handle its dust sampling program. Triangle's principal and agent admitted falsifying the samples submitted to MSHA and admitted that on numerous occasions they blew air on the filter surfaces of manufactured dust samples. Harry White and Ronald Ellis of Triangle have been convicted of defrauding the government and have been sentenced to prison. Respondent provided Triangle with signed blank dust data cards which were submitted to MSHA with the samples.

On May 8, 1992, Judge Samuel G. Wilson of the Western District of Virginia sentenced Solid Mining Co., Inc., to pay a fine of \$15,000 and to 2 years probation. Paul Fletcher was sentenced to 2 years probation and 60 days of home confinement. As part of the plea agreement the Secretary agreed to move to dismiss pending civil penalty proceedings against Respondent for violations of the laws governing the dust sampling program.

I conclude that under the circumstances dismissal of these proceedings effectuates the purposes of the Mine Act.

Accordingly the above contest proceedings and the civil penalty proceeding are DISMISSED.


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

DEC 1 1992

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|-----------------------------|---|--------------------------|
| SECRETARY OF LABOR, |) | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Master Docket No. 91-1 |
| Petitioner |) | Docket No. VA 91-535 |
| v. |) | A.C. No. 44-04632-03557D |
| |) | |
| M P & M COAL COMPANY, INC., |) | Mine No. 2 |
| Respondent |) | |

ORDER OF DISMISSAL

Before: Judge Broderick

On November 27, 1992, the Secretary filed a motion to dismiss this proceeding on the grounds that on August 6, 1991, the Respondent and Frank Hackney, President of Respondent entered into plea agreements, agreeing to plead guilty to charges of conspiracy to defraud the United States in connection with the civil violations charged herein. Respondent contracted with Triangle Research to handle its dust sampling program. Triangle's principal and agent admitted falsifying the samples submitted to MSHA and admitted that on numerous occasions they blew air on the filter surfaces of manufactured dust samples. Harry White and Ronald Ellis of Triangle have been convicted of defrauding the government and have been sentenced to prison. Respondent provided Triangle with signed blank dust data cards which were submitted to MSHA with the samples.

On August 7, 1992, Judge Samuel G. Wilson of the Western District of Virginia sentenced M.P & M, Inc. to pay a fine of \$30,000 and to 2 years probation. Frank Hackney was sentenced to 2 years probation and 60 days of home confinement. As part of the plea agreement the Secretary agreed to move to dismiss pending civil penalty proceedings against Respondent for violations of the laws governing the dust sampling program.

I conclude that under the circumstances dismissal of this proceeding effectuates the purposes of the Mine Act.

Accordingly, this proceeding is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

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(Certified Mail)**

**Frank W. Hackney, M P & M Coal Company, Inc., Rt. 1, Box 513,
Grundy, VA 24614 (Certified Mail)**

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 1 1992

VINCENT BRAITHWAITE, : DISCRIMINATION PROCEEDING
Complainant :
 :
 : Docket No. WEVA 91-2050-D
V. : MORG CD 91-06
 :
 :
TRI-STAR MINING, INC., :
Respondent :

DECISION DENYING MOTION FOR RECONSIDERATION AND AWARDING DAMAGES

Appearances: Vincent Braithwaite, Piedmont, WV,
Pro Se;
Thomas G. Eddy, Esq., Eddy & Osterman,
Pittsburgh, PA, for Respondent.

Before: Judge Fauver

This case was brought under § 105(c) of the Federal Mine Safety and Health Act of 1977, § 801 et seq., alleging a discriminatory discharge.

On August 24, 1992, a decision on liability was entered, finding that Respondent discharged Complainant on April 2, 1991, in violation of the Act, and that on the date of hearing, April 29, 1992, Respondent made a bona fide offer to reinstate Complainant pending a decision on liability and Complainant refused the offer. The decision therefore limited the period for back pay to April 2, 1991, through April 29, 1992.

Following extensive conference calls and exchanges of documents on damages, a hearing on damages was held on September 29, 1992. At the hearing, Respondent moved to reconsider the decision on liability based on the decision of the Maryland Department of Economic and Employment Development Office of Unemployment Insurance, dated April 12, 1991. The state agency denied Complainant's claim for unemployment compensation on the ground that he had refused to perform work and his "action was a deliberate and wilful disregard of standards of behavior, which his/her employer had a right to expect." I have reviewed the documents and arguments submitted on the motion, and find that the state agency's decision does not warrant reconsideration of my liability decision. The state decision is not binding on this Commission, and did not involve federal issues raised by the Mine Safety Act.

At the hearing on damages, based on the hearing evidence and prehearing exchanges of documents and representations of facts in the conference calls, a provisional order was entered assessing damages as follows:

| | |
|---|-------------------------|
| Damages for repossessed truck. | \$2,150.00 ¹ |
| Medical expenses that would have been paid by Pennsylvania Blue Shield had Complainant not been discharged. | \$7,854.00 |
| Back pay after deduction for earnings from other employment. | \$19,798.00 |
| Litigation expenses and expenses seeking other employment. | \$198.13 |
| | <hr/> |
| | \$30,001.12 |

After the hearing, Respondent submitted a letter from Pennsylvania Blue Shield stating that it would not have paid a certain part of the prenatal charges paid by Complainant. Based on that letter, and without opposing documents from Complainant, I find that \$2,300.00 should be deducted from the bill from Drs. Mould and Kho for \$4,100.00 in considering Complainant's medical damages. This deduction results in an allowance of \$1,440.00 for their bill (80% x \$1,800.00), instead of the allowance in the provisional order of \$3,280 (80% x \$4,100.00). ² This change reduces medical damages to \$6,614.99 (\$7,854.99 minus \$1,840.00).

Based on the evidence, no other adjustments in the provisional order are warranted. Accordingly, damages will be awarded in the amount of \$28,161.12 (\$30,001.12 minus \$1,840.00), plus interest.

ORDER

WHEREFORE IT IS ORDERED that:

1. The motion for reconsideration of the decision on

¹ This figure is reached by adding (A) the fair market value of the truck (time of repossession) and (B) the lender's charge for repossession, then subtracting (C) the lender allowance for the repossession sale of the truck. The figures are included in the transcript of the hearing on damages.

² I find that Blue Shield would have paid 80% of the covered part of the doctors' bill and 100% of the hospital bill submitted by Complainant.

liability is DENIED.

2. Within 30 days of the date of this decision, Respondent shall pay damages of \$28,161.12 to Complainant plus accrued interest from April 2, 1991, until the date of payment. Interest will be computed according to the Commission's decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1483 (1988), aff'd sub nom. Clinchfield Coal Co. v. FMSHRC 895 F.2d 773 (D.C. Cir., 1990), and calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984).

3. This decision and the decision on liability constitute the judge's final disposition of this proceeding.



William Fauver

Administrative Law Judge

Distribution:

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Thomas G. Eddy, Esq., Eddy and Osterman, 820 Grant Building, Pittsburgh, PA 15219 (Certified Mail)

/fccca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 2 1992

| | | |
|-----------------------------|---|----------------------------|
| SECRETARY OF LABOR, | : | TEMPORARY REINSTATEMENT |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION ON BEHALF | : | Docket No. WEVA 93-31-DM |
| OF PAUL H. BROOKS, | : | NE-MD 92-03 |
| Applicant | : | |
| | : | Greystone Quarry and Plant |
| v. | : | |
| | : | |
| RONALD B. SNYDER AND R.B.S. | : | |
| INCORPORATED, | : | |
| Respondents | : | |

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Gretchen Lucken, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia
for the Applicant:
David J. Hardy, Esq., Jackson & Kelly,
Charleston, West Virginia for the Respondents.

Before: Judge Barbour

On October 28, 1992, the Secretary of Labor ("Secretary") file an application for an Order requiring Respondents Ronald B. Snyder and R.B.S. Incorporated ("R.B.S.")¹ to reinstate Paul H. Brooks to the position that he held immediately prior to his discharge on July 30, 1992, or to a similar position at the same rate of pay, and with the same or equivalent duties. The Application was supported by the affidavit of James E. Betcher, Chief, Office of Technical Compliance and Investigation Division, Metal and Non-Metal Safety and Health Division, Mine Safety and Health Administration ("MSHA") and by a copy of the original complaint filed by Brooks with MSHA.

In a letter filed on November 9, 1992, counsel for Respondents requested a hearing on the Application. As the result of a November 10, 1992 telephone conversation involving counsels and myself, the parties agreed to November 24, 1992, as

¹Ronald Snyder is the president of R.B.S. Incorporated.

the date for the hearing. Therefore, the requested hearing was held pursuant to notice on that date in Beckley, West Virginia.² As yet, the hearing is not transcribed.

Prior to counsels' opening statements and to the taking of testimony, I orally summarized the pleadings, and I stated that the issue to be resolved at the hearing was narrow - - whether Brooks' complaint was "not frivolous brought" as that term is used in Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). I also stated my understanding of the law to be that I was not required to determine the merits of Brooks' discrimination complaint but solely to determine whether the complaint was frivolous; that is to say, whether it was clearly without merit, clearly fraudulent or clearly pretextual in nature.

THE TESTIMONY

THE APPLICANT'S WITNESSES

The Secretary, on behalf of Brooks, presented her case through the testimony of Brooks and of Larry W. Brendle, a special investigator for MSHA who investigated Brooks' discrimination complaint for the Secretary.

Brooks testified that until his discharge on July 30, 1992, he had worked as the operator of a front end loader ("loader") at the Greystone Quarry and Plant.³ He stated that on the morning of July 30, 1992, he was loading limestone from a muck pile into a waiting truck and that he was concerned about the condition of the highwall above him. He described the highwall as being cracked from top to toe and as being topped by overburden

²Although Commission Procedural Rule 44(b), 29 C.F.R. § 2700. 44(b), requires that a hearing be held within ten (10) days of the receipt of a request for hearing, November 24, 1992, was the earliest date available to try and to hear the Application. Therefore, compelling reasons existed to extend the time within which the hearing was conducted.

³The facility is a limestone quarry located near White Sulphur Springs, West Virginia. The quarry is owned and operated by R.B.S. and was generally described by Snyder as being approximately "U" shaped, as having a limestone highwall topped by overburden ranging in depth from 0 feet to 80 feet and as being mined in a step-like series of three benches each of which measures approximately 70 feet in height. Witnesses for both parties essentially agreed that limestone is mined at the quarry in the following sequence: the face of the highwall is drilled and blasted, the resulting muck pile is loaded into a waiting truck by a loader and the limestone is trucked from the pit.

(including broken rock) that was soft and saturated with water. According to Brooks the overburden was unstable and some had fallen previous to July 30.

Brooks described the muck pile that he was loading as being approximately 45 feet high. In addition to the highwall, he stated that he was concerned about material coming off of the muck pile. According to Brooks, both the highwall and the muck pile were too high for him to have easy visibility of their tops from his seat in the loader's cab. Brooks stated he was concerned that if the loose, unconsolidated material fell from the highwall he would be unable to get out of the way.

Brooks further stated that he had other visibility problems in that a cab protector above the windshield of the loader also restricted his view upward.⁴

Brooks testified that on July 28, an effort had been made to scale the loose, unconsolidated material on top of the highwall, but that he believed the result was only to loosen the overburden further and to make it more likely to come down. He described himself on July 30, as being tense and uncomfortable and unable to do his job. As a result, Brooks claimed that he drove the loader out of the pit, parked it and spoke with his foreman, John Harless.

According to Brooks, he told Harless that he did not want to return to work at the muck pile because the highwall was unsafe and the muck pile was too high for the visibility he required. He stated that he offered to do other work - - specifically, to help get the loose, unconsolidated material down from the highwall. In Brooks' version of the events, Harless told him to wait. Shortly after that, Snyder arrived.

Brooks stated that Snyder asked him what was going on? Brooks responded that the company needed to take care of the highwall, that it was unsafe and that it needed to be scaled. Brooks testified that Snyder asked him several times if he were going to go back to work at the muck pile and load the truck. Brooks indicated to Snyder that he would have to think about it. (Brooks explained that he was "thinking about his life.")

⁴Brooks described the cab protector as offering protection to the windshield from falling or flying rock and as consisting of a series of metal bars extending about 5 inches from the top of the cab over the windshield and being about 3 1/2 inches thick. Snyder testified that the cab protector was not new and had been standard equipment on the loader since the first day the loader was operated at the quarry.

Brooks testified that Harless said to Snyder that while Brooks was thinking they should go into the pit and look at the situation. Brooks indicated that the two men went to where he had been working but that he did not see them look at the highwall, rather that they looked at the muck pile. Brooks stated that when they returned, Harless asked him if he had made his decision and that Brooks responded he was still thinking. He also stated that he told them he would help Harless get the loose material down from the highwall, but that until he was told what to do he would stay put.

According to Brooks, it was at this point that Snyder told him that he was fired. Brooks stated he shook hands with Snyder, told him that it had been a pleasure working for him and said that if Snyder ever needed him again to just give him a call.

Brooks testified that after he was fired he filed a discrimination complaint with MSHA, as well as a safety complaint about the hazardous nature of the area where he was working.

Brooks was persistent in maintaining that the condition of the highwall was the source of his safety concerns. He stated that if the highwall had been safe he would not have had any concerns and would have continued to work.

The Secretary then called Brendle to testify. Brendle stated that he went to the quarry on August 11, 1992, to view the area where Brooks had been working. While at the quarry, Brendle issued a Section 107(a), 30 U.S.C. § 817(a), imminent danger closure order with an associated Section 104(a), 30 U.S.C. § 814(a), citation alleging, among other things, that approximately 40 feet of unconsolidated dirt and stones (the overburden) at the top of the south wall section of the highwall constituted an imminent danger and a violation of mandatory safety standard Section 56.3131.⁵ G. Exh. 4. Brendle maintained

⁵The standard states:

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.

30 C.F.R. § 56.3131. R.B.S. is contesting the validity of the order/citation, including the alleged violation of Section 56.3131.

that the edge of the area encompassed in his order/citation was even with the muck pile Brooks was loading and that the conditions he cited endangered Brooks.

Brendle also testified that as a result of Brooks' safety complaint, MSHA Inspector Carl Sneed had gone to the quarry the day after Brooks was fired (July 31, 1992) and had issued a Section 107(a) imminent danger withdrawal order with an associated Section 104(a) citation that cited a violation of mandatory safety standard Section 56.3200.⁶ Gov. Exh. 3. This order/citation stated in part that loose, unconsolidated material, was present along the top of the catch bench in the west section of the pit for approximately 100 feet. Inspector Sneed did not testify, but Brendle stated that he understood Sneed's order/citation to have been issued for the same general area of the quarry that he, Brendle, had cited.⁷ Brendle believed it was possible that Brooks had been endangered by the conditions cited by Sneed, but he did not know for certain. Brendle stated that in any event, the condition of the highwall that he cited on August 11 was "atrocious."

Brendle testified that on July 30, Brooks was working under overburden that consisted of large stones and fill dirt made loose by rain. In addition, Brooks had the highwall to his right as he worked, and Brendle believed that because he had to turn to his right to look at the highwall and because of the highwall's height, Brooks' vision was obscured and he could not detect any loose material that might be coming down near him. Brendle also believed it possible that the cab protector further obscured Brooks' vision. Brendle feared that any falling loose material could travel up to 150 feet from the base of the highwall if the

⁶The standard states:

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.

30 C.F.R. § 56.3200. R.B.S. is also contesting the validity of this order/citation, including the alleged violation of Section 56.3200.

⁷There was confusion about directional references at the quarry. Sneed referred in his order/citation to the west section of the pit, Brendle referred in his testimony to the south wall section, and Snyder, if I understood him correctly and who I assume knows best, spoke of the area involved as the southeast corner of the pit.

material hit something on the way down and bounced. In Brendle's opinion, Brooks clearly was working within a distance from where he could have been injured by falling material.

Brendle also stated that Snyder told him he had fired Brooks because Brooks said that he would not load any material piled higher than the windshield of the loader, and because Brooks expected to be paid on July 30 for a full day, even though he had stopped operating the loader around noon. Finally, Brendle stated that after Inspector Sneed had issued the order/citation on July 31, Sneed allowed the muck pile on which Brooks had been working to be totally cleared. (In other words, Sneed allowed normal work to continue in the area where Brooks had been working.) Brendle explained that he did not agree with Sneed's decision in this regard, that he had called Sneed at the time he, Brendle, issued his order/citation to express his disagreement and to advise Sneed of what he was going to do, and that in so doing, he found out that Sneed had not inspected the top of the highwall prior to issuing the order/citation on July 31. Nonetheless, Brendle stated that it was possible Sneed was in a better position to evaluate the conditions under which Brooks had worked on July 30 than he, Brendle, was.

THE RESPONDENTS' WITNESSES

After the Secretary rested, the Respondents presented their case through the testimony of three witnesses: Snyder, Harless and Ricky Massey, a fill-in laborer. Not surprisingly, they offered a different version of events.

Snyder stated that around 11:00 A.M. on the morning of July 30, 1992, he was at his office when he received a telephone call from Harless. Harless informed Snyder that Brooks was refusing to load anything higher than the windshield of the loader. According to Snyder, muck piles at the quarry are typically 40 to 45 feet high. Thus, of necessity, a loader operator must load material that is higher than the windshield. Therefore, Snyder asked Harless if he was sure Brooks had said that he would not load such material, and Harless replied, "Yes." Harless suggested to Snyder that he come to the quarry and talk to Brooks.

Once at the quarry, Snyder found Brooks and the parked loader outside of the work area. Snyder asked Brooks what the problem was and Brooks replied, "It's the same old s__t, Harless doesn't know what he is doing." Snyder said to Brooks that

Harless had told him that Brooks refused to load anything higher than the windshield of the loader. Snyder asked Brooks two or three times if this were true, and Snyder answered, "Yes."⁸

Harless then suggested that he and Brooks look at the area and see what the problem was. Snyder stated that he and Harless went to the muck pile and that he did not see anything that he believed was unsafe. Snyder expressed the opinion that there was nothing inherently unsafe about loading material that was higher than the cab or the windshield of a loader.

After Snyder and Harless returned from the muck pile, Snyder stated that he asked Brooks again if he would not load material that was piled above the cab of the loader, and Brooks stated that he would think about it. After he had thought about it, Brooks indicated to Snyder that he had come to the quarry that day expecting to work and that he intended to be paid for a day's work. Snyder responded, "No you're not," or words to that effect, and told Brooks that he was fired. Snyder stated that he discharged Brooks for two reasons: (1) for refusing to load material higher than the windshield of the loader, and (2) for demanding a day's work when he had not worked a full day. Brooks was paid to the time he was fired - - approximately 12:00 P.M. - - and left the quarry.

During cross-examination, Snyder stated that he was certain that in the course of their conversation on July 30, Brooks had not made any statement about his safety and the condition of the highwall. However, counsel for the Secretary read to Snyder from a transcript of Snyder's unsworn interview with Brendle concerning Brooks' discharge. In the transcript, Snyder was quoted as telling Brendle that Brooks had said to him, "It's the same old s__t, Harless doesn't know what he is doing and I am not going to risk my safety or life under the highwall." Snyder indicated that he had made the statement to Brendle.

Snyder also stated that at no time during his conversation with Brooks did Brooks offer to do other work. Snyder stated that, in fact, there was nothing unsafe about loading material piled higher than the cab of the loader and that July 30 was the first time Brooks had ever stated he would not load such material.

Snyder also stated that he believed the area encompassed by Sneed's order/citation of July 31 was at least 200 feet from where Brooks was working on July 30; and that the area

⁸I asked Snyder if he had questioned Brooks as to why Brooks would not load higher material, and he stated that he had not. He explained that he could not foresee any conditions under which the practice to which Brooks objected would be hazardous.

encompassed by Brendle's order/citation of August 12, although it extended somewhat closer to the area where Brooks was working was nonetheless 150 feet away from Brook's work station.

Snyder maintained that on July 30, Brooks was not in any danger. The overburden under which Brooks was working had been stripped back. It was not loose or unconsolidated. To support his opinion he noted that after issuing his order/citation, Sneed had permitted the entire muck pile on which Brooks was working to be loaded and that it took approximately 40 hours to do so.

Jimmy Harless, Brooks' supervisor, testified next. He stated that scaling on the highwall had been underway prior to July 30, and that on July 30 the area scaled was about 200 feet from where Brooks was located and that any material knocked loose came down on a barricaded bench, not near Brooks. Harless testified that on July 30 he was advised by the driver of the truck Brooks was loading that Brooks wanted to talk to him. Brooks told Harless that he would not load anything above the height of the loader's windshield.⁹

According to Harless, Brooks made no reference to safety concerns about the highwall or the muck pile. However, on cross-examination, Brooks' counsel asked Harless about the following exchange during Harless' unsworn interview with Brendle:

Q. On July 30 . . . Brooks . . . said that he did not feel safe working at the highwall . . . and he was . . . fired that day. Do you want to . . . tell me what you know?

A. The part of the highwall that he was talking about, he was approximately 300 to 400 feet away from it and the shot he was mucking out, there was no big stuff over his head. Then he told me he was not going to load anything over windshield height . . .

Resp. Exh. 3. Harless agreed that this is what he had said.

Harless stated that after talking to Brooks he called Snyder, who came to the quarry to talk to Brooks. During their conversation, Snyder stated to Brooks that Harless had told him Brooks had refused to load anything above the height of the loader's windshield, and Snyder asked, "Is that what you said?" Brooks responded, "Right." Snyder let Brooks know that he wanted

⁹Harless noted that because muck piles at the quarry are usually piled well above windshield height, it would have been impossible to operate a front end loader at the quarry under Brooks' restrictions.

Brooks to return to work, and Brooks stated that he would have to think about it. Snyder and Harless then went to look at the area where Brooks had been working, and according to Harless, did not see anything that was unsafe.

When the two returned, Brooks told Snyder that he had not made up his mind about whether he would return to work, and he indicated he would continue to sit and draw his pay. Harless stated that Snyder said, "No you won't.", and Snyder fired Brooks.

Harless agreed with Snyder that Sneed's order/citation of July 31 covered an area that was approximately 200 feet from Brooks, and that although Brendle's order/citation of August 12 was more inclusive, the area concerned was still approximately 150 feet from where Brooks had been working on July 30. Harless believed that the conditions referenced in both order/citations could not have endangered Brooks.

Ricky Massey was the last to testify. He stated that he had known Brooks "for years." He also stated that on July 30, scaling was being conducted on the highwall, but in an area that was barricaded and that was removed from where Brooks was working. The scaling did not endanger Brooks. He agreed with Snyder and Harless that the conditions cited in the July 31 and August 12 order/citations were physically distant from where Brooks had been working and would have posed no danger to him.

THE ISSUE

The essence of Brooks' complaint is that he engaged in protected activity - - i.e., a protected work refusal - - and that his subsequent discharge was motivated by that activity. A miner has a right under Section 105(c) of the Mine Act to refuse work if the miner has a good faith, reasonable belief that such work is hazardous. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211, 1216 N.6, 1219 (3rd Cir. 1981); Miller v. Consolidation Coal Co., 687 F.2d 194-195 (7th Cir. 1982). A good faith belief "simply means honest belief that a hazard exists." Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 807-12 (April 1981).

As previously stated, the standard of review in this proceeding is whether the Secretary's legal theory, as well as the Secretary's factual assertions, are not frivolous. See Jim Walter Resources, Inc., v. FMSHRC, 920 F.2d 738, 747 (11th Cir. 1990). Although the Secretary's legal theory of a protected work refusal may or may not be sustained at a trial on the merits, it is certainly an arguable legal position given the testimony of Brooks that he refused to continue loading because of his concern

about the dangers presented by the highwall, his testimony that he expressed those concerns and the undisputed fact that immediately subsequent to his refusal he was terminated.


While there is an obvious disagreement over whether, in fact, Brooks was in any danger on July 30 and/or reasonably could have believed himself to be in any danger, there is no doubt that some parts of the highwall contained loose, unconsolidated overburden, and I believe that resolution of questions about the actual conditions under which Brooks was working and/or reasonably believed he was working require credibility determinations and factual findings more appropriately made after a full trial of the issues. Further, the same is true concerning whether, as required by the Mine Act, Brooks "communicate[d] . . . his belief in the safety . . . hazard at issue." Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 133 (February 1982); See also Simpson v. FMSHRC, 842 F.2d 453, 459 (D.C. Cir 1988).

Thus, I conclude that while there is conflicting testimony on these fundamental issues, it cannot be found that the Secretary's legal theory of discrimination and her factual assertions are clearly fraudulent, clearly without merit or clearly pretextual. Therefore, I find that Brooks' complaint is "not frivolously brought" and that Brooks is entitled to temporary reinstatement.

While I can well understand that such reinstatement may seem an unwarranted intrusion on R.B.S.'s prerogatives to control the makeup of its workforce, it is important to remember that the right to temporary reinstatement and the "not frivolously brought" standard represent the judgement of Congress on the protection individual miners should be afforded as the result of playing their part in ensuring the safety of mining facilities and how the risk of possible discharge should be born. See Jim Walter Resources, 920 F.2d at 748 n. 11.

ORDER

Respondent is ORDERED to immediately reinstate Paul H. Brooks to the position from which he was discharged on or about July 30, 1992, or to an equivalent position, at the same rate of pay and with same equivalent duties.


David F. Barbour
Administrative Law Judge
(703) 756-5232

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 7 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 92-267-M
Petitioner : A/O No. 11-01578-05537
v. :
WEDRON SILICA COMPANY, : Wedron Silica Plant
Respondent :

DECISION APPROVING SETTLEMENT

Appearances: Rafael Alvarez, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois,
for the Petitioner; Peter Comodeca, Esq.,
Calfee, Halter and Griswold, Cleveland, Ohio,
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). At hearing, Petitioner filed a motion to approve a settlement agreement and to dismiss the case. Respondent has agreed to pay the proposed penalty of \$700 in full. 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 \$700 within 30 days of this order. In accordance with the settlement agreement, the "significant and substantial" findings are hereby deleted from the subject citation.


Gary Melick
Administrative Law Judge

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OFFICE OF ADMINISTRATIVE LAW JUDGES
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V.

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

Docket No. PENN 91-1480-R
Citation No. 3687890;
8/21/91

Emilie No. 1 Mine

Mine ID 36-00821

Docket No. PENN 91-1454-R
Citation No. 3687888;
8/14/91

Margaret No. 11 Mine
Portal # 2

Mine ID 36-08139

Docket No. PENN 92-54-R
Citation No. 3687895;
9/20/91

Emilie No. 1 Mine

Mine ID 36-00821

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

$$V_0$$

KEYSTONE COAL MINING CORP.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. PENN 92-114
A.C. No. 36-00821-03761

Emilie No. 1 Mine

Docket No. PENN 92-119
A. C. No. 36-08139-03512

Margaret No. 11 Mine No. 2
Portal

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for Keystone Coal Company;
Edward H. Fitch, Esq., and Carl C. Charneski, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Secretary of Labor

Before: Judge Weisberger

Statement of the Case

In these consolidated contests and civil penalty proceedings the Secretary (Petitioner) filed petitions for assessment of civil penalty alleging violations of 30 C.F.R. § 70.100(a). On February 7, 1992, the Operator (Respondent) filed a Motion for Summary Decision, which was replied to by the Secretary on March 27, 1992. In a telephone conference call between the undersigned and counsel for both parties on April 9, 1992, counsel were requested to provide proper citations in the record to certain assertions set forth in their respective memorandum submitted in connection with the Operator's Motion. On May 5, 1992, an order was issued denying the Motion for Summary Decision.

Subsequent to notice, the cases were heard on June 2,3,4, 1992, in Pittsburgh, Pennsylvania, and pursuant to counsels' agreement, on July 21, and 22, 1992, in Falls Church, Virginia.

Both parties filed post hearing briefs on October 9, 1992. On October 9, 1992, American Mining Congress filed a Motion for leave to file an amicus curiae brief, and leave was granted in an order issued October 26, 1992, and the amicus curiae brief, was deemed filed as of a October 9, 1992. Respondent filed a Reply Brief on October 20, 1992. On October 21, 1992, Petitioner filed a Motion for an Extension of Time to file a Reply Brief from November 13, to November 25, 1992, and Respondent objected to this Motion. On October 26, 1992, an order was issued granting Petitioner until November 25, 1992, to file a Reply Brief. On November 25, 1992, Petitioner filed a Reply Brief.

I. Introduction

At issue in these cases are three citations issued by MSHA inspector Brady Cousins on August 14, August 21, and September 20, 1991. Each citation alleges violations of 30 C.F.R. § 70.100(a), based on a single respirable dust sample taken during one shift which indicated dust concentrations

exceeding 2.0 milligrams per cubic meter of air (hereinafter referred to as 2.0 mg/m³). Specifically, the issue presented is the validity of the Secretary's Spot inspection program, which commenced July 1991, requiring the citation of an operator for non-compliance based on dust samples obtained in a single shift.

II. Statutory Background

Section 70.100(a) supra, repeats the language of Section 202(b)(2), of Federal Mine Safety and Health Act of 1977 ("the 1977 Act") as follows:

Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active working of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with § 70.206 (Emphasis supplied)

"Average concentration" is not defined in the Regulations, but it is defined in Section 202(f) the 1977 Act, 30 U.S.C. § 842(f) as follows:

For the purpose of this title, the term "average concentration" means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active workings of a mine is exposed (1) as measured, during the 18 month period following the date of enactment of this Act, over a number of continuous production shifts to be determined by the Secretary and the Secretary of Health, Education, and Welfare, and (2) as measured thereafter, over a single shift only, unless the Secretary and the Secretary of Health, Education, and Welfare find, in accordance with the provisions of section 101 of the Act, that such single shift measurement will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift. (Emphasis supplied)

Section 202(f) of the Federal Coal Mine Safety Health Act of 1969 ("the 1969 Act") as pertinent, contains language identical to that set forth in Section 202(f) of the 1977 Act. It reads as follows:

For the purpose of this subchapter, the term "average concentration" means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active

workings of a mine is exposed (1) as measured, during the 18 month period following December 30, 1969, over a number of continuous production shifts to be determined by the Secretary and the Secretary of Health, Education, and Welfare, and (2) as measured thereafter, over a single shift only, unless the Secretary and the secretary of Health, Education, and Welfare find, in accordance with the provisions of Section of Section 811 of this title that such single shift measurement will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift.

On July 17, 1971, the Secretary of the Interior and the Secretary of Health, Education, and Welfare made the finding required by Section 202(f) as follows:

Notice of Finding That Single Shift Measurements of Respirable Dust Will Not Accurately Represent Atmospheric Conditions During Such Shift.

Section 202(f) of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 801; 83 Stat. 742) provides that the term "average concentration" means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active workings of a mine is exposed (1) as measured, during the period ending June 30, 1971, over a number of continuous production shifts to be determined by the Secretary of Health, Education, and Welfare, and (2) as measured thereafter, over a single shift only, unless the Secretary of the Interior and the Secretary of Health, Education, and Welfare find, in accordance with the provisions of Section 101 of the Act, that such single shift measurement will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift, that is, the shifts during which the miner is continuously exposed to respirable dust.

Notice is hereby given that, in accordance with Section 101 of the Act, and based on the data summarized below, the Secretary of the Interior and the Secretary of Health, Education, and Welfare find that single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is continuously exposed.

In April 1971, a statistical analysis was conducted by the Bureau of Mines, using as a basis the current basic

In April 1971, a statistical analysis was conducted by the Bureau of Mines, using as a basis the current basic samples for the 2,179 working sections in compliance with the dust standard on the date of the analysis. In accordance with the sampling procedures set forth in Part 70, Subchapter O, Chapter I, Title 30, Code of Federal Regulations, these current basic samples were submitted to the Bureau over a period of time prior to the date the analysis was conducted. The average concentration of the current 10 basic samples was compared with the average of the two most recently submitted samples of respirable dust, then to the three most recently submitted samples, then to the four most recently submitted samples, etc. The results of these comparisons showed that the average of the two most recently submitted samples of respirable dust was statistically equivalent to the average concentration of the current basic samples for each working section in only 9.6 percent of the comparisons. Figure 1 lists the results of the comparisons and shows that a single shift measurement would not, after applying valid statistical techniques, accurately represent the atmospheric conditions to which the miner is continuously exposed.

36 Fed. Reg. 13286 (July 17, 1971) (K-46 emphasis supplied) ("1971 Notice")¹ See, Eastern Associated Coal Corp, 7 IBMA 14, 29 (September 30, 1976). (The Interior Board of Mine Operator's Appeals took cognizance of the July 17, 1971 finding made pursuant to Section 101 of the 1969 Act).

On April 8, 1990, in connection with the promulgation of the Respirable dust standards, 30 C.F.R. § 70.100 et seq., the Secretary published the following language in the Federal Register under the heading Discussion of Major Issues:

The Secretary of the Interior and Secretary of Health, Education, and Welfare conducted continuous multi-shift sampling and single-shift sampling and, after applying valid statistical techniques, determined that a single-shift respirable dust sample should not be relied upon for compliance determinations when the respirable dust concentration being measured was near 2.0 mg/m³.

¹ Keystone Exhibit 46 (K-46) was submitted, post hearing, by Respondent along with a covering letter, dated September 28, 1992, wherein Respondent requested I take judicial notice of this document. The Secretary in her brief, does not argue that this document is not a proper matter for judicial notice. Hence, I take judicial notice of Keystone exhibit 46, a copy of 36 Fed. Reg. 13286, 13287 (July 17, 1971).

Health, Education, and Welfare prescribed consecutive multi-shift samples to enforce the respirable dust standard.

45 Fed. Reg. 23997 (April 8, 1980) (K-25) ("1980 comment").

III. Regulatory Dust Standards

A. Operator Sampling

On April 8, 1980, Regulations were promulgated requiring operators to submit five dust samples, collected on consecutive shifts, on a bimonthly basis for each mechanized mining unit. (30 C.F.R. § 207(e) the results of such sampling are reported to the operator and include not only "the concentration of respirable dust ... for each valid sample" but also "the average concentration of respirable dust ... for all valid samples" 30 C.F.R. § 70.210(a)(3) and (4) (emphasis supplied). Any citation to the operator is based upon the average of the samples (K-23, p.3). Under 30 C.F.R. § 70.208 an operator is required to submit one sample every two months for each designated area. If that sample exceeds the respirable dust standard, the operator is required to take five more samples. 30 C.F.R. § 70.208(c). If the average of these five samples exceeds the standard, a citation may then be issued (K-23, p.3, K-25, p. 23992).

In ruling on the challenges to the dust standards promulgated in 1980, the Court of Appeals justified its decision to uphold the standards, in part, upon the fact that:

All compliance determinations are based upon the average dust concentration of five samples. Id. §§ 70.207(a), 208(c), 210(a)(4). This system minimizes the variability associated with the result of a single sample or several samples taken on a single shift.

American Mining Congress v. Marshall, 671 F.2d 1251, 1259 (10th Cir. 1982).

b. MSHA Sampling

1. Prior to July 1991

With regard to MSHA sampling to determine compliance with Section 70.100(a) supra, the MSHA Underground Manual, (March 9, 1978), (Keystone 21) under the heading Safety and Health Technical Inspection, does not set forth any levels of dust concentration that would be considered out-of compliance on the basis of a single sample. Also, the MSHA handbook provided to inspectors dated Feb 15, 1989, (Keystone 18, June 2 Tr. 114-115), states in the preface that it "...sets forth procedure for MSHA personnel to follow when conducting health surveys, investigations, and inspections of underground and surface coal

mines", and provides that "a decision of non compliance cannot be made on one sample" (K-18, 1-12).

2. Spot inspections after July 1991

In the spring of 1991, a Coal Mine Respirable Dust Task Group ("task group") was established by the Assistant Secretary for Mine Safety and Health, William Tattersall, to "evaluate the agency's respirable dust program" (June 3 Tr. 7). The task group decided to conduct a study to ascertain the actual levels of dust that miners are exposed to (June 3, Tr.8). As part of the study, dust results were to be obtained from a single shift.²

On June 27, 1991, Assistant Secretary of Labor, William J. Tattersall, announced the creation of a program of special spot inspections to audit coal mines for respirable coal dust sampling, dust control and training (G-18).

The Respirable Dust Spot Inspection and Monitoring Program for Underground Mines, ("Spot Inspection") program was initiated on July 15, 1991. The Spot Inspection program consisted of two parts. Part I of the program involved the actual spot inspection which included the collecting of dust samples, reviewing dust plan parameters and sampling procedures, and interviewing mine personnel. Part II of the program consisted of monitoring the operators' respirable dust sampling activities. Effective July 15, 1991 MSHA inspectors were instructed, as reflected in the "Respirable Dust Spot Inspection Procedures" memorandum and revisions thereto issued to certain MSHA inspectors, that a citation was to be issued in the event of a single shift sample at or exceeding the levels set forth in that document (G-12). Such memoranda were not made part of the MSHA Program Policy Manual, and were not the subject of rulemaking.

The Respirable Dust Spot Inspection Procedures sets forth a table, prepared by Thomas Tomb, a member of the task group who is the Chief of the Dust Division, Pittsburgh Safety and Health Technology Center. The table is based upon a statistical analysis, which led Tomb to conclude that if a single dust sample yields, at a minimum, the level of dust set forth in the table

² A question arose in the task group as to what an inspector should do if, when collecting samples as part of the spot inspection monitoring process, the data showed a "very high probability" that the dust exposure exceeded 2.0 mg/m³. (June 3, Tr.57) It was decided that in these circumstances a citation should be issued.

i.e. 2.5 mg/m³, then there is a 95 percent level of confidence that the regulatory standard of 2.0 mg/m³ was exceeded.³

Pursuant to the CBE spot inspection program, single shift samples obtained by Cousins on August 13, 21, and September 20, 1991, contained the following levels of dust respectively. 4.4 mg/m³, 2.8 mg/m³ and 4.7 mg/m³. Cousins applied the figures in the table set forth in the Respirable Dust Spot Inspection Procedures, and issued citations alleging, in each instance, violations of the Regulatory standard i.e. average concentration in excess of 2.0 mg/m³.

IV. Analysis and Discussion

In essence, Respondent and Amicus seek dismissal of these citations on the ground that the spot inspection program, on which they are predicated, is invalid, as inter alia, the policy requiring the issuance of citations based on results of a single sample, was adopted without rulemaking. On the other hand, the Secretary argues, inter alia, that the spot inspection program, including the issuance of citations based on single samples, has been authorized by Congress, is grounded upon accepted scientific principles, and is consistent with the sampling strategy of Federal agencies. For the reasons that follow, I find that rulemaking was required to institute a new policy of issuing citations based on a single sample. Since the new policy was not adopted through rulemaking, it is not valid. Thus, citations issued pursuant to this policy are also invalid. It thereafter is not necessary to decide whether the statistical analysis underlying the new policy provides a reasonable basis for the policy. Even if this analysis is reasonable, it can not support a change in testing policy that has not been promulgated subject to rulemaking.

Also, my finding, that the single sample program is not valid as it was not adopted by rulemaking, is dispositive of this case. Thus, it is not necessary to decide the balance of the issues raised by the parties.

A. The 1971 Notice, 36 Fed. Reg. supra

Under Section 202(f) of the 1977 Act, supra, a determination of the "average concentration" of respirable dust for purposes of ascertaining compliance with the mandatory standard of exposure to less than 2.0 mg/m³ (Section 202(b)

³ In this connection, Tomb testified that each of the three single full-shift samples generated greater than a 97.5 percent "confidence" that the average concentration of the dust in the mine atmosphere for the sampled shift exceeded the dust standard. (June 3, Tr. 90, 166-167)

supra, and Section 70.100(a) supra, is based on a measurement over a single shift unless the Secretary of Interior and Health, Education and Welfare find "...in accordance with the provisions of Section 101 of the Act, that such single shift measurement will not, after applying valid statistical techniques to such measurements, accurately represent such atmosphere condition during such shift".

Thus, under the 1977 Act, the Secretary can cite an operator for a violation of the dust standard based on a single shift sample, unless the Secretary and the Secretary of Health Education and Welfare find that a single shift sample will not accurately represent such atmospheric conditions during such shift. Such a finding has been made in the 1971 Notice.

The 1971 Notice, 36 Fed. Reg. supra, is entitled Notice of Finding that Single Shift measurement of Respirable Dust will not Accurately Represent Atmospheric Conditions During such shift. It clearly and unambiguously provides as follows:

Notice is hereby given that in accordance with section 101 of the Act, and based on the data summarized below, the Secretary of the Interior and the Secretary of Health, Education, and Welfare find that single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is continuously exposed.

Thus, reading the 1971 Notice along with Section 202(b)(2) supra, and Section 202(f), supra, it appears that the Secretary is bound not to make dust determinations based on a single shift sample.

In essence, the Secretary argues that the 1980 comment, 45 Fed. Reg. supra, supersedes the 1971 Notice, 36 Fed. Reg. supra, inasmuch as the former contains a finding that only single shift samples "near" 2.0 mg/m³ are not reliable.⁴ The 1980

⁴ The Secretary also argues that my order of May 5, 1992, denying Respondent's Motion for Summary Decision, constitutes the law of the case insofar as I noted that the Secretary had not made an explicit finding in accordance with Section 101(a) of the Act, as to what dust concentrations are to be considered "near" 2.0 mg/m³, and found that "...it has not been established that the Secretary has made a finding, in accordance with Section 101[a] of the Act concerning the unreliability of single shift samples in general." Order of May 5, 1992 at 3-4.

The order was based on the record before me at the time which did not contain on any reference by either party, to the

comment does not explicitly refer to the 1971 Notice or its findings. Specifically, it does not explicitly indicate that it is superseding the 1971 Notice. Since the 1971 Notice contains findings made pursuant to Section 101 supra, based on "valid statistical techniques" as required of Section 202(f) supra, it is clear that it can not be rescinded or superseded without prior notice of the proposed rule through publication in the Federal Register and the opportunity for the public to comment (5 U.S.C. § 553 (b)(d)). In the 1971 Notice (36 Fed. Reg. supra), it is explicitly stated that "notice is hereby given" that, based on reliable statistical techniques, the Secretary of the Interior and the Secretary of Health, Educational and Welfare "find" that a single shift measurement will not accurately represent the atmospheric conditions to which a miner is exposed. In contrast, the language of the 1980 comment, 45 Fed Reg. supra, under the heading Discussion of Major issues, does not explicitly state that it is giving notice that a finding is made with regard to Section 202(f) of the Act. In contrast, it refers to the fact that the Secretary of the Interior, and the Secretary of Health, Education, and Welfare, "conducted" sampling, and after applying statistical techniques, "determined" that a single shift should not be relied on when the dust concentration was near 2.0 mg/m³. Thus, the language is ambiguous. Since the operative verbs, conducted, and determined are in the past tense, it might be concluded that this comment is a reference to the earlier 1971 finding, rather than a new contemporaneous finding based on valid statistical techniques. In this connection, I note that the 1980 comment does not define the term "near 2.0 mg/m³" nor does it set forth any statistical data or techniques that were applied in making the determination referred to. I thus find that the Secretary has not met its burden of establishing that the 1971 Notice was superseded by the 1980 comment.⁵

⁴ cont'd.

1971 Notice (36 Fed Reg. supra). As such the order is not the law of the case with regard to the entire record presently before me, including the 1971 Notice. (36 Fed. Reg. supra).

⁵ The Secretary also argues that the 1971 Notice, 35 Fed. Reg. supra, should be accorded no weight, inasmuch as the instant single shift sampling strategy "bears no resemblance to the Bureau of Mines data discussed in the 1971 Federal Register Notice" (Post Hearing Brief, at 25). In other words, it is argued that "...the type of measurement discussed in the 1971 Federal Register Notice is not at all like this single shift measurement at issue in this case".

I find that any deficiencies in the statistical data relied on by the Secretaries of Interior, Health, Education and Welfare as set forth in the 1971 Notice (K-25) do not negate the fact

Therefore, if the 1971 Notice has not been superseded, then applying Section 202(f) supra, it might be concluded that a measurement of the "average concentration" can not be made over a single shift.⁶

B. The Requirement for Rulemaking

The finding in 1971, 36 Fed. Reg. supra, that compliance determinations can not be based on a single sample, was explicitly issued as rulemaking under Section 101 of the 1969 Act, as specifically required by Section 202(f) (K-46). Hence, if rulemaking is required and was utilized in making such a finding, it is clear that rulemaking is similarly required to rescind the 1971 finding. As discussed above, infra IV(A), the evidence does not clearly establish that the 1971 finding was explicitly by rescinded by rulemaking, i.e., the 1980 comment, 45 Fed. Reg. supra.

In addition, for the reasons that follow, I find that rulemaking pursuant to the APA was required to promulgate a program providing for compliance determinations based on a single sample. Notice and comment are required by the APA when an agency is engaged in rulemaking defined as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). A "rule" is broadly defined by the APA as: "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy..." 5 U.S.C. § 551(4). A wide variety of statements issued by agencies meet this broad definition. See, e.g., Batterton v. Marshall, 648 F.2d 694, 704-705 (D.C. Cir. 1980) (where the agency's selection of a statistical methodology was found to constitute a rule under the APA); Pickus v. United States Bd. of Parole, 507 F.2d 1107,

⁵ cont'd.

that they made an explicit unequivocal finding, in accordance with Section 202(f) supra of the 1969 Act, that a single shift measurement will not accurately reflect the atmospheric conditions to which miners are exposed.

⁶ Due to the ambiguity of the 1980 comment. 45 Fed. Reg. supra, as to whether it was intended to supercede the 1971 finding as it pertains to dust concentrations not "near" 2.0 mg/m³, I do not base my decision regarding the validity of single sample testing solely on a finding that the 1971 notice was not superceded by the 1980 comment. Instead, for the reasons that follow, I conclude that a program requiring the issuance of citations based on single safe testing is not valid, as it was not put into effect through APA rulemaking.

1112-13 (D.C. Cir. 1974) (Board of Parole's guidelines limiting discretion and affecting private interests deemed substantive, not interpretive). Prows v. United States Department of Justice, 704 F. Supp. 272 (D.D.C. 1988), aff'd 938 F.2d 274 (D.C. Cir. 1991) (where the Federal Bureau of Prisons' issuance of a program statement affecting the financial obligations of prison inmates was a rule subject to notice and comment requirements); Waste Management, Inc. v. EPA, 669 F. Supp. 536, 538 (D.D.C. 1987) (where the deferral of ocean incineration permits pending the promulgation of new regulations was found to constitute a rule under the APA).

The Commission, in Drummond Company Inc., 14 FMSHRC 661 (May 5, 1992) recently addressed the issue of whether MSHA was required to comply with the APA in adopting its policy concerning "excessive history" penalties. In Drummond, supra, the Commission addressed a program policy letter (PPL) which had been issued to all operators. The Commission described the test for whether an agency must comply with the APA as follows:

Advance notice and public comment are required for rules that are substantive or legislative, and thus bear the force of law. Id. In the words of the Batterton Court, legislative rules manifest the following qualities:

Legislative rules . . . implement congressional intent; they effectuate statutory purposes. In so doing, they grant rights, impose obligations, or produce other significant effects on private interests. They also narrowly constrict the discretion of agency officials by largely determining the issue addressed. Finally, legislative rules have substantive legal effect. 648 F.2d at 701-02 (footnote omitted).

14 FMSHRC at 684.

The Commission, in Drummond, supra in analyzing whether the program policy letter at issue was a substantive rule requiring compliance with the APA took cognizance of the "two criteria" test set forth by the D.C. Circuit in American Bus Ass'n v. United States 627 F.2d 525, 529 (D.C. Cir. 1980) quoting Texaco v. FPC, 412 F.2d 740, 744 (3d Cir. 1969). The Commission in Drummond supra, noted that the first criteria is whether the pronouncement acts prospectively, and the second criteria is "...whether a purported policy statement genuinely leaves the agency and its decision makers free to exercise discretion" 14 FMSHRC supra at 686 quoting American Bus Ass'n, supra at 529.

Applying these principles, the Commission in Drummond, 14 FMSHRC, supra, held that a policy letter, setting forth a program for increased penalties based on excessive history, affects private interests in a substantial and present manner, and as such is subject to rulemaking.

Applying the above analytical framework to the case at bar, I agree with the argument of amicus that "An agency statement that establishes an entirely new basis for the issuance of a citation unquestionably meets the APA's expansive definition of a rule. This is particularly true when the existing standards and MSHA's longstanding practices and procedures base compliance determinations upon multiple samples".⁷

Specifically, prior to the implementation of the spot inspection program, a citation would not have been issued based on a single shift sample. In contrast, the spot inspection program unequivocally deprives an inspector of discretion as it clearly mandates that a citation shall be issued if a single sample measure exceeds the appropriate value set forth in a table provided to inspectors (GX 12 P.2). In the event such a citation is issued, as in the case at bar, the operator becomes liable to pay a civil penalty. Prior to the spot inspection program, no such liability would have been incurred as no citations were issued on the basis of a single sample. Hence, the spot inspection program definitely affects private interests in a substantial manner.⁸

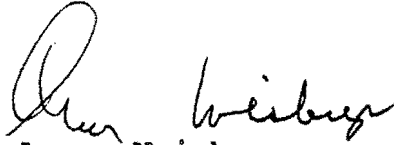
Therefore since Petitioner did not engage in APA rulemaking in setting forth its procedures for the spot inspection program requiring citations to be issued based on a single shift sample, the procedures are not valid, and the citations issued pursuant to these procedures are to be vacated.

⁷ In this connection, I note, as set forth by amicus, that "An operator is required to submit five samples every two months for each MMU (mechanized mining unit) on which compliance is determined. See, C.F.R. § 70.207. It submits one sample for each designated area. If such samples exceed the standard, it is required to submit five additional samples on which compliance is determined. See 3 C.F.R. § 70.208(c)." (Parenthesis added.)

⁸ For these reasons I reject Petitioner's argument that the spot inspection program only changes the "manner" in which the Secretary will prove a violation, and does not violate the operator's substantive rights.

ORDER

It is **ORDERED** that Docket Nos. PENN 92-114 and PENN 92-119 be **DISMISSED**. It is further **ORDERED** that the following Notices of Contests be sustained: Docket Nos. PENN 91-1454-R, PENN 91-1480-R, and PENN 92-54-R. It is further **ORDERED** that Citation Nos. 3687890, 3687888, and 3687895 be **DISMISSED**.



Avram Weisberger
Administrative Law Judge

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nb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 7 1992

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

v.

HELEN MINING COMPANY,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 92-704
A.O. No. 36-00926-03946

Docket No. PENN 92-705
A.O. No. 36-00926-03947

Docket No. PENN 92-537
A.O. No. 36-00926-03937

Docket No. PENN 92-536
A.O. No. 36-00926-03936

Docket No. PENN 92-565
A.O. No. 36-00926-03940

Docket No. PENN 92-732
A.O. No. 36-00926-03951

Docket No. PENN 92-789
A.O. No. 36-00926-03955

Docket No. PENN 92-641
A.O. No. 36-00926-03942

Docket No. PENN 92-439
A.O. No. 36-00926-03929

Docket No. PENN 92-419
(partial settlement)
A.O. No. 36-00926-03925

Docket No. PENN 92-664
A.O. No. 36-00926-03945

Docket No. PENN 92-538
A.O. No. 36-00926-03938

Docket No. PENN 92-521
A.O. No. 36-00926-03932
(settled on 9/22/92)

HELEN MINING COMPANY,
Contestant

v.

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

Docket No. PENN 92-597
A.O. No. 36-00926-03941

Docket No. PENN 92-564
A.O. No. 36-00926-03939

Docket No. PENN 92-534
A.O. No. 36-00926-03933

Docket No. PENN 92-535
A.O. No. 36-00926-03935

NOTICE OF CONTEST
PROCEEDINGS

Docket No. PENN 92-407-R
Citation No. 3488593; 2/11/92

Docket No. PENN 92-408-R
Order No. 3488594; 2/13/92

Docket No. PENN 92-409-R
Order No. 3488670; 2/4/92

Docket No. PENN 92-410-R
Order No. 3488672; 2/8/92

Docket No. PENN 92-411-R
Citation No. 3488933; 2/12/92

Docket No. PENN 92-412-R
Order No. 3488595; 2/12/92

Docket No. PENN 92-413-R
Citation No. 3488854; 1/27/92

Docket No. PENN 92-414-R
Order No. 3488677; 2/13/92

Docket No. PENN 92-433-R
Citation No. 3488900; 3/26/92

Docket No. PENN 92-434-R
Citation No. 3488934; 3/17/92
Docket No. PENN 92-435-R
Order No. 3708390; 3/28/92

Docket No. PENN 92-436-R
Order No. 3708391; 3/28/92

DECISION APPROVING SETTLEMENT

Appearances: Edward H. Fitch, Esq., Arlington, VA,
for Petitioner;
J. Michael Klutch, Esq., Pittsburgh, PA,
for Respondent.

Before: Judge Fauver

These consolidated cases were brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The parties have moved for approval of a comprehensive settlement disposing of all the issues in these cases. The settlement includes agreed civil penalties for specified citations or orders and the withdrawal of others, and the withdrawal of the corresponding actions for review of citations or orders.

I have reviewed the documentation submitted in support of the motion and conclude that the motion is consistent with the criteria for assessment of civil penalties in § 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that:

1. The motion for approval of settlement is GRANTED.
2. Within 30 days of the date of this Decision, Respondent shall pay to the Secretary the approved civil penalties of \$22,732.00.
3. The approved settlement constitutes a final disposition of all the cases, which upon payment of the above civil penalties are DISMISSED.


William Fauver

Administrative Law Judge

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/fcc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 8 1992

J. BRADLEY MILLER, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. PENN 92-368-DM
WHITE'S PELLETIZING CO., : NEMD 92-01
Respondent :

ORDER OF DISMISSAL

Appearance: Madelyn P. Nix, Esq., Lancaster, PA,
for Respondent.

Before: Judge Fauver

This case was called for hearing at Lancaster, Pennsylvania, on November 10, 1992, pursuant to notice of hearing. Counsel for Respondent appeared, but Complainant did not appear for the hearing. Since the date of the hearing, Complainant has not submitted any explanation for his failure to appear at the scheduled hearing.

Accordingly, it is ORDERED that this case is DISMISSED for failure of Complainant to prosecute his claim.


William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

DEC 8

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

JIM WALTER RESOURCES, INC.,
Respondent

: CIVIL PENALTY PROCEEDINGS
:
: Docket No. SE 92-226
: A.C. No. 01-00758-03838
: No. 3 Mine
:
: Docket No. SE 92-227
: A.C. No. 01-01247-03957
:
: Docket No. SE 92-228
: A.C. No. 01-01247-03958
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: Docket No. SE 92-230
: A.C. No. 01-01247-03959
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: Docket No. SE 92-238
: A.C. No. 01-01247-03962
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: No. 4 Mine
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: Docket No. SE 92-239
: A.C. No. 01-01322-03837
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: Docket No. SE 92-250
: A.C. No. 01-01322-03839
:
: No. 5 Mine
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: Docket No. SE 92-219
: A.C. No. 01-01401-03866
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: Docket No. SE 92-229
: A.C. No. 01-01401-03871
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: Docket No. SE 92-241
: A.C. No. 01-01401-03872
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: Docket No. SE 92-242
: A.C. No. 01-01401-03873
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: Docket No. SE 92-243
: A.C. No. 01-01401-03874
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: Docket No. SE 92-251
: A.C. No. 01-01401-03875

: Docket No. SE 92-272
: A.C. No. 01-01401-03878
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: Docket No. SE 92-278
: A.C. No. 01-01401-03879
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: Docket No. SE 92-296
: A.C. No. 01-01401-03883
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: Docket No. SE 92-300
: A.C. No. 01-01401-03882
:
: Docket No. SE 92-301
: A.C. No. 01-01401-03884
:
: Docket No. SE 92-342
: A.C. No. 01-01401-03891
:
: No. 7 Mine

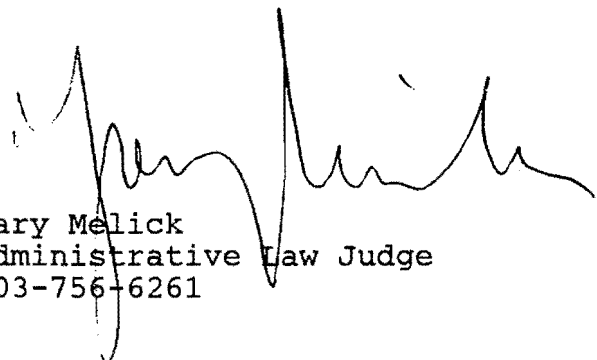
DECISION

Appearances: William Lawson, Esquire, Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
R. Stanley Morrow, Esq., Mining Division,
Jim Walter Resources, Inc., Brookwood, Alabama,
for Respondents

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the "Act"). At hearings, Petitioner filed motions to approve settlement agreements and to dismiss the cases. A reduction in total penalties from \$18,125 to \$10,754, the vacation of Citation Nos. 3191450, 3191451, 3191544, 3191574, 2804674 and 3008118, and removal of the "significant and substantial" designations for the specified citations have been proposed. I have considered the representations and documentation submitted in these cases before and at hearings, 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, including the Secretary's removal of her "significant and substantial" findings as requested, and it is ORDERED that Respondent pay a penalty of \$10,754 within 30 days of this order.



Gary Melick
Administrative Law Judge
703-756-6261

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R. Stanley Morrow, Esq., Jim Walter Resources, Inc., P.O. Box 133, Brookwood, AL 35444 (Certified Mail)

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

DEC 2

| | | |
|-------------------------|---|---------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. SE 92-248 |
| Petitioner | : | A.C. No. 01-00515-03822 |
| v. | : | Mary Lee No. 1 Mine |
| | : | |
| DRUMMOND COMPANY, INC., | : | Docket No. SE 92-253 |
| Respondent | : | A.C. No. 01-00821-03720 |
| | : | Mary Lee No. 2 Mine |

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the Petitioner; J. Fred McDuff, Esq., Drummond Company, Birmingham, Alabama, for Respondent in Docket No. SE 92-248; and David M. Smith, Esq., Maynard, Cooper, Frierson and Gale, Birmingham, Alabama, for Respondent in Docket No. SE 92-253

Before: Judge Melick

These consolidated proceedings are before me upon the petitions for civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801, et seq., the "Act" charging Drummond Company, Inc. (Drummond) with violations of mandatory standards.

Docket No. SE 92-253

At hearings Drummond admitted the violation charged in the one citation at issue, Citation No. 2805497, and conceded the inspector's findings relating to the violation. Drummond thereafter challenged only Section 104(b) Withdrawal Order No. 3008781, issued for an alleged failure to abate that citation.¹ At the conclusion of the Secretary's case-in-chief,

¹ Section 104(b) provides as follows:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as

Drummond moved for a directed verdict arguing that based on the Secretary's case alone, it was clear that the violation charged was fully abated at the time the Section 104(b) order was issued and that the Secretary was without authority under that section to require it to take the additional specified action beyond what was necessary to remedy and correct the violative condition cited. In a bench decision, the motion was granted. That decision is set forth below with only non-substantive correction.

The motion for directed verdict is granted. The admitted citation underlying the Section 104(b) order in this case provides as follows:

The operator's approved ventilation system, methane and dust and control plan, was not being followed in the 40 north section in that the following conditions were observed in the three right entry face where the continuous miner was cutting coal; One, they had taken a 40 foot cut out of the left side of the face prior to cutting the right side. Two, this was the first cut in by the crosscut, and the line curtain was 25 feet back from the last row of roof bolts. Three, there was seven feet of the wing dropout by the crosscut had been rolled up, therefore short circuiting the air. Four, there was only 145 feet per minuit [sic] at the end of the line curtain. The foreman stated he took a reading and had 245 feet per minuit [sic]. There were no notes to support this reading.

originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violations, and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

The Secretary acknowledges that immediately upon the issuance of the citation the first three of the cited conditions were abated and that, therefore, they are not at issue. It is alleged by the Secretary that only the fourth condition was not abated when the order was issued on July 30, 1991, and was not abated until sometime later when the operator met certain additional criteria required by the Secretary.

The order reads as follows:

The four of the five places examined did not have the required amount of air to cut 40 foot cuts. The two shifts prior cut 40 foot cuts. The day shift cut four places 40 feet, and the evening shift cut two places 40 feet. Therefore, it is determined that the required air quantity and velocity is not being maintained so as to cut 40 foot cuts continuously which is the operator's mining plan. Therefore, the time of abatement cannot be extended.

Nowhere does the order charge, nor is it alleged, that the specific conditions set forth in the underlying citation, and which caused the violation in that citation, continued to exist once the inspector issued that citation. Three of the four conditions were immediately abated, mining was halted in the cited entry, and there is no evidence of any additional mining in the cited entry that was not in full compliance with the ventilation plan. For that matter there are no allegations nor any evidence that any cuts were thereafter taken in violation of the plan.²

More particularly, Section 104(b) of the Act provides, in part, that 'if upon any follow-up inspection of a coal or other mine an authorized representative of the Secretary finds one, that a

² The ventilation plan permitted the operator to take 20 foot cuts with only 200 linear feet of air per minute at the end of the line curtain and 40 foot cuts with 300 linear feet of air per minute at the end of the line curtain. The operator is in no way required by the plan to take 40 foot cuts even if it meets the higher ventilation requirements.

violation described in a citation issued pursuant to Subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended ...'

That is as far into Section 104(b) as I need to go in this case. I find that on the facts of this case and considering the ventilation plan in effect that, at the time the citation was written, the violation that was specifically charged was, indeed, abated in that the violative conditions in the citation no longer existed. Since mining in the cited 40 foot cut was halted upon the issuance of the citation, and no mining was resumed in violation of the ventilation plan, the citation was clearly abated at that time. There was nothing more for the mine operator then to do to be in full compliance with its ventilation plan and so long as the operator did not violate the ventilation plan thereafter, it could not be deemed to have failed to abate the violation.³

Under the circumstances, I am going to grant the motion and dismiss the Section 104(b) order that is before me.

Docket No. SE 92-248

In a motion for settlement considered at hearing in this case, Petitioner proposed a reduction in penalty from \$1,000 to \$750 for the one order at issue, Order No. 2806102. I have considered the representations and documentation submitted in the case and conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. An appropriate order directing payment of the proposed penalty will be incorporated in the following Order.

³ The Secretary is without authority under Section 104(b) to compel performance of additional mining activities or create new requirements beyond what is necessary to abate the precise violation charged. In order to fully abate the citation, the inspector apparently wanted the operator to take 40 foot cuts in his presence with 300 linear feet of air per minute at the end of the line curtain. However, nothing in the ventilation plan requires the operator to take such 40 foot cuts and it may continue to legally take 20 foot cuts with lesser ventilation.

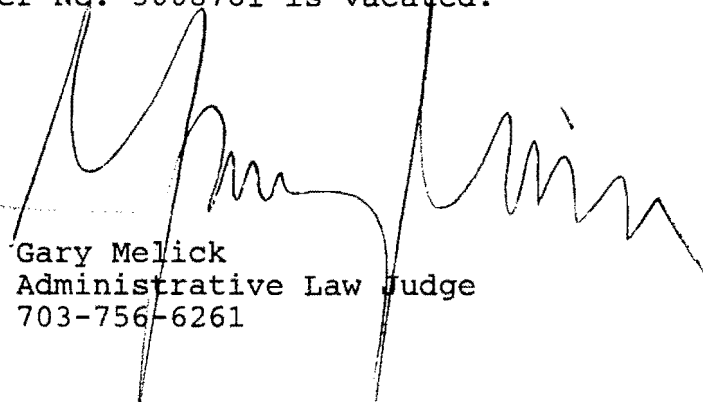
ORDER

Docket No. SE 92-248

Order No. 2806102 is affirmed and Drummond Company, Inc. is hereby directed to pay civil penalties of \$750 for the violation charged therein within 40 days of the date of this decision.

Docket No. SE 92-253

Citation No. 2805497 is affirmed and Drummond Company, Inc. is directed to pay civil penalties of \$910.00 for the violation charged therein within 40 days of the date of this decision. Section 104(b) Order No. 3008781 is vacated.



Gary Melick
Administrative Law Judge
703-756-6261

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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

DEC 11 1992

| | | |
|----------------------------|---|---------------------------|
| SECRETARY OF LABOR, | : | DISCRIMINATION PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | Docket No. WEVA 92-1010-D |
| on behalf of | : | MORG CD 92-03 |
| Ralph J. Thorn, | : | |
| Complainant | : | Dobbin Mine |
| v. | : | |
| | : | |
| ISLAND CREEK COAL COMPANY, | : | |
| Respondent | : | |

ORDER APPROVING SETTLEMENT AND DISMISSING CASE

Before: Judge Barbour

This proceeding concerns a complaint of discrimination filed by the Secretary of Labor ("Secretary") on behalf Ralph J. Thorn, Complainant, against Island Creek Coal Co. ("Island Creek") pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C. § 815(c). The complaint alleges that the Complainant was illegally discriminated against on February 5, 1992, when a written warning was unlawfully placed in his personnel employment file. Island Creek filed a timely answer denying that it had violated Complainant's Section 105(c) rights and the parties engaged in pre-trial discovery. Following the scheduling of this matter for hearing, counsels for the parties settled the case, and counsel for the Secretary has submitted a motion to approve the settlement. The motion is signed by counsels and the Complainant and sets forth the parties agreements with respect to resolving the matter. In particular, it states:

1. That Island Creek agrees to clear Complainant's employment record of all references pertaining to any incidents occurring from February 4 through February 14, 1992, at the Dobbin Mine; that Island Creek specifically agrees to immediately expunge the disciplinary warnings which were dated February 5, 1992 by Michael Nestor and February 14, 1992 by Richard Perando, and any references to such warnings, from any and all personnel files, payroll files, mine files, supervisors' notes, microfilm/microfiche files, and any other records maintained by Island Creek, Island Creek Corporation, or by any of their agents; and that Island Creek further agrees to mail the original copies of the warnings to the Secretary within ten (10) days of the issuance of the Order approving settlement.

2. That Island Creek agrees that it shall not assert, rely upon, or otherwise consider the disciplinary actions taken in February 1992 in any future disciplinary action, personnel decision, or other action involving the Complainant.

3. That Island Creek asserts that it is complying and will continue to comply with Section 105(c) of the Mine Act, agrees that it will not discharge or in any other manner discriminate 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 the Mine Act because such miner, representative of miners, or applicant for employment had filed or made a complaint under or related to the Mine Act, including a complaint notifying the Respondent, the Respondent's agent, of an alleged danger, or safety or health violation in a coal or other mine, or because such miner, representative of miners, or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101 of the Mine Act, or because such miner, representative of miners, or applicant for employment has instituted or caused to be instituted any proceeding under or related to the Mine Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miner, or applicant for employment on behalf of himself or others of any statutory right afforded by the Mine Act.

4. That Island Creek agrees to pay a civil penalty of one thousand (\$1,000) within thirty (30) days of the issuance of the Order approving settlement.

5. That Island Creek agrees to post a copy of the Motion To Approve Settlement and this Order approving settlement at the Dobbin Mine for a period of not less than thirty (30) days.

6. That the parties agree the settlement agreement shall not be offered or used for any other purpose whatsoever, except for Mine Act proceedings.

7. That except for amounts already received by Complainant and the reinstatement of personal leave to the Complainant, the parties agree to bear their own costs.


I conclude that the settlement, which compromises and settles this matter amicably, is in the public interest and should be approved.

ORDER

Accordingly, Island Creek is ORDERED to comply with provisions 1, 2, 3, 4, and 5 of the Agreement as stated above, and Island Creek, the Secretary and the Complainant are ORDERED

to comply with provisions 6 and 7 of the Agreement, as stated above. Island Creek shall mail to the Secretary the original warnings dated February 5 and February 14, 1992 within ten (10) days of the date of this Order and a civil penalty of (\$1,000) within thirty (30) days of the date of this Order. Upon receipt of the warnings and of payment, this proceeding is DISMISSED.

Counsels are commended and thanked for the diligent and responsible manner in which they have represented their respective clients during the course of this proceeding and in which they have kept me advised of the ongoing status of this case.


David F. Barbour
Administrative Law Judge
(703) 756-5232

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

DEC 1 1977

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|--------------------------|---|--------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. SE 92-84-M |
| Petitioner | : | A.C. No. 09-00265-05514 |
| v. | : | |
| | : | Junction City Mine |
| BROWN BROTHERS SAND CO., | : | |
| Respondent | : | |

DECISION

Appearances: Michael K. Hagan, Esq., Office of the Solicitor,
U.S. Department of Labor, Atlanta, Georgia, for
Petitioner;
Mr. Carl Brown, Brown Brothers Sand Co., Howard,
Georgia, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

This civil penalty proceeding was initiated by the Secretary of Labor ("Secretary") against Brown Brothers Sand Company ("Brown Brothers") pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 815 and 820. The issues are whether Brown Brothers violated two mandatory safety standards for surface metal and non-metal mines and, if so, the amount of the civil penalty to be assessed for each violation. The case was heard in Macon, Georgia.

STIPULATIONS

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

1. Brown Brothers is subject to the Act and to the Commission's jurisdiction.
2. Brown Brothers is a small operator employing nine to ten persons.

3. The payment of the proposed civil penalty assessments will not adversely affect Brown Brother's ability to continue in business.¹
4. During the two year period prior to the date of the first alleged violation at issue, records of the Mine Safety and Health Administration ("MSHA") indicate that Brown Brothers has an history of five prior violations of the mandatory standards.
5. Brown Brothers exhibited good faith in abating both of the alleged violations in a timely fashion.

See Tr. 3-4.

DISCUSSION

| <u>Mine Act</u> <u>Section</u> | <u>Citation No.</u> | <u>Date</u> | <u>30 C.F.R.</u> |
|-----------------------------------|---------------------|-------------|------------------|
| Section 104(a) ² | 3601603 | 09/04/91 | 56.14130(i) |

Citation No. 3601603 alleges that Brown Brothers failed to adequately maintain a seat belt on a self-propelled mobile equipment vehicle and that the violation was not a significant and substantial contribution to a mine safety hazard. The citation states in pertinent part:

The seatbelt is broken on the John Deere
. . . dozer.

Exh. P.2.

The Secretary presented her case through the testimony of MSHA Inspector Darrell Brennan. He confirmed that on September 4, 1991, while conducting an inspection of Brown Brothers' sand operation, he examined a John Deere bulldozer. Brennan testified that a bolt fastening the seat belt to the frame of the bulldozer was broken, making the seat belt

¹The Secretary proposed a civil penalty of \$20 for each alleged violation.

²30 U.S.C. § 814(a).

inoperable. Tr. 20. Because Section 56.14130(i) requires that the seat belts on such equipment be properly maintained, he issued the citation.³ Id.

Brennan stated that the bulldozer had been brought out of the pit and was being used on level terrain. Therefore, he considered it unlikely that an accident would occur and an injury would result because of the violation. Tr. 20-21. He also believed Brown Brothers was negligent in allowing the violation to exist, but the degree of negligence was not high because mine personnel had not reported the condition of the seat belt to mine management. Id.

Brown Brothers, through the statement of its representative Carl Brown, pointed out a recent instance at the mine in which a bull dozer had overturned and the bull dozer operator would have been severely injured, perhaps fatally, had he been wearing a seat belt and been trapped in the equipment. Tr. 24-26.

CONCLUSIONS

There is really no dispute about the existence of the violation. The defecting bolt made the seat belt unusable. Thus, the seat belt was not maintained in functional condition, and I so find. I further conclude that Brown Brothers was negligent in failing to properly maintain the seat belt. It is the operator's duty to ensure that equipment at its mine is properly maintained. To effectively carry out that duty, an operator must make certain equipment defects are promptly observed and reported. Here, Brown Brothers failed to meet the mandated standard of care required of an operator.

I also conclude that the violation was not serious. As the inspector rightly noted, the fact that the bull dozer was being operated on level ground made the chance of an injury causing accident extremely unlikely, and there was no testimony offered that the bull dozer was scheduled to be taken back to the pit or to be used on more hazardous ground.⁴

³30 C.F.R. § 56.14130(i) states:

Seat belt maintenance. Seat belts shall be maintained in functional condition, and replaced when necessary to assure proper performance.

⁴However, I would be remiss if I did not comment on Brown Brothers' apparent argument that use of a seatbelt can, in and of itself, be more hazardous than non-use. Undoubtedly there are instances where such is the case, perhaps even in the episode discussed by Mr. Brown, but common sense and experience dictates that in the vast majority of instances properly maintained and used seat belts save, not cost lives. Examples of equipment operators who were maimed or crushed while not wearing seat belts or while wearing seat

(continued...)

CIVIL PENALTY

The Secretary proposed a civil penalty of \$20 (Tr. 18), which I find appropriate in view of Brown Brother's negligence, the non-serious nature of the particular violation, and Brown Brother's stipulated small history of previous violations, its small size, its good faith abatement of the violation and the lack of effect of the penalty on Brown Brother's ability to continue in business.

Mine Act

| <u>Section</u> | <u>Citation No.</u> | <u>Date</u> | <u>30 C.F.R.</u> |
|----------------|---------------------|-------------|------------------|
| Section 104(a) | 3601604 | 09/11/91 | 56.14107(a) |

Citation No. 3601604 alleges that Brown Brothers failed to guard a coupling on a water gun pump motor and that the violation was not a significant and substantial contribution to a mine safety hazard. The citation states:

The water gun pump motor drive coupling is not provided with a guard.

Exh. P-3

Inspector Brennan again testified for the Secretary. He stated that during the course of the September 11 inspection he observed that the coupling connecting the drive shaft of the water gun pump to the water gun was not guarded. Tr. 16. The pump provides the pressurized water that is "shot" from the water gun in order to wash down sand during the mining process. The inspector testified that the coupling was turning fast (at an estimated 1,800 RPM) and that miners could have been caught in the unguarded part. Tr. 10. He believed that if a miner's clothing had become entangled in the coupling, the miner could have been pulled into the rotating machinery and could have endured lost workdays or restricted duty on account of injuries resulting from the accident. Tr. 9, 13-14. In his opinion, the coupling was a moving machine part that pursuant to Section 56.14107(a) should have been guarded.⁵

⁴(...continued)

belts that failed thorough the lack of proper maintenance were obviously too numerous for the Secretary to ignore when promulgation regulations governing the use of self-propelled mobile equipment at surface metal and non-metal mines, and the rare exception but proves the rule.

⁵30 C.F.R. § 56.14107(a) states:

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

The inspector also believed Brown Brothers was negligent in allowing the violation to occur. The inspector stated he had been told by management personnel that the rapidly rotating coupling had been guarded previously by a protective "house" enclosing the pump motor and the coupling. However, when Brown Brothers replaced the pump motor with a larger unit, the house was not enlarged proportionally and the coupling was "pushed" outside the house. Id.

Inspector Brennan stated that it was unlikely any miners would be injured due to the violation because there was very little exposure of miners to the pump motor. Tr. 9. He observed that the motor was located away from where miners usually worked and that the only time a miner would have been in its immediate vicinity was to start it up or to service it. Inspector Brennan believed that one miner probably came once a day to service the pump, and Carl Brown agreed this was correct. Tr. 18.

CONCLUSIONS

The standard's requirements are clear. As Commission Administrative Law Judge George Koutras has aptly stated, "The . . . language found in [Section] 56.14107(a) specifically and unequivocally requires guarding of any of the enumerated moving machine parts, as well as any similar moving part that can cause injury if contacted. The obvious intent of the standard is to prevent contact with a moving part." Highland County Board of Commissioner, 14 FMSHRC 270, 291 (February 1992) (quoted with approval Overland Sand & Gravel Co., 14 FMSHRC 1337, 1341 (August 1992) (ALJ Barbour)). Here, there is no doubt but that the cited moving coupling was not guarded, and I accept the inspector's testimony that a miner's clothing could have become entangled in the turning part causing injury to the miner. Therefore, I find that the violation existed as alleged.

In addition, I agree with the inspector that there was very little exposure of miners to the hazard posed by the violation and that this was not a serious violation. I also agree with his opinion and I find that Brown Brothers negligently failed to make sure that the coupling continued to be guarded when it installed the new pump motor. I infer from the presence of the previous guard that Brown Brothers was well aware of what the standard required.

CIVIL PENALTY

The Secretary proposed a \$20 civil penalty, which I find appropriate in view of Brown Brother's negligence, the non-serious nature of the violation, Brown Brother's stipulated small history of previous violations, its small size, its good faith abatement of the violation and the lack of effect of the penalty on Brown Brother's ability to continue in business.

ORDER

In light of the foregoing findings and conclusions, Brown Brother's is ordered to pay a civil penalty of \$20 for the violation of Section 56.14130(i) cited in Citation No. 3601603 and a civil penalty of \$20 for the violation of Section 56.14107(a) cited in Citation No. 3610604. Brown Brothers shall pay the civil penalties within thirty (30) days of the date of this Decision, and, upon receipt of payment, this matter is DISMISSED.



David F. Barbour
Administrative Law Judge
(703) 756-5232

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DENVER, CO 80204-3582
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DEC 1 1997

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|----------------------------|---|---------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 92-124-M |
| Petitioner | : | A.C. No. 05-04055-05507 |
| | : | |
| v. | : | |
| | : | Hopemore Shaft |
| LEADVILLE MINING & MILLING | : | |
| CORPORATION, | : | |
| Respondent | : | |

DECISION

Appearances: Tambra Leonard, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
George E. Reeves, Esq., Denver, Colorado,
for Respondent.

Before: Judge Lasher

In this matter, MSHA, proceeding pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeks assessment of a civil penalty for an alleged violation of 30 C.F.R. § 57.11050(a) pertaining to escapeways in underground mines. This standard provides:

Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.

Contentions of the Parties

Respondent (herein "LMMC") contends that it was engaged in exploration or development of the ore body and thus was not "required" to have a second escapeway, although such is "recommended" by the regulation.

Petitioner (herein "MSHA") contends that LMMC was not engaged in exploration or development but rather was engaged in actual mining operations. MSHA also contends that the alleged violation was "Significant and Substantial."

Findings

The Section 104(a) Citation in question (No. 3633365) was issued by MSHA Inspector Ronald L. Beason on July 3, 1990, during a regular inspection, and described the alleged violation as follows:

A separate escapeway to the surface was not provided at the mine. A method of refuge was provided; but, development towards a second escapeway was not being conducted at the time of this inspection. The employees were working on the 740 West Vent drift. Blasted a slab round in the 640 Zinc Stope. 1990.

In 1989 Mining was conducted on the 500 and 700 level. In 1988 Drifting 700 level.

An active development program must be established to comply with the standards and provide a second escape to the surface.

(Ex. R-4).

Although the allegedly violative condition was never actually abated, MSHA does not contend that LMMC did not proceed in good faith to achieve abatement. The mine was closed in November 1990.

The parties have stipulated (Court Ex. 1; T. 36-37) that the mine did not, on July 3, 1990, have two or more separate escapeways to the surface. The record is clear that the mine did have one escapeway--the Hopemore Shaft itself, and that a method of refuge was provided on the inspection day (T. 95). The second escapeway, contemplated by Respondent, was called the Hunter Shaft. (T. 94-95).

During his inspection of the Hopemore Shaft [an underground gold and base metals mine (T. 60, 68-69)] on July 3, Inspector Beason was accompanied underground by lead miner Robert Calder and by Oliver Jeter on the surface. The mine (Hopemore Shaft) had been in existence since 1985 (T. 44; Ex. 6-7). Two miners were working underground on the day of the inspection. (T. 59, 60, 72).

After Inspector Beason entered the mine, he rode the "skip" to the 700 level, and then went to the 740 "raise" and on to what is called the "640 stope" (T. 26-28, 35-36). He said a "stope" is not development work. (T. 42, 43, 49; Ex. G-2). He testified he saw men working, but not on the second escapeway:

I seen [sic] that they were working in the 500¹ and 700 levels and the 600 level. I observed that they were working in the 640 zinc stope while I was there and the 740 west drift. I did not observe any work towards a second escape. I didn't see in the previous reports and the previous citations issued for radon that they were in the 500 level working toward a second escape. (T. 36).

I conclude from the entire record on this point that while miners previously may have done some work in the 500 level, they had not been engaged in developing a second escapeway for at least a year (T. 37-39, 65).

The mine layout is shown in Exhibit R-1. The Hopemore Shaft (a vertical shaft) is shown thereon as a rectangle on the edge of square 427. The Hopemore Shaft is intersected by four different horizontal tunnels called the 5 level, 6 level, 7 level, and 8 level, and such are indicated respectively on R-1 by the colors yellow, green, brown, and red.

The Inspector's testimony relating to whether LMMC was engaged in production (mining) was first stated in the form that it was his "understanding" (T. 71) that such was the case:

¹ The Inspector said that, to "gain access" to a second escape, the work would have to be performed from the 500 level, and that "they were not working on the 500 level" (T. 36), contradicting what he said in the testimony quoted above. He said, in further explanation, that work would have to be done on the 500 level to be "toward the Hunter shaft" (T. 37, 42) which he was told was developed down 24 feet from the surface (T. 37) but was unable to confirm since it was timbered over (T. 38). This contemplated second escapeway, the Hunter Shaft, would have been 500 feet top to bottom, i.e., from the surface to the 500 level (T. 63-64).

- A. The 740 raise, they had completed that. And from my discussion with them, I determined that they had made a slab round and was in the process of using a slusher to move that down the stope, or down the raise into the skip.
- Q. So where was this slab round?
- A. In the 640 stope.
- Q. And could you describe what a slab round is and what its significance is, if it has any?
- A. Normally when you drive a drift, you drive it through an ore-bearing area or waste rock, that type of thing. If there's some ore or something where you want to widen it or something like that, you drill into the side of your drift and blast that off. And that's a slab.
- Q. Did this seem like an occasion where they wanted to widen it? Did it seem like they were blasting for the ore?
- A. It was my understanding that they were blasting for the ore, the skip--the car at the bottom of the 740 raise, we discussed that and how he moved the car of ore out to the shaft. And he told me he had to do it by hand. And we discussed that some.

So it was my understanding that they were blasting or putting it in the raise, and he was pushing this car to the shaft and hoisting it to the surface. (T. 27-28).

The Inspector said that "When they leave the levels and start pulling ore out of the shaft in the 640 stope, they were "mining." (T.43). He said he was told that ore had been hauled up with the skip out of the shaft and taken to the mill where it was stored in stockpiles (T. 45, 79, 99, 102). He did not see the stockpile. There were three such stockpiles (T. 162). Moreover, Donald Wilson, the President of LMMC, confirmed that there were stockpiles of gold ore which would have been salable after milling and that there were approximately 15 to 20 tons of such ore in the stockpiles. (T. 137-138, 193, 222-223, 224).

Inspector Beason said that the way LMMC was interpreting the regulation, "you'd have the mine mined out or have a cave-in before you ever got a second escapeway in." (T. 101-102) ²

Inspector Beason said development and exploration are the same thing:

What you do is you drive a drift in a specific part of the mine to determine the ore value. You long-hole it to determine how much you may have in that mine. And that's development and exploration. (T. 46).

In determining whether exploration or development was being conducted, Inspector Beason relied (T. 47) on MSHA's Program Policy Manual, Subpart J, pertaining to "Escapeways" (Ex. G-3) which provides, inter alia:

This standard requires two or more separate escapeways to the surface for every underground mine. However, a second escapeway is recommended, but not required, during the exploration or development of an ore body. In this connection, "exploration or development of an ore body" should be used in its narrowest sense, i.e., while an ore body is being initially developed, or development or exploration work is being conducted as an extension of a currently producing mine. Where mining occurs along a mineralized zone and production and development are indistinguishable as separate activities, the standard shall be applied as it would to a producing mine.

Inspector Beason inspected the mine's ventilation plan (Ex. G-6) and determined that LMMC was not ventilating the 500 level and therefore could not have been working on the 500 level. (T. 54). He also reviewed the locations where the last inspector had taken radon samples and noticed that no samples had been taken on the 500 level where the second escapeway would come down to (T. 36) and concluded that work was not being performed on that level

² LMMC contends that the regulation does not require a second escape to be developed at all during the exploration or development of an ore body (Brief, pg. 17). But see T. 73, 74, 79, 84, 99, 102, 107-109, 137-140, 156, 162, 168-169, 193, 222-224, indicating that mining (extracting ore) was being conducted.

because federal mining inspectors are required to take radon samples in all areas men are working. (T. 36). Inspector Beason reasonably concluded from so-called "contract" information (T. 37; Ex. G-2) and observations at the mine on inspection day that work had not been performed on the second escapeway for at least one year. (T. 37-38, 39).

On cross-examination, Inspector Beason pointed out the significance of determining where the miners had been working. (T. 73-74). He stated:

The work in the 500 drift toward the Hunter shaft would be to establish a second escape. Any work off of the main levels, such as the stopes, the raises, where you're into mineralized areas or working in those areas is mining. (T. 74).

There is no question but that ore was extracted from the mine and placed in stockpiles near the mill (T. 27-28, 45, 71-72, 79, 99, 107-108, 137-140, 141, 193, 222-224), that the concentrate therefrom could be sold after milling (T. 141, 192-193, 222, 223), and that the President of LMMC intended to sell it ultimately (T. 141, 192-194, 220-224).

The ore and other material removed from the mine was dumped on the ground and separated after a distinction was made whether it was "waste" rock or was mineralized (T. 107, 155-156, 161, 164, 214-215). None of the material put in the stockpiles has ever been milled by LMMC (T. 164) other than for test runs of approximately 10 tons (T. 168-169).

Inspector Beason identified the hazard involved as follows:

... if there's one escape, you only have one way out if you have a cave-in in any of your drifts, that prevents you from going out, or you lose your shaft, or if your skip gets hung up in there and drops, that type of thing, in the shaft. Or fire can occur in the shaft. Those types of things can create real hazards to the miners underground. (T. 59).

The Inspector felt that this exposure to miners had endured from 1988 to 1990 (T. 61) and that if one of the contemplated events occurred and the main shaft was blocked, and fire occurred, then fatal injuries could occur (T. 63). He acknowl-

edged that the existence of a refuge chamber could lessen the likelihood of a fatality (T. 63, 95).

Inspector Beason concluded that LMMC was moderately negligent on the basis of this rationale:

Well, at previous times they had done some work in the 500 level. You see, on the contract report, I show that they had been in the 500 level, 527 level at one month--I think it was two months that they were there. So they were throughout that period of time in the 500 level. I'm assuming that the only reason they were doing that is to make their second escape.

Then they had done the head frame and they claimed to be down 24 feet there, and they put the head frame in at that point. So, in that respect, they have mitigating circumstances that they have done some work, so I determined it to be moderately negligent. (T. 65).

LMMC established, contrary to Inspector Beason's assertion that blasting slab rounds in the stope constitutes "pulling ore out," that:

1. The mere fact that such occurs in a stope does not necessarily mean that production (mining) is ongoing (T. 42, 78-79).
2. The mere fact that LMMC was in the stope and blasting a slab round does not establish that LMMC was pulling out ore, i.e., extracting mineral (T. 85).
3. That the slab round which Inspector Beason thought was blasted on July 2, 1990 (the day before the inspection) in the 640 stope, was actually blasted on the 5 level drift (T. 27 71, 85, 154; Exs. R-2 and R-6; See LMMC's Brief, pp. 5-7, 15).
4. That the purpose of blasting the slab round in question, as stated by Mr. Calder, the miner who performed the task, was to turn a drift, which he explained as follows:

I had to go at an angle with the drift so it enabled me to have more time to turn around to put a car in mud, car and track." (T. 154).

5. That the mere existence of the muck chute does not warrant the inference that such was being used by LMMC for removal of ore (T. 57, 58, 72, 79).

DISCUSSION

A. Occurrence

This matter calls for interpretation of the standard. I construe the cited regulation, and conclude therefrom, as follows:

The first of the three sentences requires, without qualification, that every "mine" have two escapeways. Reference to the Act itself reveals that a "coal or other mine" is "... an area of land from which minerals are extracted" Thus, it would seem that if minerals are being extracted, for whatever reason, from an area of land, as here (T. 222-224), then the operation is a mine and the first sentence of the regulation applies so as to require two escapeways.

The second sentence of the regulation, requiring a "method of refuge while a second opening to the surface is being developed" was being complied with on the day the citation was issued. Respondent had put in such method of refuge (T. 95, 207).

The third sentence states that a second escapeway is recommended but not required during the exploration or development of the ore body. I construe this third sentence to be an exception to the requirement of the first sentence and concur with MSHA's position (stated in its Program Policy Manual) that the exception should be construed narrowly.³ So read, the regulation requires that when mining, extracting mineral, is ongoing, two escapeways

³ The Mine Act and the standards promulgated thereunder are to be interpreted to ensure, insofar as possible, safe and healthful working conditions for miners. Westmoreland Coal Co. v. FMSHRC, 606 F.2d 417, 419-420; (4th Cir. 1979). The conclusion reached here would prevent a mine operator from extracting ore and conducting mining under the guise of development by rejecting an "either-or" analytical approach and recognizing that development (or exploration) work and mining can be carried on simultaneously.

are required.⁴ Carrying this construction to finality, I conclude: (1) If such mining is incidental, in combination with, or part of exploration or development, it nevertheless is mining; (2) As mining, it is covered by the general rule of the regulation requiring two escapeways; (3) LMMC was required by the regulation to first install the second escapeway before engaging in other exploration or development work in which minerals were extracted; (4) If mineral extraction occurs as a direct result of the work involved in developing the second escapeway, no violation occurs; (5) If mineral extraction occurs as a result of work performed in other development not related to installation of the second escapeway, a violation does occur; and (6) If exploration or development work not related to installation of the second escapeway does not entail extraction of minerals, no violation is committed.

In this matter, LMMC was engaged in development work which did involve extraction of mineral and was not part of the work necessary to install the second escapeway. While such was development work, it also was mining (production). As mining, it was covered by the regulation and two escapeways were required to have been in place before such work was commenced.

Accordingly, it is concluded that a violation did occur.

B. Significant and Substantial

LMMC's position that this violation was not "Significant and Substantial" is found meritorious and is here adopted.

A violation is properly designated "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., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

⁴ At page 9 of its Brief, LMMC argues "... the mere fact that the material excavated in a particular operation is ore or mineralized rock does not prevent that operation from being exploration or development." When such ore or mineralized rock is extracted and stockpiled for future sale, is this not "mining" also? Is the regulation to be construed narrowly in a manner adverse to safety, or broadly to cover its obvious intent to require two escapeways when mining is going on?

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

Accord, Austin Power v. Secretary of Labor, 861 F.2d 99, 103 (5th Cir. 1988).

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, and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). See also Monterey Coal Co., 7 FMSHRC 996, 1001-1002 (July 1985). The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved. Texas-gulf, Inc., 10 FMSHRC 498, 500-501 (April 1988); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2011-2012 (December 1987). It is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

During Inspector Beason's direct testimony regarding whether the alleged violation was "Significant and Substantial," he testified in broad general terms regarding cave-ins, fire, and collapse of the shaft (T. 59) and then concluded that these events were "reasonable and likely," based on his experience in other mines (T. 62). His testimony on both direct and cross-examination is devoid of any mention of the particular facts surrounding the violation (Cement Division, National Gypsum Company, 3 FMSHRC 822 (April 1981) which would support his conclusion. Even from the record as a whole (including MSHA's evidence) it must be concluded that Petitioner established only a possibility (T. 62-63, 91) that the hazard contributed to by the violation would come to fruition so as to result in an injury or fatality. Since the "reasonable likelihood" requirement of Mathies, supra, has

not been satisfied, it is determined that the "Significant and Substantial" designation of this violation should be stricken.

C. Penalty Assessment ⁵


LMMC is the owner and operator of the Hopemore Shaft, a small underground gold and base metals mine. It had a history of seven violations in the pertinent two-year period preceding the issuance of the citation. LMMC's ability to continue in business will not be placed in jeopardy by the payment of a reasonable penalty in this matter. MSHA does not contend that LMMC, after notification of the violation did not proceed in good faith to promptly abate the same (T. 67). Based on the evidence previously discussed, LMMC is found to be but moderately negligent in the commission of this violation.

In view of the failure of the evidence with regard to the alleged "Significant and Substantial" nature of this violation, the paucity of the evidence bearing on whether there was a reasonable likelihood that the hazard envisioned would occur as a result of the violation's contribution, and the Inspector's opinion that the existence of the refuge chamber would lessen the likelihood of the occurrence of a fatality should a contemplated hazard come to fruition, the violation is found to be of only a moderate degree of gravity. Weighing these criteria, a penalty of \$100 is here assessed.

ORDER

1. Citation No. 3633365 is **MODIFIED** to delete the "Significant and Substantial" designation thereon and is otherwise **AFFIRMED**.

2. Respondent LMMC **SHALL PAY** to the Secretary of Labor within 40 days from the date hereof the sum of \$100 as and for a civil penalty.


Michael A. Lasher, Jr.
Administrative Law Judge

⁵ Petitioner seeks a penalty of \$85 in this matter.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 14 1992


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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 91-75 |
| Petitioner | : | A. C. No. 15-16323-03514 |
| v. | : | |
| | : | Black Mountain Mine |
| WASTE COAL MANAGEMENT, INC., | : | |
| 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 joint motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$273 to \$70 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 \$70 within 30 days of this order.


Roy J. Maurer
Administrative Law Judge

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Mr. W. H. Crandall, President, Waste Coal Management, Inc.,
P. O. Box 590092, Birmingham, AL 35259 (Certified Mail)

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ONE FILE

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|-----------------------------|---|---------------------------|
| CONSOLIDATION COAL COMPANY, | : | CONTEST PROCEEDING |
| Contestant | : | |
| v. | : | Docket No. PENN 92-739-R |
| | : | Order No. 3699507; 7/2/92 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Dilworth Mine |
| ADMINISTRATION (MSHA), | : | Mine I.D. No. 36-04281 |
| Respondent | : | |

DECISION

Appearances: Daniel E. Rogers, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant;
Nancy Koppelman, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent

Before: Judge Melick

This case is before me upon the notice of contest filed by Consolidation Coal Company (Consol) pursuant to Section 107(e) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. § 801, et seq., the "Act," to challenge an "imminent danger" order of withdrawal issued by the Secretary under Section 107(a) of the Act.

The withdrawal order at issue charges as follows:

There were two hot hangers and a third hanger found arcing across the insulator found on the G-main haulage. The first one found at the mouth of the 1-D switch was found with the insulator on fire. The flame was from 1 to 3 inches in height. The second hot hanger found just outby 73 and 1/2 crosscut had the roof coal and rock hot to the touch and was smoking when found. The third danger inby the 75-G mains crosscut was not hot but found to be arcing across the insulator. These are trolley wire hangers and the wire is 550 volts d.c. A citation will accompany this order.

Section 107(a) of the Act provides, in part, as follows:

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

Section 3(j) of the Act defines "imminent danger" as the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. This definition was not changed from the definition contained in the Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801, et seq. (1976) (Amended 1977) ("Coal Act"). The Senate Report for the Coal Act states that an imminent danger is present when "the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered without waiting for any formal proceeding or notice." S. Rep. No. 411, 91st Cong., 1st Sess. 89 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess. Part I, Legislative History of the Federal Coal Mine Safety and Health Act of 1969 at 215 (1975) (quotes Coal Act Legislative History). It further states that the "seriousness of the situation demands such immediate action" because "delays, even of a few minutes, may be critical or disastrous." See Utah Power and Light Company, 13 FMSHRC 1617 (1991).

In Rochester and Pittsburgh Coal Company v. Secretary, 11 FMSHRC 2159 (1989), the Commission set forth the analytical framework for determining the validity of imminent danger withdrawal orders issued under section 107(a) of the Act. The Commission indicated that it is first appropriate for the judge to determine whether the Secretary has met her burden of proving that an "imminent danger" existed at the time the order was issued. The Commission also suggested, however, that even if an imminent danger had not then existed, the findings and decision of the inspector in issuing a section 107(a) order should nevertheless be upheld "unless there is evidence that he has abused his discretion or authority." Rochester and Pittsburgh, supra, at p. 2164 quoting Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d at p. 31 (7th Cir. 1975).

The order at issue, No. 3699507, in fact charges three separate incidents as constituting separate grounds for issuance of the withdrawal order. It is not disputed that the first incident was discovered at approximately 8:30 a.m. on July 2, 1992, by an inspection party consisting of Ronald Hixson, a coal mine inspector for the Mine Safety and Health Administration (MSHA), Morton Whoolery, the union walkaround, and Patrick Wise, Consol's inspection escort. It is further undisputed that at around that time an underground trolley wire was found to be on fire with flames 1 to 3 inches in height.

Martin Whoolery, who corroborated the testimony of Inspector Hixson in essential respects, recalled that they first saw a glow in the distance and, as they approached, observed that the hanger was actually on fire. Whoolery testified that Wise then called the dispatcher and pulled the power. At that point Whoolery removed and replaced the old insulator. According to the expert testimony of Ron Gossard, an electrical engineer and MSHA supervisor, there was a high probability of ignition of roof coal by the open flames, particularly coal in the Pittsburgh seam, which is easily ignited and once ignited spreads rapidly.

Inspector Hixson confirmed that had the fire not been discovered as soon as it was, there was a chance for a major mine fire. There was coal in the roof, there was sloughage of coal on the mine floor and wood cribs were nearby the open flame. Hixson also observed that the hot mine roof could fall taking down the trolley wire in its entirety. With the air velocity in the mine at approximately 535 cubic feet per minute at the location of the fire, the fire would also likely spread rapidly. Hixson also observed that the instant mine liberates 1 to 1.5 million cubic feet of methane in a 24 hour period and the condition was accordingly that much more aggravated. In addition to the inspection party itself, pumpers and the fireboss would also have been exposed to the hazard.

Consol's escort, Patrick Wise, also saw the hot hanger from about 800 feet away as it was glowing and arcing. He acknowledged that the condition was dangerous and had it not been corrected was an imminent danger.

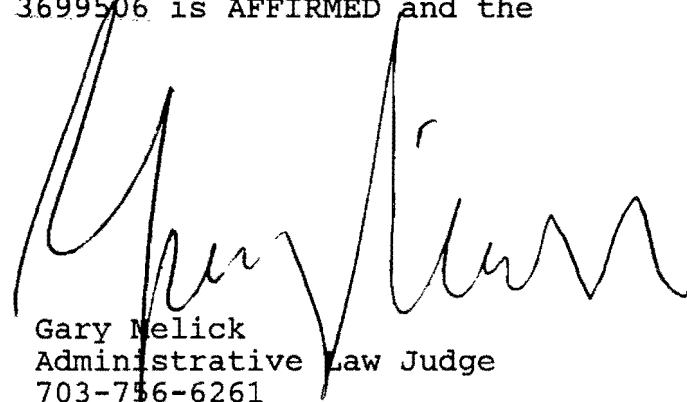
Within this framework of undisputed evidence it is clear beyond all doubt that the condition found at the first location at approximately 8:30 a.m. on July 2, 1992, was indeed an "imminent danger." The oral order of withdrawal

issued by Inspector Hixson at that time and subsequently committed to writing in Order No. 3699507 is accordingly affirmed.

Inasmuch as the Secretary was unable to prove by a preponderance of the evidence that even an oral order of withdrawal had been issued by Inspector Hixson prior to the abatement of the second and third conditions cited I cannot affirm those parts of the order. Inspector Hixson himself testified that he could not recall whether he even told Wise that a Section 107(a) order was being issued on the second condition. He further acknowledged that he did not tell Wise that persons inby had to be withdrawn following the discovery of the second and third conditions. Wise testified that it was only after they had replaced the smoking hanger at the second location that he asked Inspector Hixson "I assume this will be the same as the other one" and Hixson responded "Yes."

ORDER

Order of Withdrawal No. 3699506 is AFFIRMED and the Contest herein is DISMISSED.

A large, stylized handwritten signature in black ink, appearing to read 'Gary Melick', is written over the typed name and title.

Gary Melick
Administrative Law Judge
703-756-6261

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Nancy F. Koppelman, Esq., Office of the Solicitor, U.S. Department of Labor, 14480 Gateway Center, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

/lh

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| SECRETARY OF LABOR, |) | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Master Docket No. 91-1 |
| Petitioner |) | Docket No. KENT 92-110 |
| v. |) | A.C. No. 15-14990-03534D |
| |) | |
| BLACK WIDOW COLLIERIES LTD., |) | Warco No. 1 Mine |
| Respondent |) | |

ORDER OF DISMISSAL

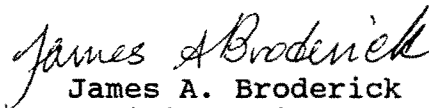
Before: Judge Broderick

On November 27, 1992, the Secretary filed a motion to dismiss this proceeding on the grounds that on August 12, 1991, the Respondent and Ernest Varney, President of Respondent entered into plea agreements, agreeing to plead guilty to charges of conspiracy to defraud the United States in connection with the civil violations charged herein. Respondent contracted with Triangle Research to handle its dust sampling program. Triangle's principal and agent admitted falsifying the samples submitted to MSHA and admitted that on numerous occasions they blew air on the filter surfaces of manufactured dust samples. Harry White and Ronald Ellis of Triangle have been convicted of defrauding the government and have been sentenced to prison. Respondent provided Triangle with signed blank dust data cards which were submitted to MSHA with the samples.

On August 7, 1992, Judge Samuel G. Wilson of the Western District of Virginia sentenced Black Widow Collieries Ltd to pay a fine of \$30,000, \$15,000 of which was suspended and to 2 years probation. Ernest Varney was sentenced to pay a fine of \$5,000 and to 2 years probation. As part of the plea agreement the Secretary agreed to move to dismiss pending civil penalty proceedings against Respondent for violations of the laws governing the dust sampling program.

I conclude that under the circumstances dismissal of this proceeding effectuates the purposes of the Mine Act.

Accordingly, this proceeding is DISMISSED.


James A. Broderick
Administrative Law Judge

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Hand delivered to Lead Defense Counsel Committee

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| SECRETARY OF LABOR, |) | PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Master Docket No. 91-1 |
| Petitioner |) | Docket No. VA 91-453 |
| v. |) | A.C. No. 44-05265-03526D |
| |) | |
| AMBROSE BRANCH COAL COMPANY, |) | Prep Plant No. 1 Mine |
| Respondent |) | |

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On November 30, 1992, the Secretary filed a motion to approve a settlement between the parties in the above case. The case includes one alleged violation of 30 C.F.R. § 70.209(b), each of which was originally assessed at \$1,000. The Secretary continued to assert that the violations resulted from a deliberate act, which is denied by the mine operator. The degree of negligence is disputed, and the parties agree to the reduction in the total penalties from \$1,000 to \$750.

I have considered the motion in the light of the criteria in section 110(i) of the Act and conclude that it should be approved.

Accordingly, the settlement motion is APPROVED. The operator is ordered to pay within 30 days of the date of this order the sum of \$750 for the violations charged in these proceedings.


James A. Broderick
Administrative Law Judge

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| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Master Docket No. 91-1 |
| Petitioner |) | Docket No. VA 91-583 |
| v. |) | A.C. No. 44-04079-03525D |
| |) | |
| CAROL COAL CORPORATION, |) | No. 1 Mine |
| Respondent |) | |

ORDER OF DISMISSAL

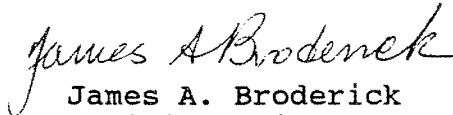
Before: Judge Broderick

On December 1, 1992, the Secretary filed a motion to dismiss this proceeding on the grounds that on August 2, 1992, the Respondent and Donald R. Lester, President of Respondent entered into plea agreements, agreeing to plead guilty to charges of conspiracy to defraud an agency of the United States in connection with the civil violations charged herein. Respondent contracted with Triangle Research to handle its dust sampling program. Triangle's principal and agent admitted falsifying the samples submitted to MSHA and admitted that on numerous occasions they blew air on the filter surfaces of manufactured dust samples. Harry White and Ronald Ellis of Triangle have been convicted of defrauding the Government and have been sentenced to prison. Respondent provided Triangle with signed blank dust data cards which were submitted to MSHA with the samples.

On May 8, 1992, Judge James C. Turk of the Southern District of West Virginia sentenced Carol Coal Company to pay a fine of \$30,000 and to 2 years probation. Donald R. Lester was sentenced to 2 years probation, 2 months home confinement, and a fine of \$5,000. As part of the plea agreement, the Secretary agreed to move to dismiss pending civil penalty proceedings against Respondent for violations of the laws governing the dust sampling program.

I conclude that under the circumstances dismissal of this proceeding effectuates the purposes of the Mine Act.

Accordingly, this proceeding is DISMISSED.


James A. Broderick
Administrative Law Judge

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| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Master Docket No. 91-1 |
| Petitioner |) | Docket No. VA 91-460 |
| v. |) | A.C. No. 44-04862-03541D |
| |) | |
| L & L ENERGY OF HURLEY, INC., |) | Mine No. 2 |
| Respondent |) | |

ORDER OF DISMISSAL


Before: Judge Broderick

On December 9, 1992, the Secretary filed a motion to dismiss this proceeding on the grounds that on August 8, 1991, the Respondent L & L Energy of Hurley, Inc. and Corbin Eugene Cline, principal of Respondent entered into plea agreements, agreeing to plead guilty to charges of conspiracy to defraud an agency of the United States in connection with the civil violations charged herein. Respondent contracted with Triangle Research to handle its dust sampling program. Triangle's principal and agent admitted falsifying the samples submitted to MSHA and admitted that on numerous occasions they blew air on the filtered surfaces of manufactured dust samples. Harry White and Ronald Ellis of Triangle have been convicted of defrauding the Government and have received prison sentences. Respondent provided Triangle with signed blank dust data cards which were submitted to MSHA with the samples.

On August 6, 1992, Judge James C. Turk of the Western District of Virginia sentenced L & R Energy to pay a fine of \$30,000 of which \$15,000 was suspended and to 2 years probation. Corbin Eugene Cline was sentenced to pay a fine of \$5,000 and to 2 years probation, and 2 months home confinement. As part of the plea agreement, the Secretary agreed to move to dismiss pending civil penalty proceedings against Respondent for violations of the laws governing the dust sampling program.

I conclude that under the circumstances dismissal of this proceeding effectuates the purposes of the Mine Act.

Accordingly, this proceeding is DISMISSED.


James A. Broderick
Administrative Law Judge

Distribution:

Douglas White, Esq., Mark R. Malecki, Esq., Office of the
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Hand delivered to Lead Defense Counsel Committee

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 18 1992

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| SECRETARY OF LABOR, |) | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Master Docket No. 91-1 |
| Petitioner |) | Docket No. VA 91-495 |
| v. |) | A.C. No. 44-04858-03554D |
| |) | |
| BRIARFIELD COAL CORPORATION, |) | Mine No. 1 |
| Respondent |) | |

ORDER OF DISMISSAL


Before: Judge Broderick

On November 27, 1992, the Secretary filed a motion to dismiss this proceeding on the grounds that on August 2, 1991, the Respondent and James W. Dotson, President of Respondent entered into plea agreements, agreeing to plead guilty to charges of conspiracy to defraud an agency of the United States in connection with the civil violations charged herein. Respondent contracted with Triangle Research to handle its dust sampling program. Triangle's principal and agent admitted falsifying the samples submitted to MSHA and admitted that on numerous occasions they blew air on the filter surfaces of manufactured dust samples. Harry White and Ronald Ellis of Triangle have been convicted of defrauding the Government and have been sentenced to prison. Respondent provided Triangle with signed blank dust data cards which were submitted to MSHA with the samples.

On May 8, 1992, Judge Samuel G. Wilson of the Western District of Virginia sentenced Briarfield Coal Corporation to pay a fine of \$30,000 and to 2 years probation. James W. Dotson was sentenced to pay a fine of \$5,000, and to 2 years probation. As part of the plea agreement the Secretary agreed to move to dismiss pending civil penalty proceedings against Respondent for violations of the laws governing the dust sampling program.

I conclude that under the circumstances dismissal of this proceeding effectuates the purposes of the Mine Act.

Accordingly, this proceeding is DISMISSED.


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 20 1992

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| SECRETARY OF LABOR, |) | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Docket No. VA 91-458 |
| Petitioner |) | A.C. No. 44-02241-03516D |
| |) | |
| v. |) | Mine No. 1 |
| |) | |
| LUCKY L & L COAL CO., INC., |) | |
| Respondent |) | |

ORDER OF DISMISSAL

Before: Judge Broderick

On December 8, 1992, the Secretary filed a motion to dismiss this proceeding on the grounds that on August 7, 1991, Respondent Lucky L & L Coal Co., Inc., and Robert Lee Brown, principal of Respondent entered into plea agreements, agreeing to plead guilty to charges of conspiracy to defraud an agency of the United States in connection with the civil violations charged herein. Respondent contracted with Triangle Research to handle its dust sampling program. Triangle's principal and agent admitted falsifying the samples submitted to MSHA, and admitted that on numerous occasions they blew air on the filter surfaces of manufactured dust samples. Harry White and Ronald Ellis have been convicted of defrauding the Government, and have received prison sentences. Respondent provided Triangle with signed blank dust data cards which were submitted to MSHA with the samples.

On August 10, 1992, Judge Samuel G. Wilson of the Western District of Virginia, sentenced Lucky L & L Coal Co., Inc., to pay a fine of \$30,000 of which \$15,000 was suspended and to 2 years probation. Robert Lee Brown was sentenced to pay a fine of \$500 and to 2 years probation. As part of the plea agreement, the Secretary agreed to move to dismiss pending civil penalty proceedings against Respondent for violations of the laws governing the dust sampling program.

I conclude that under the circumstances dismissal of these proceedings effectuates the purposes of the Mine Act.

Accordingly, these proceedings are DISMISSED.


James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 21 1992

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| SECRETARY OF LABOR, |) | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Master Docket No. 91-1 |
| Petitioner |) | |
| |) | Docket No. VA 91-462 |
| v. |) | A.C. No. 44-06333-03508D |
| |) | |
| GOOD TIMES MINING, INC., |) | Mine No. 2 |
| Respondent |) | |
| |) | Docket No. KENT 91-1051 |
| |) | A.C. No. 15-16410-03514D |
| |) | |
| |) | Mine No. 3 |

ORDER OF DISMISSAL

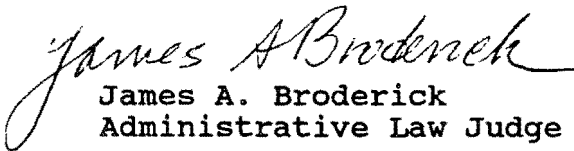
Before: Judge Broderick

On December 8, 1992, the Secretary filed a motion to dismiss these proceedings on the grounds that on August 6, 1991, Respondent Good Times Mining, Inc., and Jay Wallace, principal of Respondent, entered into plea agreements, agreeing to plead guilty to charges of conspiracy to defraud an agency of the United States in connection with the civil violations charged herein. Respondent contracted with Triangle Research to handle its dust sampling program. Triangle's principal and agent admitted falsifying the samples submitted to MSHA, and admitted that on numerous occasions they blew air on the filter surfaces of manufactured dust samples. Harry White and Ronald Ellis have been convicted of defrauding the Government, and have received prison sentences. Respondent provided Triangle with signed blank dust data cards which were submitted to MSHA with the samples.

On August 6, 1992, Judge James C. Turk of the Western District of Virginia, sentenced Good Times Mining, Inc. to pay a fine of \$30,000 of which \$15,000 was suspended and to 2 years probation. Jay Wallace was sentenced to pay a fine of \$5,000 and to 2 years probation and 2 months home confinement. As part of the plea agreement, the Secretary agreed to move to discuss pending civil penalty proceedings against Respondent for violations of the laws governing the dust sampling program.

I conclude that under the circumstances dismissal of these proceedings effectuates the purposes of the Mine Act.

Accordingly, these proceedings are DISMISSED.


James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 23 1992

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 89-274 |
| Petitioner | : | A. C. No. 46-05682-03505 |
| v. | : | |
| | : | Ward Mine |
| TEN-A COAL COMPANY, | : | |
| Respondent, | : | |

DECISION UPON REMAND APPROVING SETTLEMENT

Before: Judge Maurer

On May 3, 1990, I rendered a decision affirming section 104(d)(1) Citation No. 2944253 in its entirety and assessed a \$400 civil penalty. That portion of this case was not appealed and was not affected by the subsequent Commission decision and the operator has agreed to pay that \$400 as part of the instant settlement negotiation. The crux of the Secretary's appeal of my decision in this case and the subsequent Commission decision in Ten-A Coal Co., 14 FMSHRC 1296 (August 1992) dealt with my modification of section 104(d)(1) Order No. 2944252 to a section 104(a) citation. The Commission reversed that portion of my decision and remanded this matter to me for further proceedings.


Subsequently, the parties have proposed to settle this remaining portion of the case by reinstating the section 104(d)(1) Order and assessing a \$300 civil penalty vice the \$400 penalty originally proposed by the Secretary. I have reconsidered the entire record in this case and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Mine Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**.

ORDER

1. Section 104(d)(1) Citation No. 2944253 and section 104(d)(1) Order No. 2944252 **ARE AFFIRMED**.

2. Ten-A Coal Company is ordered to pay the sum of \$700 within 30 days of the date of this decision.


Roy J. Maurer
Administrative Law Judge

Distribution:

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Harold S. Yost, Esq., 126 West Main Street, Bridgeport, WV 26330
(Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 23 1992

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. VA 92-129 |
| Petitioner | : | A. C. No. 44-06533-03534 |
| v. | : | |
| | : | Mine No. 1 |
| DIXIE MINING COMPANY, INC., | : | |
| Respondent | : | |


DECISION APPROVING SETTLEMENT

Appearances: Javier I. Romanach, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia, for
the Secretary;
Sam Blankenship, President, Dixie Mining Company,
Inc., Bristol, Virginia, for Respondent.

Before: Judge Maurer

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing, on November 24, 1992, in Abingdon, Virginia, after the completion of testimony, the parties made a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$500 to \$150 was proposed. I have considered the representations, documentation and trial testimony submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Mine Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is ordered that respondent pay a civil penalty of \$150 within 30 days of this order.


Roy J. Maurer
Administrative Law Judge

Distribution:

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

Mr. Sam Blankenship, President, Dixie Mining Company, Inc.,
P. O. Box 909, Bristol, VA 24203 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 28 1992

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| SECRETARY OF LABOR, | : | DISCRIMINATION PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 92-1052-D |
| ON BEHALF OF | : | |
| DONALD BOWLING, | : | |
| Complainant | : | Mine ID 15-13937 and |
| | : | 15-13937 AFW |
| and | : | |
| | : | MSHA Case No. BARB CD 92-28 |
| DONALD BOWLING, | : | |
| Intervenor | : | |
| | : | |
| v. | : | |
| | : | |
| PERRY TRANSPORT, INC., | : | |
| a Corporation; STEVIE CALDWELL, | : | |
| TRUCKING, INC., a Corporation; | : | |
| and STEVIE CALDWELL, | : | |
| an Individual, | : | |
| Respondents | : | |

DECISION

Appearances: Stephen D. Turow, Esq., Office of Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
Tony Oppegard, Esq., Lexington, Kentucky, for Complainant; and
Sara Walter Combs, Esq., Stanton, Kentucky, for Respondents.

Before: Judge Fauver

This is an application for temporary reinstatement pending final determination of the merits of a miner's complaint of discrimination, under § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The application, filed on September 15, 1992, states that the Secretary reviewed Mr. Bowling's complaint to MSHA and determined that it was not frivolous.

With the parties agreement as to the date, a hearing on the application was held on October 20, 1992. The parties did not object to a posthearing briefing schedule after receipt of the transcript rather than oral arguments and a decision without the transcript. Pending briefs, the Secretary moved that temporary reinstatement, if granted, be made retroactive to October 27, 1992. Respondents filed an opposition to the motion.

At all relevant times, Lost Mountain Mining Co. operated coal mines in Kentucky, producing coal for sale or use in or substantially affecting interstate commerce.

Donald Bowling was employed by Stevie Caldwell Trucking, Inc., from February 1990, to February 7, 1992. He drove a coal truck under the corporation's contract with Perry Transport, Inc., which has had a longstanding contract with Lost Mountain Mining Co. to transport coal produced at its mines.

Stevie Caldwell Trucking, Inc., is a Kentucky corporation that owns one truck. The corporation was established by Stevie Caldwell upon the suggestion and guidance of his father, David Caldwell, as a means of contracting with Perry Transport, Inc., to deliver coal under its contract with Lost Mountain Mining Co. The principal officers of Perry Transport, Inc., are Dewey Grigsby (President), David Caldwell (Vice President) and Zack Caldwell (Secretary-Treasurer).

I find that Stevie Caldwell Trucking, Inc., and Perry Transport, Inc., have close economic and family ties warranting their treatment as co-employers of Donald Bowling as a truck driver. I also find that the history and nature of Stevie Caldwell Trucking, Inc., warrants treating its owner, Stevie Caldwell, individually as a co-employer of Donald Bowling.

The scope of a hearing on an application for temporary reinstatement is "limited to a determination by the Judge as to whether the miner's complaint is frivolously brought" and "the burden of proof shall be upon the Secretary to establish that the complaint is not frivolously brought." 29 C.F.R. § 2700.44.

To prevail on a petition for temporary reinstatement, the complainant need only (1) advance a legal theory of discrimination that is not frivolous and (2) produce sufficient evidence to convince the trier of fact that the evidence supporting the legal theory is not frivolous. C H Mining Company, Inc., 14 FMSHRC 1362, 1364-5 (1992).

There can be no argument regarding the sufficiency of Mr. Bowling's legal theory of discrimination: that the Mine Act prohibits discharging a miner for making safety complaints to MSHA. The question is therefore the sufficiency of the evidence to show that the complaint was not "frivolously brought."

The term "frivolous" describes something "of little or no worth" or something that is not "worthy of serious" consideration; "trifling," "petty," "paltry" and "trivial" are all terms that are synonymous with the word "frivolous." Random House College Dictionary, Revised Edition, 531 (1980). The common meaning of "frivolous" applies and temporary reinstatement should be granted unless the Complainant's position is "clearly without merit." Price and Vacha v. Jim Walter Resources, 9 FMSHRC 1305, 1306 (1987). In applying the term "frivolous" in a similar context, the Supreme Court ruled that a complaint is not frivolous from an evidentiary standpoint unless "the factual allegations [supporting the complaint] are clearly baseless" or "fanciful." Neitzke v. Williams, 490 U.S. 319, 325-7 (1989) (establishing a test for dismissing frivolous prisoner complaints under 28 U.S.C. § 1915 (d)); see also: Young v. Kann, 926 F.2d 1396, 1404 (3rd Cir. 1991) (refusing to dismiss a prisoner's complaint as frivolous since the claim was not based upon "completely baseless factual contentions").

The hearing evidence shows a sharp dispute of the facts concerning the termination of Mr. Bowling's employment. Mr. Bowling's version of the facts shows a discharge because of his safety complaints to MSHA. Mr. Caldwell's version shows a voluntary quit having nothing to do with complaints to MSHA.

I do not find that Mr. Bowling's testimony is so incredible or unworthy of belief as to amount to a "frivolous" complaint.

I therefore conclude that the special concern Congress has shown to require temporary reinstatement of a miner unless his claim is frivolous requires temporary reinstatement in this case. This decision is reached without any opinion as to the ultimate merits of the complaint of discrimination.

I also find that the Secretary's motion is well taken to grant temporary reinstatement retroactive to five days after the hearing on the petition, i.e., to October 27, 1992.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondents, jointly and severally, shall, within 10 days from the date of this Order, reinstate Donald Bowling, pending final determination of the merits of his complaint of discrimination, to the employment position he held immediately before the termination of his employment on February 7, 1992, with the same pay, benefits, duties, and other features of employment that would apply had his employment not terminated. The reinstatement shall be retroactive to October 27, 1992, and shall continue until dissolved, modified, or made permanent by further order.

2. Respondents, jointly and severally, shall compensate Donald Bowling for any lost wages due to the termination of his employment computed from October 27, 1992, until (1) Donald Bowling is reinstated in compliance with this Order, (2) he refuses an offer of reinstatement, or (3) he fails to accept an offer within five days after receiving a written offer of reinstatement. Interest shall accrue on the back pay in accordance with the Commission's decisions on interest. Provided: Back pay due under this Order shall be reduced by earnings made by Donald Bowling from other employment since October 27, 1992, and may be reduced further by proof of failure to mitigate damages by reasonable and diligent efforts to find other gainful employment since October 27, 1992.

3. The parties shall confer within seven days of receipt of this Order in an effort to stipulate damages and interest due under this Order, and within another seven days report any agreed amount to the judge. If the parties do not agree, counsel for the Secretary and Complainant shall promptly file a statement of proposed damages and interest. After an opportunity to reply, a hearing may be held on any issues of fact concerning damages.

4. Counsel for the Secretary and Complainant shall promptly file a Satisfaction of Order upon Respondents' compliance with this Order.

5. The Secretary's motion for temporary reinstatement retroactive to October 27, 1992, is GRANTED. Provided: the 90-day period for the Secretary to file a complaint for permanent reinstatement (provided in 29 C.F.R. § 2700.44(f)) shall run from October 27, 1992. If such a complaint is not filed within 90 days from that date, this Order hereby constitutes a Show Cause Order to the Secretary to show cause in writing why this temporary reinstatement order should not be dissolved effective the 91st day after October 27, 1992.

7. This Decision and Order shall not constitute the judge's final disposition of this proceeding until a decision on damages is issued.

William Fauver

William Fauver
Administrative Law Judge

Distribution:

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Sara Walter Combs, Esq., P. O. Box 828, Stanton, Kentucky 40380 (Certified Mail)

Tony Oppegard, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., 630 Maxwellton Court, Lexington, Kentucky 40508 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 92-519-M
Petitioner : A.C. No. 48-00154-05549
v. :
Big Island Mine and
Refinery
RHONE-POULENC OF WYOMING CO., :
Respondent :

ORDER OF DISMISSAL

Before: Judge Morris

The issues presented here are: (1) whether Secretary's Motion for Late Filing of her Proposal for Penalty should be granted; and (2) whether the proceedings should be dismissed because of a delay of 237 days in notifying Respondent of the proposed penalty.

Factual Background:

1. On October 2, 1991, a Citation was issued by the Federal Mine Safety and Health Administration ("MSHA") to Respondent, pursuant to § 104 of the Federal Mine safety and Health Act (30 U.S.C. § 814). On May 26, 1992, Respondent was notified of a proposed penalty assessment of \$1,000.

2. On August 14, 1992, the Secretary filed her motion to accept late filing of her Proposal for Penalty, pursuant to Commission Rule 10, 29 C.F.R. § 2700.14.

3. Pursuant to Commission Rule 27(a), the Secretary's proposal for penalty should have been filed by July 31, 1992. The proposal for penalty was, in fact, filed on August 14, 1992, two weeks after the Commission's deadline.

4. Respondent moved to dismiss Secretary's proposal for penalty.

Discussion

I

The Commission case law is well established. The late filing of a penalty proposal has been permitted where the Secretary shows adequate cause for the delay. An equally important facet concerning late filing involves prejudice to the operator. Salt Lake County Road Department, 3 FMSHRC 1714 (July 1981). In a subsequent decision, Medicine Bow Coal Company, 4 FMSHRC 882 (May 1982) the Commission elaborated on the decision in Salt Lake stating "[t]he Judge [in Medicine Bow] correctly interpreted Salt Lake as creating a two-part test. Salt Lake first established that the Secretary must show adequate cause for any delayed filing." 4 FMSHRC at 885. Further, "[w]e also heed in Salt Lake that adequate cause notwithstanding dismissal could be required where an operator demonstrates prejudice caused by the delayed filing," 4 FMSHRC at 885.

In the instant case, the Secretary's justification for her late filing is that "[t]he case was sent by the Arlington office to Denver but not received by the Denver Office of the Solicitor until August 3, 1992." (See Penalty for Proposal ¶ 3).

I agree with Respondent that the above-stated bare assertion by the Secretary does not show adequate cause.

The Secretary's 45 days were up on July 31, 1992. The case was apparently not sent to the Solicitor until after the deadline. No explanation is advanced for the Secretary's failure to comply with the deadline. An unexplained excuse cannot arise to the level of adequate cause.

It is, however, appropriate to consider the issues raised in the Secretary's statement in opposition to Respondent's motion.

The Secretary states that Respondent did not demonstrate any prejudice and merely seized upon a procedural irregularity to justify the drastic remedy of dismissal. The Secretary's efforts to inject prejudice as an issue are rejected. As stated in Medicine Bow, the two-part test initially requires the Secretary to show prejudice.

The Secretary in her statement further elaborates on her reasons for missing the penalty proposal filing deadline by two weeks and asserts that these reasons amount to "adequate cause."

The Secretary explains the filing was two weeks late because: (1) changes in MSHA's civil penalty assessment process resulted in the need to recalculate many assessments and renotify many operators; (2) the invalidation of MSHA's "excessive history" program caused hundreds of citations to be dismissed and then refiled and reassessed; and (3) MSHA lacks sufficient clerical personnel.

Essentially, the Secretary argues that MSHA was unusually busy as a result of its own policy changes and its mistake in trying to enforce its "excessive history" program, with the problem compounded by a lack of clerical personnel.

All of Petitioner's excuses have been rejected previously by the Commission. Changes in administrative policy or practice do not constitute adequate cause. River Cement Co., 10 FMSHRC 1602 (Oct. 1986). Since at least 1981, an unusually high workload and a shortage of clerical personnel do not constitute adequate cause. Price River Coal Co., 4 FMSHRC 489 (Mar. 1982); Salt Lake County Road Department, supra.

Furthermore notably missing from the Secretary's argument is any explanation why, in light of the asserted work overload, the Secretary failed to make use of the pre-established procedure for handling such problems. The leading decision on this issue, Salt Lake County Road Department, supra, accepted the excuses now offered by Petitioner (high workload and lack of clerical personnel) as "minimally adequate in this case," but also expressly warned that these excuses would not suffice in the future. 3 FMSHRC at 1717. Moreover, the Commission clearly pointed out that if the Secretary needs additional time because of a high workload or lack of personnel, her remedy is to obtain an extension prior to the deadline as allowed by Commission Rule 9, 29 C.F.R. § 2700.9. 3 FMSHRC at 1717 (fn. 8).

Inasmuch as the Secretary failed to establish adequate cause, the late filing of the Proposal for Penalty should be denied.

II

While Respondent only collaterally raises the issue (Brief, p. 5, fn. 4), the operator further asserts MSHA took 237 days to notify Respondent of the proposed penalty and thus did not comply with Section 105(a) of the Act.

Section 105(a) of the Act, 30 U.S.C. § 815(a), provides that after the Secretary issues a citation or order under section 104, she shall within a reasonable time notify the operator of the proposed civil penalty to be assessed for the cited violation.

The Mine Act does not define "reasonable time." However, the following statements of the Senate Committee are instructive:

To promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the operator and miner representative promptly. The Committee notes, however, that there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to

propose a penalty with promptness shall vitiate any proposed penalty proceeding.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 24 34, reprinted in Senate Subcommittee on Labor, Comm. on Human Resources, 95th Cong., 2 Sess., Legislative History of the Federal Mine Safety and Health Act, at 622 (1978).

The Commission has apparently not addressed this issue but it has been considered by some Judges' decisions.

In Heldenfels Brothers, Inc., 2 FMSHRC 851 (April 1980), a judge denied a motion to dismiss where there was a 220-day delay on the ground that MSHA's assessment procedures required considerable time and that the operator had not shown that it suffered any actual harm. However, in Anaconda Company, 3 FMSHRC 1926 (August 1981), another judge dismissed a case where there had been nearly a two-year delay and the Secretary offered no reasons for the delay, but this same judge subsequently refused to dismiss a case for a 132-day delay because the operator had not claimed prejudice. Industrial Construction Corp., 6 FMSHRC 2181 (Sept. 1984). Delays of a year and a half and two years have not been countenanced. Washington Corporation, 4 FMSHRC 1807 (October 1982).

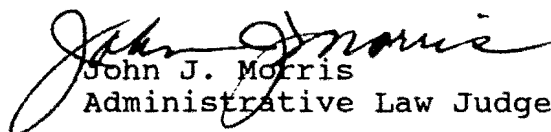
In the instant case, there was a delay of 237 days from when the Citation was issued to the issuance of the proposed penalty. However, the delay is within the parameters allowed in the above cited cases.

While Respondent asserts it was "inherently prejudiced" by the delay, it has failed to allege any factual basis to establish such prejudice.

Accordingly, I enter the following:

ORDER

1. Respondent's Motion to Dismiss under Section 105(a) of the Act is **DENIED**.
2. Secretary's motion to accept late filing of Proposal for Penalty is **DENIED**.
3. Respondent's Motion to Dismiss is **GRANTED**.


John J. Morris
Administrative Law Judge

Distribution:

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

Daniel A. Jensen, Esq., KIMBALL, PARR, WADDOUPS, BROWN & GEE, P.O. Box 11019, Salt Lake City, Utah 84147 (Certified Mail)

ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 29 1992

| | | |
|--------------------------|---|--------------------------|
| EDD POTTER COAL COMPANY, |) | CONTEST PROCEEDINGS |
| Contestant |) | |
| v. |) | Master Docket No. 91-1 |
| |) | Docket No. KENT 91-680-R |
| SECRETARY OF LABOR, |) | through KENT 91-697-R |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Citation Nos. 9858737 |
| Respondent |) | through 9858754; 4/4/91 |
| |) | |
| |) | Mine No. 2 |
| |) | Mine ID 15-05436 |
| |) | |
| SECRETARY OF LABOR, |) | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Docket No. KENT 91-1136 |
| Petitioner |) | A.C. No. 15-05436-03531D |
| v. |) | |
| |) | Mine No. 2 |
| EDD POTTER COAL COMPANY, |) | |
| Respondent |) | |

ORDER OF DISMISSAL

Before: Judge Broderick

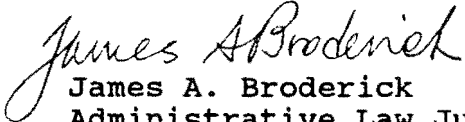
On December 8, 1992, the Secretary filed a motion to dismiss these proceedings on the grounds that on May 11, 1991, the Respondent Edd Potter Coal Company, and David Potter, principal of Respondent entered into plea agreements, agreeing to plead guilty to charges of conspiracy to defraud an agency of the United States in connection with the civil violations charged herein. Respondent contracted with Triangle Research to handle its dust sampling program. Triangle's principal and agent admitted falsifying the samples submitted to MSHA and admitted that on numerous occasions they blew air on the filtered surfaces of manufactured dust samples. Harry White and Ronald Ellis of Triangle have been convicted of defrauding the Government and have received prison sentences.

On August 10, 1992, Judge Joseph M. Hood, of the Eastern District of Kentucky, sentenced Edd Potter Coal Company to pay a fine of \$25,000 and to 2 years probation. David Potter was sentenced to 2 years probation including 3 months of home detention and 3 months of community service. As part of the plea agreement the Secretary agreed to move to dismiss pending civil

penalty proceedings against Respondent for violations of the laws governing the dust sampling program.

I conclude that under the circumstances, dismissal of these proceedings effectuates the purposes of the Mine Act.

Accordingly, these proceedings are DISMISSED.


James A. Broderick
Administrative Law Judge

Distribution:

Douglas White, Esq., Mark R. Malecki, Esq., Office of the
Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard,
Suite 400, Arlington, VA 22203 (Certified Mail)

Ronald L. King, Esq., Robertson, Cecil, King & Pruitt, 237 Main
Street, Drawer 1560, Grundy, VA 24614 (Certified Mail)

Hand delivered to Lead Defense Counsel Committee

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 29 1992

| | | |
|---------------------------|---|------------------------------|
| RED DOG COAL CORPORATION, |) | CONTEST PROCEEDING |
| Contestant |) | |
| v. |) | Master Docket No. 91-1 |
| |) | Docket No. KENT 91-698-R |
| SECRETARY OF LABOR, |) | Citation No. 9859294; 4/4/91 |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Mine No. 3-A |
| Respondent |) | Mine ID 15-15908 |
| |) | |
| SECRETARY OF LABOR, |) | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Docket No. KENT 91-1112 |
| Petitioner |) | A.C. No. 15-15908-03525D |
| v. |) | |
| |) | Mine No. 3-A |
| RED DOG COAL CORPORATION, |) | |
| Respondent |) | |

ORDER OF DISMISSAL

Before: Judge Broderick

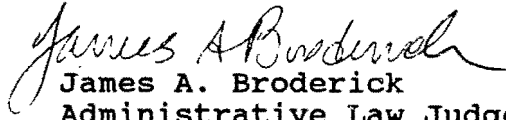
On December 9, 1992, the Secretary filed a motion to dismiss these proceedings on the grounds that on August 7, 1991, the Respondent Red Dog Coal Corporation and Ronnie Alan Edwards, principal of Respondent entered into plea agreements, agreeing to plead guilty to charges of conspiracy to defraud an agency of the United States in connection with the civil violations charged herein. Respondent contracted with Triangle Research to handle its dust sampling program. Triangle's principal and agent admitted falsifying the samples submitted to MSHA and admitted that on numerous occasions they blew air on the filtered surfaces of manufactured dust samples. Harry White and Ronald Ellis of Triangle have been convicted of defrauding the Government and have received prison sentences.

On August 7, 1992, Judge Samuel J. Wilson of the Western District of Virginia sentenced Red Dog Coal Corporation to pay a fine of \$30,000 of which \$15,000 was suspended and to 2 years probation. Ronnie Alan Edwards was sentenced to pay a fine of \$5,000 and to 2 years probation and 2 months home confinement. The Secretary agreed to move to dismiss pending civil penalty

proceedings against Respondent for violations of the laws governing the dust sampling program.

I conclude that under the circumstances, dismissal of these proceedings effectuates the purposes of the Mine Act.

Accordingly, these proceedings are DISMISSED.


James A. Broderick
Administrative Law Judge

Distribution:

Douglas White, Esq., Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Suite 400, Arlington, VA 22203 (Certified Mail)

Ronald L. King, Esq., Robertson, Cecil, King & Pruitt, 237 Main Street, Drawer 1560, Grundy, VA 24614 (Certified Mail)

Hand delivered to Lead Defense Counsel Committee

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 29 1992

| | | |
|------------------------------|---|---------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 92-17 |
| Petitioner | : | A.C. No. 15-13920-03720-A |
| | : | |
| v. | : | Pyro No. 9 Wheatcroft |
| | : | |
| DAVIS A. SHOULDERS | : | |
| EMPLOYED BY PYRO MINING CO., | : | |
| Respondent | : | |

DECISION

Appearances: Steve D. Turow, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia
for Petitioner;
Flem Gordon, Esq., P.S.C., Madisonville,
Kentucky, for Respondent.

Before: Judge Barbour

This civil penalty proceeding was initiated by the Secretary of Labor ("Secretary") against Davis A. Shoulders pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act").¹ The Secretary charges, inter alia, that at all times relevant to this matter, Shoulders was employed by Pyro Mining Company ("Pyro") as the chief electrician at Pyro No. 9 Wheatcroft Mine and that on October 26, 1990, he was acting as an agent of corporate operator Pyro when he knowingly authorized, ordered or carried out a violation of 30 C.F.R. § 75.512, a violation for which Pyro was cited.

¹ Section 110(c) of the Act states:

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

30 U.S.C. § 820(c)

The Secretary proposes that a civil penalty of \$1,000 be assessed against Shoulders for the knowing violation. Shoulders generally denies the Secretary's allegations.

Following the filing of the petition, the Secretary moved to stay the matter, asserting that an ongoing criminal investigation of Pyro and several employees at the mine by the U.S. Department of Justice warranted deferring the civil penalty proceeding until the Department determined whether to bring criminal charges against any individual involved in the civil penalty proceeding. Shoulders did not oppose a stay, and the Secretary's motion was granted. Subsequently, the stay was dissolved upon the Secretary's assertion that the investigation no longer overlapped with conditions at issue in the civil penalty proceeding, and the matter was scheduled to be heard on December 1, 1992, in Nashville, Tennessee.

Counsel for Shoulders then moved for summary judgement, asserting as uncontroverted fact that on October 26, 1990, Pyro was not a corporate entity but was instead a partnership. Counsel attached to the motion a copy of a Statement of Assumed Name filed on January 27, 1982, with the Secretary of State of the Commonwealth of Kentucky. The document states that W. K. Y. Mining (Pyro) Inc., and Costain Mining (Pyro) Inc., exist as a general partnership in the State of Illinois and intend to conduct and transact business in Kentucky under the assumed name of Pyro Mining Company. Because Section 110(c) subjects only corporate agents to liability, counsel for Shoulders moved that the case be dismissed. Motion for Summary Decision 1-3.

The Secretary opposes the motion. Counsel for the Secretary contends that while Section 110(c) contemplates liability only for agents of "corporate operators," Shoulders is not entitled to summary judgement since Shoulders "was employed by a corporate operator on the date the alleged violation occurred." Br. in Op. to Resp's. Mot. for Sum. Judg't. 2. The essence of the Secretary's position is that:

Pyro Mining Company is the product of two corporations, W. K. Y Mining (Pyro) Inc., and Costain Mining (Pyro) Inc., that apparently formed a "general partnership." Thus, the issue is not whether an employee of a non-corporate entity can be subject to § 110(c) liability, but whether a corporation can exonerate its agents from the responsibility that Congress intended then to shoulder simply by entering into partnership with another corporation. Affirming this proposition would create a result completely contrary to [the] language and the spirit of

the Act. . . . Agents of an entity created and controlled by two or more corporations are agents of a "corporate operator."

Id. 3.

REQUIREMENTS FOR SUMMARY DECISION

Commission Rule 64(b) is clear. 29 C.F.R. § 2700.64(b). It states that, "A motion for summary decision shall be granted only if the entire record, including the pleading, depositions, answers to interrogatories, admissions, and affidavits shows: (1) That there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law."² Id. As the Commission has pointed out, summary decision is an extraordinary procedure and must be entered with care, for it has the potential, if erroneously invoked, of denying a litigant the right to be heard. Thus, it may only be entered when there is no genuine dispute as to material facts and when the party in whose favor it is entered is entitled to summary decision as a matter of law. Missouri Gravel Co., 3 FMSHRC 2470, 2471 (November 1981). Here, the burden is on Shoulders, as the moving party, to establish his right to summary decision, and I conclude that Shoulders has met that burden.

RATIONALE

The language of Section 110(c) is unambiguous in imposing liability upon "corporate operators" and upon "any director, officer, or agent of such corporation" (emphasis added). The Secretary does not dispute that Pyro is a general partnership composed of two corporations.³ However, the Secretary's position

² Commission Rule 64(a) provides that a motion for summary decision may be filed "at any time after commencement of a proceeding and before scheduling of a hearing on the merits". 29 C.F.R. § 2700.64(a). Although, Shoulders' motion was filed out of time in that a hearing had been scheduled prior to its submission, for the reasons stated in this decision it would make a little sense to proceed with the scheduled hearing.

³ Indeed, there is no factual dispute in this case. The parties have stipulated as follows:

(1) Pyro Mining Company was a general partnership composed of two corporations, W. K. Y. Mining (Pyro), Inc. and Costain Mining (Pyro), Inc.;

(2) Pyro Mining Company was a general partnership pursuant to the laws of the State of Illinois;

(3) Pyro Mining Company was recognized and authorized to do business in the Commonwealth of Kentucky as a general partnership;

(continued...)

is that Pyro, as a partnership entity composed of two corporations, has a "corporate nature" and that Shoulders was thus the employee of a "corporate operator." Id. 5 In short, the Secretary argues that because Pyro's business arrangement is much closer to that of a traditional corporation than to that of

³(...continued)

- (4) Pyro Mining Company was not incorporated in any jurisdiction;
 - (5) The Uniform Partnership Act had been adopted in both the State of Illinois and the Commonwealth of Kentucky;
 - (6) Pyro Mining Company was authorized to do business as a general partnership in the Commonwealth of Kentucky and operated in good standing within the Commonwealth;
 - (7) W. K. Y. Mining (Pyro), Inc., had its primary corporate offices at 653 South Hebron Avenue, Evansville, Indiana;
 - (8) Costain Mining (Pyro), Inc., had its principal corporate offices at 653 South Hebron Avenue, Evansville, Indiana;
 - (9) Pyro Mining Company operated the Pyro No. 9 Wheatcroft Mine, Mine I.D. No. 15-13920;
 - (10) Respondent, Davis A. Shoulders, was an employee of Pyro Mining Company, a general partnership;
 - (11) The year in which the violation was issued, the Pyro No. 9 Wheatcroft Mine produced approximately 2,651,687 tons of coal per year;
 - (12) The year in which the violation was issued, approximately 350 employees were employed at the Pyro No. 9 Wheatcroft Mine;
 - (13) Respondent, Davis Shoulders, worked at the Pyro No. 9 Wheatcroft Mine;
 - (14) On October 29, 1990, Mr. Curtis Harte, MSHA Inspector and authorized representative of the Secretary of Labor, issued a Section 104(d)(2) order pursuant to the Federal Mine Safety Health Act of 1977 and the order issued is Number 3551162;
 - (15) The order charged that Pyro Mining Company violated Section 30 C.F.R. 75.512, an alleged electrical hazardous condition;
 - (16) On July 10, 1991, and after an investigation, the Mine Safety & Health Administration assessed a \$1,000 penalty against Respondent Davis Shoulders, alleging that Respondent was an agent of a corporate operator, that he knew or should have known of the violative condition cited in Order No. 3551162, and pursuant to Section 110(c) of the Act, he would be held personally liable for the violation cited in Order No. 3551162;
 - (17) The notice of contest was timely and properly filed by Respondent; this tribunal has jurisdiction over the named parties and subject matter.
- Stipulations 1-2.

a traditional partnership, Pyro should be considered a defacto corporation for the purpose of this proceeding. I reject this view.

The language of Section 110(c) of the Act restates Section 109(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 819(c) (1976), and is designed to reach decision makers responsible for the illegal acts of corporate operators. Congress, in choosing to make corporate directors, officers and agents legally responsible for violations of the Act, purposefully distinguished between those working for and/or acting on behalf of corporate operators and those similarly situated working for and/or on behalf of non-corporate operators; e.g. for partnerships or sole proprietorships. This distinction has been upheld by the courts and by this Commission. Richardson v. Secretary of Labor, 689 F.2d. 632 (6th Cir. 1982), off'g Secretary v. Kenny Richardson, 3 FMSHRC 8 (January 1981). Moreover, it is a distinction based upon a generally accepted concept of business organization that recognizes the corporation as a legal creation of the state with powers derived from the state and applicable law.

While the Secretary notes that at common law a corporation, generally, was not permitted to form a partnership with another corporation, she fails to acknowledge that "in most jurisdictions, the power to participate in a partnership is recognized by statute or granted in corporate charters." 18 B. Am Jur 2d, Corporation § 2117 (1985); Partnership Act § 2.6. Certainly, when the Mine Act was enacted, it was not unheard of for a partnership to be composed of corporate partners, and in limiting individual liability for knowing violations to directors, officers and agents of corporations, I assume Congress meant exactly what it stated. In my view, the judges of this Commission are not authorized to decide that the directors, officers and agents of a non-corporate business entity acting as an operator may be held liable under Section 110(c) because the entity embodies and/or exercises various corporate attributes. Not only would such a decisional approach run counter to the specific wording of Section 110(c), it would invite legal uncertainty by premising liability upon whether an organization was sufficiently "corporate-like" in nature to be considered for Mine Act purposes a "corporate operator."

The Secretary points out, and I fully recognize, that by subjecting directors, officers and agents of corporations to personal liability, Congress was attempting to create an added incentive for compliance, since corporations might pass off their monetary penalties as the cost of doing business. See Richardson, 689 F.2d at 632-633, (6th Cir. 1982) Cowin and Company v. FMSHRC, 612 F.2d 838, 840 (4th Cir. 1979). The Secretary may well be right in asserting that excusing personal liability in the circumstances of this case has the potential for creating a

loophole in the operator's incentive to comply with the Act and its regulations. However, I agree with Commission Administrative Law Judge Gary Melick, who after entertaining similar arguments from the Secretary, stated:

The Secretary, in essence would have me amend Section 110(c) to hold liable agents, not only of corporate operators, but also agents of partnerships, composed of two corporations. An administrative law judge is certainly not in a position to make such an amendment and . . . [is] certainly bound by the plain, clear and unambiguous language of the statute.

Paul Shirel, employed by Pyro Mining Co., 14 FMSHRC _____, Docket No. KENT 92-73, etc. (November 17, 1992) (ALJ Melick) slip op.3. As Judge Melick cogently pointed out, it is Congress that has chosen to base personal liability upon a corporate distinction, and it is Congress that should decide whether amendment of the provision is warranted in light of these and similar circumstances. Id. Accordingly, and for the foregoing reasons, this proceeding is DISMISSED.⁴

David F. Barbour
David F. Barbour
Administrative Law Judge
(703) 756-5232

Distribution:

Steve D. Turow, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Flem Gordon, Esq., Gordon and Gordon, P.S.C., P.O. Box 1305, Madisonville, KY 42431-1305 (Certified Mail)

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⁴ In opposing Shoulder's Motion for Summary Judgement, counsel for the Secretary also argued that if the Secretary's pleadings failed to allege sufficiently the presence of a corporation, the Secretary should be allowed to amend her petition to include W. K. Y. Mining (Pyro) Inc., and Costain Mining (Pyro) Inc., as entities that operated the mine in which Shoulder's worked. Br. in Op. to Resp's. Mot. for Sum. Judg't 10 N.8. In effect, the Secretary's pleadings would then allege that Shoulders was an agent of either of the two corporations. However, in a letter dated November 30, 1992, Counsel for the Secretary, in effect, withdrew this request.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 29 1992

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 92-231 |
| Petitioner | : | A.C. No. 15-14533-03542 |
| v. | : | |
| | : | Docket No. KENT 92-535 |
| LUCKY BRANCH COAL CO., INC., | : | A.C. No. 15-14533-03543 |
| Respondent | : | |
| | : | Mine No. 4 |

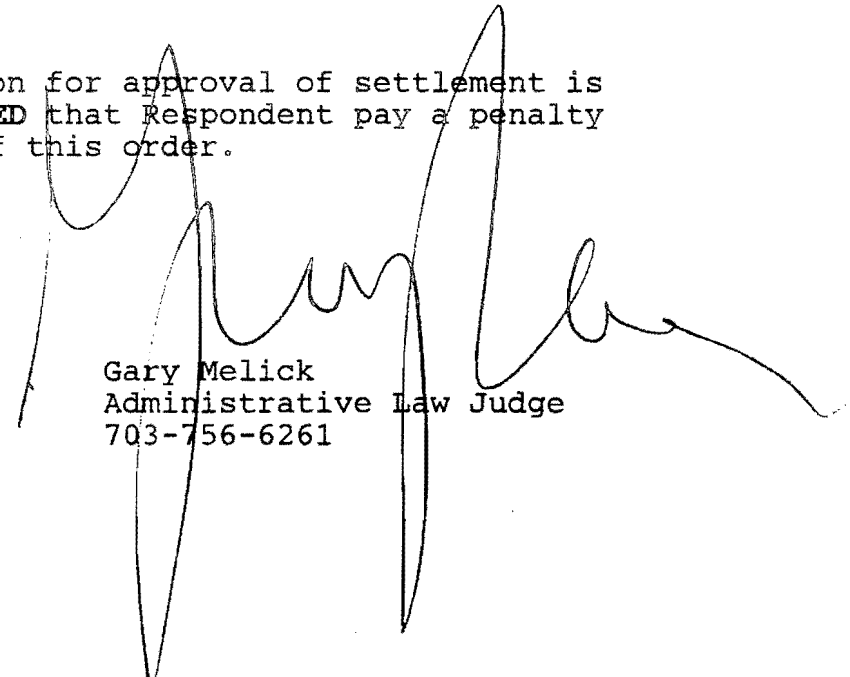
DECISION APPROVING SETTLEMENT

Appearances: Thomas A. Grooms, Esquire, Office of the
Solicitor, U.S. Department of Labor,
Nashville, Tennessee, for Petitioner;
Don Hogg, Vice-President, Whitesburg,
Kentucky, for Respondent

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). During hearings, the parties filed a motion to approve settlement and to dismiss the cases. A reduction in penalty from \$1,145 to \$850 is proposed. I have considered the representations and documentation submitted in these cases, 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 \$850 within 30 days of this order.


Gary Melick
Administrative Law Judge
703-756-6261

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 29 1992

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 91-2096 |
| Petitioner | : | A.C. No. 46-01438-03900A |
| | : | |
| v. | : | Ireland Mine |
| | : | |
| ALLAN GOODE, Employed by | : | |
| CONSOLIDATION COAL COMPANY, | : | |
| Respondent | : | |

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
Petitioner;
David J. Hardy, Esq., Charleston, West Virginia,
for Respondent.

Before: Judge Fauver

This is a petition for a civil penalty against a foreman
under § 110(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 Findings of Fact and
further findings in the Discussion below:

¹ Section 110(c) provides: "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)."

FINDINGS OF FACT

1. At all relevant times, Consolidation Coal Company operated Ireland Mine in West Virginia, producing coal for sale or use in or substantially affecting interstate commerce.

2. Respondent, Allan Goode, was employed by Consolidation Coal Company as a section foreman at the Ireland Mine for 23 of his 26 years at the mine, supervising seven to nine miners. His typical crew consisted of two roof bolters, a continuous miner operator, a loading machine operator, two shuttle care operators, a mechanic and sometimes two center roof bolters.

3. On or about March 8, 1990,² Goode's crew was cutting an overcast in the 3 North Face Section. An overcast requires a higher cut than normal because two entries will cross over the area. In addition, 12 foot planks are installed on 2 1/2 to 3 foot centers with wire mesh. Without an overcast, roof planks are normally on 4 foot centers and wire mesh is not used.

4. Goode's crew was using a 1036 Jeffrey Continuous Miner Machine. George Holmes was the miner operator, the left bolter was Donald Conner, and the right bolter was Charles Minor. The continuous miner was equipped with a mounted, or "integral," roof bolting machine and plank jack on each side of the miner, and an automated temporary roof support system ("ATRS") of four jacks (two jacks on each side of the miner).

5. Permanent roof support in the overcast required double planks with wire mesh and, if necessary, cribbing boards to fit irregular places in the roof. To build an overcast, the continuous miner cuts down existing roof support and cuts into the roof to raise the height for the overcast. The miner is then backed up to a supported roof area, where a double plank, a section of wire mesh, and if necessary cribbing boards are stacked on the plank jacks. The miner is then trammed forward and the ATRS jacks are raised firmly against the roof. After that is done, the roof bolters raise the plank jacks, drill the roof holes and install roof bolts pinning the double plank and materials to the roof. The ATRS is then lowered and the cycle is repeated.

6. The two plank jacks on the continuous miner were between the front and rear ATRS jacks. The roof control plan provided that the roof bolters "will not advance in by the last permanent [roof] support until the ATRS system is placed firmly against the roof." Each crew member was fully aware of this requirement.

² The petition alleges a violation on March 9, 1990. The witnesses were not in agreement whether the incident in question was on March 8, 1990, or March 9, 1990. My finding is that it was on or about March 8, 1990. This is not a significant variance.

7. On the night in question, the crew installed the first plank without incident. When they were installing the second plank, pieces of the roof fell, knocking down the mesh, cribbing boards and plank. Goode came upon the scene when members of the crew were trying to free the wire mesh from rocks that had fallen from the roof.

8. Goode was known for having a short temper, and became angry on the spot. He asked the miners "What in the hell is going on?" and impatiently stated that "one man" could do the job. With that, Goode climbed up on the continuous miner and helped to restack the plank, mesh and cribbing boards on the plank jacks. The miner was trammed forward to the new plank position. The ATRS jacks were raised. Goode, on top of the continuous miner and crouching between the front and rear ATRS jacks, steadied the stacked material on the plank jacks, waiting for the bolters to raise the plank jacks and bolt the plank. The stack held by Goode came loose, and a plank fell against Charles Minor, hitting him on the head. Minor told Goode, "This is unsafe" and Goode replied, "So is walking down the street, but we have to do it." Tr. 80. Minor and other members of the crew were intimidated by Goode's angry tone and manner; they had come to recognize Goode's displays of temper as permitting no response or explanation from a subordinate, evoking only silence and motivation to "keep out of his way."

9. Goode and the crew restacked the material on the plank jacks and Goode again steadied the material, crouching between the ATRS jacks, while the bolters lined up the auger holes and raised the plank jacks. Goode left as the bolters were drilling through the plank between the ATRS jacks.

10. During the bolting of the second plank, the ATRS system was not firmly placed against the roof. The left ATRS jacks were not touching the roof because of the cavity left by the roof fall. The left front jack was 12 to 18 inches from the roof and the left rear jack was not touching the roof. This meant that Goode and the two roof bolters worked out by the last permanent roof support when the ATRS jacks were not firmly placed against the roof. This was a violation of the roof control plan.

11. Page Whorton was on the left side of the miner and observed that the two left-side ATRS jacks were not touching the roof. He told the left roof bolter, Conner, that the left jacks were not touching the roof. Conner immediately said "something" to Goode but Whorton could not hear the words. Goode continued with the process of having the crew install and bolt the second plank out by the last permanent roof support.

12. Whorton did not tell Goode the ATRS system was not firmly against the roof because (1) he told Conner and Conner immediately spoke to Goode, (2) he assumed Goode knew the ATRS was not firm against the roof and that Goode decided to install the second plank despite this fact, and (3) he was intimidated by Goode's angry manner and voice.

13. Charles Minor, the right bolter, observed that at least one of the left ATRS jacks was not touching the roof. He did not tell Goode because (1) he felt intimidated by Goode's angry remarks to him and (2) he assumed that Goode knew the ATRS system was not firmly against the roof and that Goode decided that, despite this fact, he wanted the crew to drill and bolt the second plank. They did so, even though this violated the roof control plan.

14. Donald Conner, the left roof bolter, testified that he did not see the ATRS jacks and could not tell whether or not they were touching the roof. He testified that he told Goode they were having problems and that if the ATRS did not reach the top they should get jack extensions or put blocks under the miner cleat tracks, to raise the ATRS to reach the top. Tr. 150. Goode testified that no one said anything to him about jack extensions or suggested to him in any way that the ATRS was not firm against the roof, and that he could not see the ATRS jacks because he was crouched on top of the miner, steadying the stack of materials on the plank jacks.

15. Charles Minor reported the incident to David Clarke, the UMW Safety Committeeman, because he felt that Goode was responsible for violating the roof control plan. The union requested MSHA to investigate the matter under § 103(g) of the Act. On March 19, 1990, an MSHA inspector investigated and cited the corporation for a violation of the roof control plan. On March 22, 1990, the company notified Minor and Conner they were suspended with intent to discharge for violating the roof control plan. The company did not take action against Goode. The company paid a civil penalty of \$1,300.00 for the roof control violation, without contest.

16. The discharge decision went to arbitration under the labor management contract. The arbitrator found that the company had cause to discipline Minor and Conner but "compelling extenuating circumstances" mitigated against discharge. Specifically, the arbitrator found that "Foreman Goode, acting on behalf of, and as mine management, had such knowledge of the precipitant commission of the violation as to constitute culpable fault by management." Exh. G-12, p. 7. The arbitrator reversed the discharges and ordered suspensions of Minor and Conner without pay from March 22, 1990, until their next scheduled workshift after his decision on April 3, 1990.

DISCUSSION WITH FURTHER FINDINGS

On or about March 8, 1990, Goode and his crew installed a plank, mesh and cribbing boards outby the last permanent roof support when the ATRS was not firm against the roof. The crew had never done this before. They knew it violated the roof control plan and that if ATRS jacks did not reach the roof, they should use jack extensions or put blocks under the cleat tracks of the miner to be sure that the ATRS was firm against the roof. The main explanation for the crew's conduct that night is Foreman

Goode's behavior. His demeanor in losing his temper and screaming at employees made it very difficult for subordinates to tell him the ATRS was not engaged properly. His actions indicated to the crew that he was angry about the delay in installing the second plank; by angrily standing on the miner and steadying the plank for drilling, he indicated that he wanted the crew to advance the miner, line up the augers, drill the roof holes, and bolt the plank to the roof without further comment or delay. The arbitrator found that Goode displayed "culpable fault by Management" in connection with the violation by the roof bolters. I similarly find that Goode was at fault based on the evidence in this case.

Although Goode contributed to a violation of the roof control plan by his conduct (intimidating the crew and showing an angry, aggressive intention to install the second plank without further comment or delay by any of the crew), the question under § 110(c) of the Act is whether, as an agent of the corporation, he "knowingly authorized, ordered, or carried out such violation"

Section 3(c) of the Act defines "agent" as "any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of the miners in a coal or other mine." This includes section foremen.

The Commission has interpreted the term "knowingly" 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. 92 F. Supp. at 780. We believe this interpretation is consistent with both the statutory language and the remedial nature 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.

Secretary v. Richardson, 3 FMSHRC 8, 16 (1981), 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).

There is no testimony that anyone told Goode directly that the ATRS did not reach the roof, and the evidence is unclear whether Goode could see the jacks from his crouched position on

the miner. I credit Whorton's testimony that he told Conner that the left ATRS jacks did not reach the roof and that Conner immediately spoke to Goode. However, Conner testified that he told Goode if or in case the ATRS jacks did not reach the roof they should get jack extensions or put blocks under the miner cleat tracks.

The deciding issue is whether Good had reason to know that the ATRS was not firmly placed against the roof. Goode knew that there was a roof fall that left a cavity about 1 1/2 feet deep by about 6 to 8 feet long, and the cavity ran from the left side of the miner to the right (as Goode looked inby). Tr. 217. He had reason to believe that at least some of the ATRS jacks would go into the cavity and might fail to press against the roof. Also, the wire mesh above the left ATRS jacks did not audibly "crunch" against the roof and in the circumstances Goode had a reasonable duty to listen for the crunch. Ordinarily, he could expect the roof bolters to observe the ATRS jacks and to be sure that they were pressed against the roof before they advanced to raise and bolt the plank. However, by his demeanor in (1) screaming at employees and displaying intense anger at the crew's delay in installing the second double plank, and (2) angrily climbing up on the continuous miner to steady the plank while waiting for the bolters to raise the plank, drill the roof and bolt the plank, Goode created a safety risk that his crew would be intimidated and not tell him if the ATRS did not reach the roof.

I find that Goode's unsafe conduct, combined with a reasonable likelihood that the ATRS jacks in the cavity would not reach the roof and the fact that the wire mesh on the left side did not audibly "crunch" against the roof, gave Goode reason to know³ that the roof control plan was being violated. I therefore find that Goode "knowingly authorized, ordered or carried out [a] violation" within the meaning of § 110(c) of the Act.

Impatience and anger by a supervisor are not conducive to a safe working environment or compliance with safety standards. Goode's conduct endangered Goode, who steadied the plank outby the last permanent roof support, and endangered the two bolters, who drilled the roof and bolted the plank outby the last permanent roof support.⁴

³ "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." Secretary v. Richardson, supra, 3 FMSHRC 16.

⁴ I do not accept the suggestion by Conner's testimony that the bolters were under supported roof when they drilled and bolted the plank. He suggested that they did not have to extend their bodies beyond the last roof support and could steady the plank, drill the roof, and bolt the plank within "arm's length" of the last roof support. I find that the roof control plan forbade

Considering the applicable criteria in § 110(i) for assessing a civil penalty, I find that a penalty of \$1,000.00 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Respondent knowingly violated 30 C.F.R. § 75.220(a)(1) (roof control plan) within the meaning of § 110(c) of the Act.

ORDER

WHEREFORE IT IS ORDERED that Respondent, Allan Goode, shall pay a civil penalty of \$1,000.00 within 30 days from the date of this decision.

William Fauver

William Fauver
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Fourth Floor, Arlington, Virginia 22203 (Certified Mail)

David J. Hardy, Esq., Jackson and Kelly, 1600 Laidley Tower, Post Office Box 553, Charleston, West Virginia 25322 (Certified Mail)

/fccca

advancing beyond the last roof support -- whether by an arm, a leg or the entire body.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

DEC 30 1992

| | | |
|-----------------------------|---|------------------------------|
| HOMESTAKE MINING COMPANY, | : | CONTEST PROCEEDINGS |
| Contestant, | : | |
| | : | Docket No. CENT 91-217-RM |
| | : | Citation No. 2653241; 8/8/91 |
| | : | |
| v. | : | Homestake Mine |
| | : | |
| | : | Docket No. CENT 91-226-RM |
| | : | Order No. 2653196; 8/23/91 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Lead Mine |
| ADMINISTRATION (MSHA) | : | |
| Respondent | : | Mine I.D. 39-00055 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 92-344-M |
| Petitioner | : | A.C. No. 39-00055-05681 |
| | : | |
| v. | : | |
| | : | Homestake Mine - Lead |
| HOMESTAKE MINING COMPANY OF | : | |
| CALIFORNIA, | : | |
| Respondent | : | |

DECISION

Appearances: Henry Chajet, Esq., Ann Simmons, Esq., JACKSON & KELLY, Washington, DC,
for Contestant/Respondent;
Robert J. Murphy, Esq., Kristi Floyd, Esq., Office
of the Solicitor, U.S. Department of Labor,
Denver, Colorado,
for Respondent/Petitioner;
Gene Ruff, President, Local 7044, United Steel-
workers of America, Lead, South Dakota,
for United Steelworkers of America.

Before: Judge Morris

These consolidated cases are contest proceedings and a civil
penalty proceeding arising pursuant to the Federal Mine Safety

and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act"). The civil penalty proceeding herein is for the alleged violations of mandatory regulations enacted pursuant to the Act.

An expedited hearing commenced in Docket No. CENT 91-217-RM on September 17, 1991. At the hearing held in Denver, Colorado, the United Steelworkers of America were granted leave to intervene.

After an extensive conference, Contestant Homestake Mining Company of California ("Homestake") was granted leave to withdraw its motion for an expedited hearing. The case was further stayed until the Secretary proposed a civil penalty.

On November 5, 1991, the Judge vacated Closure Order No. 3630266.

On July 16, 1992, Docket Nos. CENT 91-217-RM and CENT 91-226-RM were consolidated.

On October 21, 1992, Docket No. CENT 92-344-M was assigned to the Presiding Judge.

On October 27, 1992, Docket Nos. CENT 91-217-RM, CENT 91-226-RM, and CENT 92-344-M were consolidated.

On November 6, 1992, a settlement motion, executed by Contestant and Secretary, was filed. The motion was also served on Cathy M. Dupree, the Miners' Representative of Homestake Mining Company.

No objection has been filed to the settlement motion.

In support of the motion, Contestant and Secretary state as follows:

Order No. 3909125

(a) A section 104(g)(1) Order No. 3909125 was issued to Homestake by the Secretary on March 25, 1991, alleging a violation of 30 C.F.R. § 48.7(c). This order was later assessed a penalty of \$20,000.

On the basis of information supplied by Homestake, the Secretary agreed to reduce the proposed penalty on this Order from \$20,000 to \$15,000.

Citation No. 3909122

(b) A Section 104(a) Citation No. 3909122 was issued to Homestake by the Secretary on March 16, 1992, alleging a violation of 30 C.F.R. § 57.14205. This order was later assessed a penalty of \$9,000.

On the basis of information supplied by Homestake, the Secretary agreed to reduce the proposed civil penalty on this Citation from \$9,000 to \$6,000.

Citation No. 3901926

(c) A Section 104(a) Citation No. 3909126 was issued to Homestake by the Secretary on May 25, 1991, alleging a violation of 30 C.F.R. § 48.7(c). This Citation was later assessed a penalty of \$20,000.

On the basis of information supplied by Homestake, the Secretary agreed to reduce the proposed civil penalty on this Citation from \$20,000 to \$15,000.

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

ORDER

1. The stay of proceeding is **LIFTED**.
2. The settlement agreement is **APPROVED**.
3. Order No. 3909125 and the amended penalty of \$15,000 are **AFFIRMED**.
4. Citation No. 3909122 and the amended penalty of \$6,000 are **AFFIRMED**.
5. Citation No. 3901926 and the amended penalty of \$15,000 are **AFFIRMED**.
6. Contestant/Respondent Homestake Mining Company is **ORDERED TO PAY** to the Secretary of Labor the sum of \$36,000 within 40 days of the date of this decision.

7. Contest proceedings CENT 91-217-RM and CENT 91-226-RM are **DISMISSED**.


John J. Morris
Administrative Law Judge

Distribution:

Henry Chajet, Esq., Mark N. Savit, Esq., JACKSON & KELLY, 1701 Pennsylvania Avenue, NW, Suite 650, Washington, DC 20006
(Certified Mail)

Ms. Cathy M. Dupree, Miners' Representative, Mr. Gene Ruff, President, Local 7044, United Steelworkers of America, c/o HOMESTAKE MINING COMPANY OF CALIFORNIA, 215 West Main Street, P.O. Box 875, Lead, SD 57754-1603 (Certified Mail)

Robert J. Murphy, Esq., Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 30 1992

| | | |
|-----------------------------|---|--------------------------|
| SHADY LANE COAL CORPORATION |) | CONTEST PROCEEDINGS |
| Contestant |) | |
| v. |) | Master Docket No. 91-1 |
| |) | Docket No. VA 91-367-R |
| SECRETARY OF LABOR, |) | through VA 91-368-R |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Citation Nos. 9861503 |
| Respondent |) | through 9861504; 4/4/91 |
| |) | |
| |) | Mine No. 3 |
| |) | Mine ID 44-06549 |
| |) | |
| SECRETARY OF LABOR, |) | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Docket No. VA 91-491 |
| Petitioner |) | A.C. No. 44-06549-03507D |
| v. |) | |
| |) | Mine No. 3 |
| SHADY LANE COAL CORPORATION |) | |
| Respondent |) | |

ORDER OF DISMISSAL

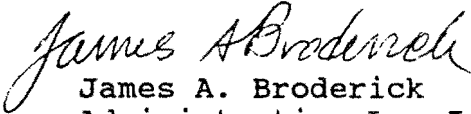
Before: Judge Broderick

On December 17, 1992, the Secretary filed a motion to dismiss these proceedings on the grounds that on August 9, 1991, Respondent Shady Lane Coal Company, and Ted Osborne, Jr., principal of Shady Lane Coal Company, entered into plea agreements, agreeing to plead guilty to charges of conspiracy to defraud an agency of the United States in connection with the civil violations charged herein. Respondent contracted with Triangle Research to handle its dust sampling program. Triangle's principal and agent admitted falsifying the samples submitted to MSHA and admitted that on numerous occasions they blew air on the filter surfaces of manufactured dust samples. Harry White and Ronald Ellis of Triangle have been convicted of defrauding the government and have been sentenced to prison. Respondent provided Triangle with signed blank dust data cards which were submitted to MSHA with the samples.

On September 1, 1992, Judge James C. Turk of the Western District of Virginia sentenced Shady Lane Coal Company to pay a fine of \$30,000 of which \$15,000 was suspended and to 2 years probation. Ted Osborne, Jr. was sentenced to pay a fine of \$5,000, to 2 years probation, and to 2 months home confinement. As part of the plea agreement the Secretary agreed to move to dismiss pending civil penalty proceedings against Respondent for violations of the laws governing the dust sampling program.

I conclude that under the circumstances dismissal of these proceedings effectuates the purposes of the Mine Act.

Accordingly, these proceedings are DISMISSED.


James A. Broderick
Administrative Law Judge

Distribution:

Douglas White, Esq., Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Suite 400, Arlington, VA 22203 (Certified Mail)

Ronald L. King, Esq., Robertson, Cecil, King & Pruitt, 237 Main Street, Drawer 1560, Grundy, VA 24614 (Certified Mail)

Hand delivered to Lead Defense Counsel Committee

/fb

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FALLS CHURCH, VIRGINIA 22041

DEC 30 1992

| | | |
|-----------------------------|---|--------------------------|
| SUNSET LAND & COAL COMPANY, |) | CONTEST PROCEEDINGS |
| Contestant |) | |
| v. |) | Master Docket No. 91-1 |
| |) | Docket No. VA 91-386-R |
| SECRETARY OF LABOR, |) | through VA 91-397-R |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Citation Nos. 9861363 |
| Respondent |) | through 9861374; 4/4/91 |
| |) | |
| |) | Mine No. 1 |
| |) | Mine ID 44-06326 |
| |) | |
| SECRETARY OF LABOR, |) | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Docket No. VA 91-502 |
| Petitioner |) | A.C. No. 44-06326-03538D |
| v. |) | |
| |) | Mine No. 1 |
| SUNSET LAND & COAL COMPANY, |) | |
| Respondent |) | |

ORDER OF DISMISSAL


Before: Judge Broderick

On December 17, 1992, the Secretary filed a motion to dismiss these proceedings on the grounds that on August 9, 1991, Respondent Sunset Land & Coal Company, and David Stevenson, principal of Sunset Land & Coal Company, entered into plea agreements, agreeing to plead guilty to charges of conspiracy to defraud an agency of the United States in connection with the civil violations charged herein. Respondent contracted with Triangle Research to handle its dust sampling program. Triangle's principal and agent admitted falsifying the samples submitted to MSHA and admitted that on numerous occasions they blew air on the filter surfaces of manufactured dust samples. Harry White and Ronald Ellis of Triangle have been convicted of defrauding the government and have been sentenced to prison. Respondent provided Triangle with signed blank dust data cards which were submitted to MSHA with the samples.

On August 6, 1992, Judge James C. Turk of the Western District of Virginia sentenced Sunset Land & Coal Company to pay a fine of \$30,000 of which \$15,000 was suspended and to 2 years probation. David Stevenson was sentenced to pay a fine of \$5,000, and to 2 years probation, and 2 months home confinement. As part of the plea agreement the Secretary agreed to move to dismiss pending civil penalty proceedings against Respondent for violations of the laws governing the dust sampling program.

I conclude that under the circumstances dismissal of these proceedings effectuates the purposes of the Mine Act.

Accordingly, these proceedings are DISMISSED.


James A. Broderick
Administrative Law Judge

Distribution:

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|---------------------------|---|--------------------------|
| SECRETARY OF LABOR, |) | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH |) | |
| ADMINISTRATION (MSHA), |) | Master Docket No. 91-1 |
| Petitioner |) | Docket No. VA 91-482 |
| v. |) | A.C. No. 44-06030-03546D |
| |) | |
| B R D COAL COMPANY, INC., |) | Mine No. 2 |
| Respondent |) | |

ORDER OF DISMISSAL

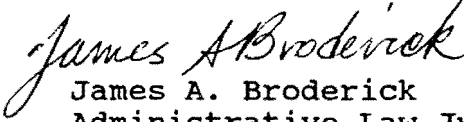
Before: Judge Broderick

On December 17, 1992, the Secretary filed a motion to dismiss this proceeding on the grounds that on August 8, 1991, Respondent B R D Coal Company, Inc., and Billy Ray Dotson, principal of Respondent entered into plea agreements, agreeing to plead guilty to charges of conspiracy to defraud an agency of the United States in connection with the civil violations charged herein. Respondent contracted with Triangle Research to handle its dust sampling program. Triangle's principal and agent admitted falsifying the samples submitted to MSHA and admitted that on numerous occasions they blew air on the filter surfaces of manufactured dust samples. Harry White and Ronald Ellis of Triangle have been convicted of defrauding the government and have been sentenced to prison. Respondent provided Triangle with signed blank dust data cards which were submitted to MSHA with the samples.

On August 7, 1992, Judge Samuel G. Wilson of the Western District of Virginia sentenced B R D Coal Company, Inc. to pay a fine of \$30,000 of which \$15,000 was suspended and to 2 years probation. Billy Ray Dotson was sentenced to pay a fine of \$5,000, to 2 years probation and 2 months home confinement. As part of the plea agreement the Secretary agreed to move to dismiss pending civil penalty proceedings against Respondent for violations of the laws governing the dust sampling program.

I conclude that under the circumstances dismissal of this proceeding effectuates the purposes of the Mine Act.

Accordingly, this proceeding is DISMISSED.


James A. Broderick
Administrative Law Judge

Distribution:

Douglas White, Esq., Mark R. Malecki, Esq., Office of the
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Ronald L. King, Esq., Robertson, Cecil, King & Pruitt, 237 Main
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DENVER, CO 80204-3582
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DEC 30 1992

| | | |
|-------------------------|---|-----------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | Docket No. WEST 91-563 |
| Petitioner | : | A.C. No. 05-03672-03508 X02 |
| | : | |
| v. | : | Docket No. WEST 91-624 |
| | : | A.C. No. 05-03672-03509 X02 |
| AMERICAN MINE SERVICES, | : | |
| INCORPORATED, | : | West Elk Mine |
| Respondent | : | |

DECISION

Appearances: Susan J. Eckert, Esq., Tandra Leonard, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado,
for Petitioner;
Michael Schultz, AMERICAN MINE SERVICES, INC.,
Aurora, Colorado,
for Respondent.

Before: Judge Morris

The Secretary of Labor, in these civil penalty proceedings charges American Mine Services, Inc., ("AMS") 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 commenced in Denver, Colorado, on March 10, 1992; a further hearing was on May 29, 1992.

The parties waived the filing of post-trial briefs.

Stipulation

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

American Mine Services, Inc. is engaged in providing services as such services relate to the mining of coal and its mining operations affect interstate commerce.

American Mine Services, Inc. is an operator at the West Elk Mine, MSHA ID number 05-03672-03509 X02.

American Mine Services, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C., Section 801, et seq., hereafter called the Act.

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

The exhibits offered by the 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.

The proposed penalties will not affect the Respondent's ability to continue business.

The operator demonstrated good faith in abating the violations.

American Mine Services, Inc. is a medium-sized contractor with total control hours worked for all contracts of 80,872 in 1991.

A 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 citations and orders.

West 91-563

This case involves imminent danger Order No. 3583894 issued under section 107(a) of the Act. The order was followed by Citation No. 3583895 issued under section 104(a) of the Act.

Order 3583894 stated as follows:

The following condition was observed, (sic) an employee was observed using (sic) a cutting torch at eye level. The employee was approximately (sic) 12" inch away and cutting molten metal the molten metal was traveling (sic) in all direction in the face area. The employee had no protective equipment on, no faceshield or goggles were being worn by the employee doing the work. This type of hazard could of been serious consequence or caused serious physical harm. (Separate citation will be issued for the violation)

Citation No. 3583895, issued under section 104(a) of the Act alleges AMS violated 30 C.F.R. § 77.1710(a). ¹

The evidence: as MSHA Inspector David Head, an experienced electrical inspector and a certified welder, crossed the West Elk parking lot he saw AMS employee Jones using a cutting torch at eye level. Jones was welding with an oxygen acetylene torch without a face shield or eye protection. (Tr. 16, 28).

The inspector didn't know if he could reach Jones in time to stop an accident. He reached Jones as quickly as he could. (Tr. 20).

The molten metal from half inch thick iron was being blown back into Jones' face. The welding light can be harmful to the eyes in the absence of properly tinted lens.

When he observed the situation, Inspector Head stopped Jones. In five minutes they located Jones' supervisor and AMS furnished a pair of welding goggles with tinted glass. (Tr. 19).

Jones had been wearing a pair of regular eye glasses with wire frames. Inspector Head did not consider the glasses the proper protective equipment since there was no shielding around the sides. In addition, the regulation requires a face shield or goggles.

The above facts justify the imminent danger order under section 107(a) of the Act since an imminent danger is defined as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated" 30 U.S.C. § 802(j), Rochester & Pittsburgh Coal Co. 11 FMSHRC 2159 (1989), (R&P).

See also Wyoming Fuel Company, 14 FMSHRC 1282, 1290-92 (August 1992).

In R&P as well as in Utah Power & Light Co. 13 FMSHRC 1617, 1621 (1991), the Commission stated the inspector must be accorded considerable discretion in determining whether an imminent danger

¹ § 77.1710 Protective clothing; requirements.

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

(a) Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist.

exists because an inspector must act with dispatch to eliminate conditions that create such danger. In the instant case loss of sight certainly involves serious physical harm justifying the inspector's quick action.

AMS argues Jones merely made a bad judgment call and no imminent danger existed. For the above reasons and the cited case law, I find this argument without merit. The imminent danger order was properly issued. Order No. 3583894 should be affirmed.

On the merits of the subsequent welding citation, AMS's witness G. Wayne Jones generally confirmed the inspector's testimony. He also indicated that the company provided goggles and a face shield.

Mr. Jones has used a cutting torch for 17 years. He claimed he was protected from sparks by his welding technique and his regular eye glasses. I am not persuaded since Mr. Jones agreed molten metal could bounce back in his face. In addition, he indicated his technique controlled the sparks only about 95 percent of the time. (Tr. 36).

The Secretary contends the violation was significant and substantial. In this regard the Commission has ruled that a violation is properly designated as being S&S" if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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 question of whether any specific violation is S&S must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498, 500-01 (April 1988);

In connection with the welding citation, and for the above reasons the evidence of the parties supports all the S&S criteria.

In assessing any civil penalties AMS should be considered as moderately negligent since it did not insist its employees use goggles.

The likelihood of a severe eye injury or possible loss of sight establish a high level of gravity.

Citation No. 3583895 should be affirmed.

WEST 91-624

Citation No. 3584059, issued under section 104(d)(1) of the Act, alleges AMC violated 30 C.F.R. 1400-3.²

The citation reads as follows:

The day shift hoistman Charles Treadwell under the supervision of George Willis - mine Foreman, failed to conduct the required daily safety examinations of the hoisting equipment located at x-cut 93 of the southmains intakes to insure that the hoisting equipment was maintained in a safe condition pryer (sic) to transporting 3 persons down the ventilation shaft. Mr. Treadwell stated that he had had a rather busy and hectic morning and had neglected to conduct the required safety checks on the hoist equipment. As a result of this, equipment failure 3 men Bob Hales-miner, Mike Lane-engineer and Tom Anderson-engineer were trapped approximately 200 feet below the collar deck in the ventilation shaft for about 2 1/2 hours.

Discussion

² § 75.1400.3 Daily examination of hoisting equipment.

Hoists and elevators shall be examined daily [list of required examinations] and such examinations shall include, but not be limited to, the following:

AMC agrees that an examination of the hoisting equipment was not conducted prior to transporting three persons down the shaft. However, the operator insists and its evidence establishes that an inspection was conducted during the last working day and the day shift. As a result AMS contends the hoistman had until the end of the day of the inspector's visit to conduct an inspection and enter it into the log book.

The issue presented is whether the "daily" inspections required by 30 C.F.R. § 75.1400-3 are to be made at the beginning of the shift or at any time during the shift.

Congress considered this regulation and stated that hoisting equipment should be "examined daily." Further, Congress stated that "[t]his standard should keep mine hoist accidents to a minimum and impart to mine management and workers the essential elements that enter into safe installation and maintenance of hoisting equipment. Hoisting of men and materials is an essential operation in many mines and has become so commonplace that some ignore day-to-day inspections or become lax in the operating phases. Where shaft or slope accidents have occurred because of failure of the hoisting equipment, they have been due almost always to lack of inspections and to lack of proper maintenance of the equipment." See S. Rep. No. 91-411, 91st Congress, 1st Session, (1975) reprinted in Senate Subcommittee on Labor Legislative History of the Federal Mine Safety and Health Act of 1977 at 207 (Legis. Hist.).

The views of the Secretary, who is charged with the protection of the safety of the nations' miners, are entitled to due deference. Missouri Rock, Inc., 11 FMSHRC 136 (1987); Secretary of Labor on behalf of John W. Bushnell v. Cannelton Industries, Inc., 867 F.2d 1432 (1989).

Accordingly, the daily inspections required by C.F.R. § 75.1400-3 are to be made at the commencement of the shift or at least prior to beginning of any hoist functions. (Tr. 57, 101, 102).

The inspector concluded this was in S&S violation. The applicable case law as to S&S is set for the previous citation.

Under the Mathies formulation there was a violation of 30 C.F.R. § 75.1400-3 in that the hoist was not examined. A measure of danger was contributed to by the violation. There was also a reasonable likelihood that the hazard would result in an accident since an examination would have disclosed a deficiency of the equipment. Finally, the evidence established that there was a reasonable likelihood that the accident would be of a reasonably serious nature. The three workers trapped in the bottom deck work platform could have been struck by any falling debris from the derailed collar doors.

The S&S allegations should be affirmed.

UNWARRANTABLE FAILURE

The Secretary contends this violation was due to the unwarrantable failure of AMS to comply with the regulation.

The special finding of unwarrantable failure, as set forth in section 104(d) of the Mine Act, 30 U.S.C. § 814(d), may be made by authorized Secretarial representatives in issuing citations and withdrawal orders pursuant to section 104. In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), and Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987), the Commission defined unwarrantable failure as "aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act." Emery examined the meaning of unwarrantable failure and referred to it in such terms as "indifference," "willful intent," "serious lack of reasonable care," and "knowing violation." 9 FMSHRC at 2003. In Emery, the Commission also pointed out that in Eastern Associated Coal Co., 3 IBMA 331 (1974), the Interior Board of Mine Operations Appeals ("Board") had defined unwarrantable failure as "intentional or knowing failure to comply or reckless disregard for the health and safety of miners." 9 FMSHRC 2003, citing Eastern, 3 IBMA at 356 n.5 (emphasis added).

To establish unwarrantable failure the Secretary relies on the fact that Inspector Gutierrez issued a citation for a violation of 30 C.F.R. § 75.1400-4 (certification by examiner) apparently five minutes before he issued the contested citation (compare P-2 and P-3). Without further evidence I do not find that the described unrelated circumstances constitute aggravated conduct as required by Emery. The failure to check the hoist before lowering the men was mere negligence, not aggravated conduct.

The allegations of unwarrantable failure should be stricken.

In assessing any civil penalties AMS should be considered as moderately negligent. Even though the operator had checked the hoist on the previous shift, the company was nevertheless as a minimum required to check the hoist before lowering the three miners.

The previous S&S discussion herein indicates a high level of gravity on the part of AMS.

Citation No. 3584059, as modified, should be affirmed.

Order No. 3584060, issued under section 104(d)(1) of the Act, alleges AMC violated 30 C.F.R. § 75.220(a)(1):³

The citation reads as follows:

This contractor operator has experienced a hoisting accident which resulted in having 3 persons trapped 200 ft. below the shaft collar of the ventilation shaft located at x-cut 93 of the southmains intakes for approximately 2 1/2 hours. George Willis-mine foreman and Charles Treadwell admitted that just prior (sic) to the hoisting accident that Bob Hales-miner, Mike Lane-engineer and Tom Anderson-engineer were lower from the shaft collar on the man-cage approximately 30 ft. down onto the work platform at which time the man-cage was released. These men were then lowered via riding on top of the workdeck another 170 ft. to an area approximately 20 ft. below the collar where the work platform stopped. The hoist operator for some unknown reason decided to bring the man cage up to the collar area. The metal doors at the collar area were in a closed position and the cage rammed right through the doors resulting in derailing the two doors, the impact in turn caused the man-cage and crosshead frame to bind on the guide ropes at a right angle determined to be approximately 30 degrees. As a result of the cage and crosshead binding on the guide ropes and jammed on the doors 3 persons on the work platform were trapped inside the shaft for approximately 2 1/2 hours because the same guide ropes that were binding on the man cage and cross frame are the same ropes that lower and raise the work platform.

The approved agreement between American Mine Services Inc. and MSHA sections 75.220(a)(1) and 75316 in page 11 states and strictly prohibits the use of the work

³

§ 75.220 Roof control plan.

(a)(1) Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

platform to transport workers/miners up or down the shaft.

The roof control plan provides, in part that, "[u]nder normal operating conditions the work platform will not be moved with workers on board." (Tr. 137, Ex. P-5, page 11).

DISCUSSION

AMS admits it violated the roof control plan (Tr. 12) in transporting workers on the work platform. However, AMS denies that the violation was severe.

The issue of severity, under the Mine Act, should be properly discussed in assessing a civil penalty. In view of the uncontroverted evidence that these workers were lowered on the work platform and in view of AMS's admission of liability I conclude that Order No. 3584060 should be affirmed.

In assessing civil penalties AMS should be considered negligent since the company knew the roof control plan requirement. It nevertheless lowered the miners in the bottom deck work platform instead of in the man cage. It is not an excuse that the miners were inspecting the shaft at the time of the accident.

The gravity of the violation is high. In arriving at this conclusion, I find the three miners were trapped for 2 1/2 hours in the shaft. They were in a precarious position and the derailed collar doors could have fallen and caused severe injuries.

A portion of this case deals with the cause of the accident. In short, was there a defective limit switch as Mr. Gutierrez contends or was there no switch as MSHA's witness Mr. Taylor and AMS's witness Mr. Hancock stated. Mr. Hancock has considerable experience with shafts and hoists. I credit his testimony together with MSHA's witness Mr. Taylor. In short, the hoist was not equipped with an upper limit switch. (See also Ex. P-7). However, the failure to have such a switch would only render the situation more hazardous rather than less hazardous.

The S&S allegations, in view of the uncontroverted evidence should be affirmed.

For the above reasons Order No. 3584060 should be affirmed.

Further Civil Penalties Criteria

AMS's negligence and the gravity of the violations have been previously considered as to each citation.

Additional criteria for assessing civil penalties is contained in section 110(i) of the Act.

According to the stipulation AMS is a medium sized contractor and the penalties assessed herein are appropriate.

The stipulation further provides that the proposed penalties will not affect the company's ability to continue business.

The operator's prior history is favorable since only 21 violations were assessed against the company in the two years ending December 17, 1990. Further, AMS had four violations assessed in the two years ending January 22, 1991.

AMS is entitled to statutory good faith since it abated the violations. (Ex. P-1, P-8).

Based on the statutory criteria for assessing civil penalties and for the above reasons I enter the following:

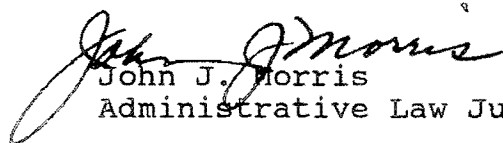
ORDER

West 91-563

1. Order No. 3583894 is **AFFIRMED**.
2. Citation No. 3583895 is **AFFIRMED** and a penalty of \$600 is **ASSESSED**.

West 91-624

3. Citation No. 3584059, as modified, is **AFFIRMED** and a civil penalty of \$400 is **ASSESSED**.
4. Order No. 3584060 is **AFFIRMED** and a civil penalty of \$600 is **ASSESSED**.


John J. Morris
Administrative Law Judge

Distribution:

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sh

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 92-798
Petitioner : A.C. No. 46-01968-03980
v. :
 : Blacksville No. 2 Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

PARTIAL DECISION APPROVING SETTLEMENT AND STAY ORDER

Appearances: Caryl Casden, Esq., U.S. Department of Labor
Office of the Solicitor,
Arlington, Virginia for Petitioner;
Daniel Rogers, Esq., Consolidation
Coal Company, Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Feldman

A hearing in Docket No. WEVA 92-798, was held on November 17, 1992, in Morgantown, West Virginia.¹ This proceeding involves two 104(a) Citations. At the hearing the parties moved for approval of their settlement agreement with respect to Citation No. 3715434. The parties also jointly moved for a stay of the remaining Citation No. 3720751². The parties' joint motions were granted on the record as reflected in this decision.

Citation No. 3715934 alleges a violation of the regulatory standard found at 30 C.F.R. Section 75.904, namely, a failure to adequately mark circuit breakers for identification. At the hearing, the Secretary moved to amend the proposed penalty from \$1,155 to \$350. The proposed penalty reduction was based on an

¹ This docket proceeding was contemporaneously tried with Docket Nos. WEVA 92-799, 92-800, 92-801. These cases will be adjudicated in a subsequent decision.


²Citation No. 3720751 was initially issued as a 104(d)(2) order. However, it was subsequently modified to 104(a) citation.

error in the initial calculation. The parties represented that the respondent has agreed to pay the amended \$350 proposed penalty. As noted on the record, based on the parties' representations at the hearing, I conclude that the proffered settlement is appropriate under the criteria contained in Section 110(i) of the Mine Act.

Citation No. 3720751 was issued as a result of the respondent's alleged failure to timely abate an alleged violation of the respirable dust concentration standard on the longwall jack setter occupation (041) on the 14-M longwall. The respirable dust concentration in question was obtained through the Secretary's single sample spot inspection method. The validity of this method of dust sampling is currently before Judge Weisberger in Keystone Coal Company Docket Nos. PENN 91-1480-R, 91-1454-R, 92-54-R, 92-114 and 92-119. The parties have jointly moved to stay further action on this citation pending final disposition in the Keystone case. While the respondent concedes that it had an obligation to timely abate the condition despite its appeal of the underlying dust concentration violation, the parties maintain that the ultimate resolution in Keystone may have a bearing on the respondent's inclination to settle and on the appropriate penalty to be assessed. Good cause having been shown, the parties joint motion to stay this proceeding as it pertains to Citation No. 3720751 will be **GRANTED**.

CONCLUSION

ACCORDINGLY, the joint motion for the approval of settlement of Citation No. 3715934 **IS GRANTED**, and **IT IS ORDERED** that the respondent pay a penalty \$350 within 30 days of the date of this decision. **IT IS FURTHER ORDERED** that this docket proceeding as it pertains to Citation No. 3720751 **IS STAYED** pending the disposition in Keystone Coal Company, supra.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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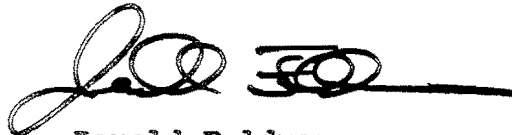
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|-----------------------------|---|---------------------------|
| ELMER DARRELL BURGAN, | : | DISCRIMINATION PROCEEDING |
| Complainant | : | |
| | : | |
| | : | Docket No. KENT 92-915-D |
| v. | : | BARB-CD-92-31 |
| | : | |
| | : | |
| HARLAN CUMBERLAND COAL CO., | : | Harlan Mine |
| Respondent | : | |

ORDER OF CONTINUANCE

Before me for consideration is a Joint Motion for Continuance of the hearing in this matter scheduled for December 22, 1992, in Lexington, Kentucky. The instant motion is predicated on the parties' intention to seek consolidation of this proceeding with the complainant's discrimination claim against Dixie Fuel Company, a case that has yet to be docketed or assigned to me. Harlan Cumberland Coal Company and Dixie Fuel Company are apparently commonly owned. This matter allegedly concerns safety complaints made by Mr. Burgan at the Harlan Cumberland Coal Company and Mr. Burgan's subsequent transfer and ultimate discharge from his employment at the Dixie Fuel Company.

In their Joint Motion, the parties have agreed to inform me when discovery is completed in the Dixie Fuel case. Upon completion of discovery and the assignment of the Dixie Fuel matter to me, I will issue an order addressing the complainant's request for consolidation and the rescheduling of these trial proceedings.

In view of the above, the parties' Joint Motion for Continuance **IS GRANTED**, and the hearing in this discrimination matter is continued without date.



Jerold Feldman
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

DEC 30 1992

| | | |
|-------------------------|---|----------------------------|
| PITTSBURG & MIDWAY COAL | : | CONTEST PROCEEDING |
| MINING COMPANY, | : | |
| Contestant | : | Docket No. KENT 93-181-R |
| | : | Order No. 3857652; 11/3/92 |
| V. | : | |
| | : | Sebree No. 1 Mine |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Mine ID 15-17044 |
| ADMINISTRATION (MSHA), | : | |
| Respondent | : | |

**ORDER DENYING MOTION FOR EXPEDITED HEARING
AND PREHEARING ORDER**

Petitioner included in its Notice of Contest a Request for Expedited Hearing on the ground that "the Sebree Mine will be subject to additional improperly issued closure orders under Section 104(d)(2) of the [Act] as a result of the wrongfully issued contested Order."

The Secretary opposes the request for an expedited hearing on the grounds that it does not show extraordinary conditions warranting an expedited hearing, it would establish an inappropriate precedent to grant the request, it would be unfair to other operators to grant the request, and it would impose an unreasonable administrative and budget burden on the Secretary's limited resources for Mine Act hearings.

Judge John J. Morris denied a similar motion for an expedited hearing which like the instant matter was predicated solely on the basis of the issuance by MSHA of § 104(d) citations/orders. Medicine Bow Coal Co. v. Secretary of Labor, 12 FMSHRC 904 (April, 1990). Initially noting that like the instant matter the enforcement documents were not issued pursuant to § 107 of the Act, Judge Morris ruled:

In the instant case contestant's sole basis for an expedited hearing is that it "is subject to a continuing possibility of the issuance of orders pursuant to Section 104(d) of the Act." However, Contestant's position is not unique. Every mine operator is subject to the "possibility" of the issuance of "104(a)" orders. In addition, these cases both 104(d) orders and contestant has failed

to allege that it is within the criteria required by subparagraphs (A), (B) and (C) of § 105(a) (B)(2).

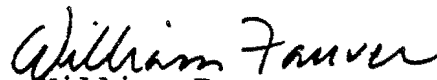
I conclude that the Secretary's opposition to the request for expedited hearing is well taken.

Accordingly, the request for expedited hearing is DENIED.

In accordance with the provisions of section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the above proceeding will be called for hearing on the merits at a time and place to be designated in a subsequent notice.

1. On or before January 25, 1993, the parties shall confer for the purpose of discussing settlement and stipulating as to matters not in dispute. If settlement is reached, a motion for its approval shall be filed by the Secretary of Labor no later than February 1, 1993.

2. If settlement is not agreed upon, the parties shall send to each other and to me no later than February 1, 1993, synopses of their expected legal arguments, expected proof, lists of exhibits that may be introduced, and matters to which they can stipulate at the hearing. Each party shall also state its best estimate of the length of time necessary to present its case at the hearing.



William Fauver
Administrative Law Judge

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