

DECEMBER 1994

COMMISSION DECISIONS AND ORDERS

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ADMINISTRATIVE LAW JUDGE ORDERS

12-02-94	Rox Coal Incorporated	PENN 94-609	Pg. 2563
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DECEMBER 1994

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

Secretary of Labor, MSHA v. Buffalo Crushed Stone, Docket No. YORK 94-51-M.
(Judge Weisberger, October 24, 1994)

Secretary of Labor, MSHA v. Sandy Jones Construction, Docket No. CENT 94-104-M.
(Chief Judge Merlin, unpublished Default, October 27, 1994)

Secretary of Labor, MSHA v. Arthur Miller employed by Mid-Wisconsin Crushing
Co., Docket No. LAKE 95-47-M. (Request for Relief from Final Order)

Secretary of Labor, MSHA v. Harlan Cumberland Coal Co., Docket No. KENT 94-408.
(Chief Judge Merlin, unpublished Default, October 27, 1994)

Secretary of Labor, MSHA v. Meshach Coal Company, Docket No. KENT 94-436.
(Chief Judge Merlin, unpublished Default, October 27, 1994)

Secretary of Labor, MSHA v. Lakeview Rock Products, Docket No. WEST 95-56-M.
(Request for Relief from Final Order)

Secretary of Labor, MSHA v. Fielding Hydroseeding, Docket No. WEVA 94-80.
(Chief Judge Merlin, unpublished Default, July 14, 1994)

Secretary of Labor, MSHA v. JEN Incorporated, Docket No. SE 93-262, etc.
(Chief Judge Merlin, unpublished Default, May 9, 1994)

Secretary of Labor, MSHA v. Ambrosia Coal & Construction and Wayne Steen,
Docket No. PENN 93-233, etc. (Judge Fauver, November 14, 1994)

Secretary of Labor, MSHA v. Bridger Coal Company, Docket No. WEST 91-233.
(Judge Cetti, November 18, 1994)

Secretary of Labor, MSHA v. ASARCO, Inc., Docket No. WEST 94-445-M. (Judge
Cetti, November 21, 1994)

There were no cases filed in which review was denied.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 5, 1994

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 94-104-M
	:	
SANDY JONES CONSTRUCTION	:	
	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

ORDER

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"). On October 27, 1994, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Sandy Jones Construction ("SJC") for failing to answer the proposal for assessment of penalty filed by the Secretary of Labor on March 25, 1994, or the judge's Order to Show Cause of July 22, 1994. The judge assessed the civil penalty of \$4,000 proposed by the Secretary.

On November 7, 1994, the Commission received a letter from Ray Jones, SJC's owner, in which Jones states that he had timely mailed SJC's answer, dated April 25, 1994, to the Department of Labor's Regional Solicitor's Office in Dallas, Texas. He further states that, after receiving the show cause order, he immediately called and explained that he had sent SJC's answer.¹ Jones also claims that on August 8, he sent a copy of the answer to the "Mine Safety and Health Administration Commission" and, on subsequent occasions, approached the solicitor's office in Dallas in an effort to obtain a copy of SJC's file and to negotiate a settlement. The record does not contain a copy of SJC's answer.

The judge's jurisdiction in this matter terminated when his decision was issued on October 27, 1994. 29 C.F.R. § 2700.69(b) (1993). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for

¹ Jones does not specify which agency he called.

discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem SJC's motion to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988).

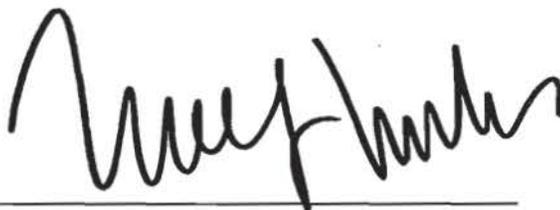
On the basis of the present record, we are unable to evaluate the merits of SJC's position. In the interest of justice, we remand this matter to the judge, who shall determine whether default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

For the reasons set forth above, we vacate the judge's default order and remand this matter for further proceedings.


Mary Lu Jordan, Chairman


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

Dec. 5, 1994

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. KENT 94-436
	:	
MESHACH COAL COMPANY, INC.	:	
	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

ORDER

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"). On October 27, 1994, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Meshach Coal Company, Inc. ("Meshach") for failing to answer the proposal for assessment of penalty filed by the Secretary of Labor on March 22, 1994, or the judge's June 30, 1994, Order to Show Cause. The judge assessed the civil penalty of \$2,000 proposed by the Secretary.

On November 7, 1994, the Commission received a letter dated October 29, 1994, from Vernon Morris, president of Meshach. Morris states that he settled this case for \$500 with Jason Huff, an attorney in the office of Department of Labor's Regional Solicitor in Barbourville, Kentucky. Morris states that he has paid that amount in full and he has attached to his letter a copy of the settlement agreement and his correspondence with Mr. Huff.¹

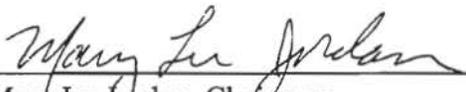
The judge's jurisdiction in this matter terminated when his decision was issued on October 27, 1994. 29 C.F.R. § 2700.69(b) (1993). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for

¹ Morris also attached a copy of a default order entered against Meshach by Judge Merlin on October 27, 1994, in a separate case, Docket No. KENT 94-337.

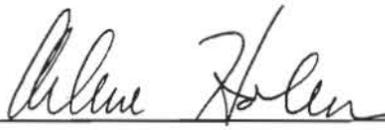
discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Meshach's motion to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988).

On the basis of the present record, we are unable to evaluate the merits of Meshach's position. In the interest of justice, we remand this matter to the judge, who shall determine whether default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

For the reasons set forth above, we vacate the judge's default order and remand this matter for further proceedings.


Mary Lu Jordan, Chairman


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

Dec. 5, 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 94-408
	:	
v.	:	
	:	
HARLAN CUMBERLAND	:	
COAL COMPANY	:	
	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

ORDER

BY THE COMMISSION:

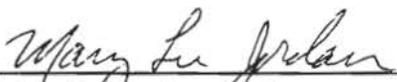
This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). On October 27, 1994, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Harlan Cumberland Coal Company ("Harlan") for failing to answer the proposal for assessment of penalty filed by the Secretary of Labor on March 7, 1994, or the judge's July 1, 1994, Order to Show Cause. The judge assessed the civil penalties of \$534 proposed by the Secretary.

On November 9, 1994, the Commission received from Harlan a Motion to Vacate Order of Default. Harlan's counsel explains that, on July 12, after receiving the show cause order, Harlan mailed its answer to the Commission and that the Secretary's counsel has confirmed receipt of the answer on July 13. Harlan attached to its motion a copy of its Response to Order to Show Cause and Answer, which contains a certificate of service stating that the motion was mailed to the Secretary's counsel on July 12. The record does not otherwise show receipt by the Commission of Harlan's July 12 answer.

The judge's jurisdiction in this matter terminated when his decision was issued on October 27, 1994. 29 C.F.R. § 2700.69(b) (1993). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Harlan's motion to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988).

On the basis of the present record, we are unable to evaluate the merits of Harlan's position. In the interest of justice, we remand this matter to the judge, who shall determine whether default is warranted. See *Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

For the reasons set forth above, we vacate the judge's default order and remand this matter for further proceedings.



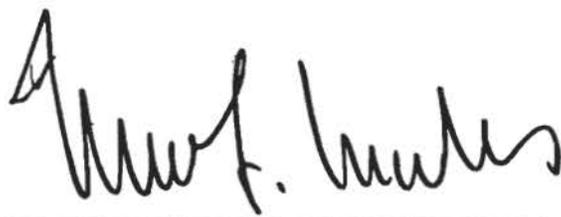
Mary Lu Jordan, Chairman



Joyce A. Doyle, Commissioner



Arlene Holen, Commissioner



Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

Dec 5, 1994

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. LAKE 95-47-M
 : A.C. #47-02996-05506A
ARTHUR L. MILLER, :
employed by :
MID-WISCONSIN CRUSHING :
COMPANY, INC. :
 :

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

ORDER

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"). On August 18, 1994, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a notice of proposed assessment to Arthur L. Miller, employed by Mid-Wisconsin Crushing Company, Inc., which charged him with individual liability under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), for knowingly authorizing, ordering, or carrying out a violation of 30 C.F.R. § 56.15005. On October 21, 1994, the Commission received a Petition from Final Order, in which Miller states that, although he timely mailed a "Green Card" request for a hearing, MSHA's Civil Penalty Compliance Office informed him by letter that his card had not been timely mailed.

Section 105(a) of the Mine Act requires the Secretary of Labor to notify a party of "the civil penalty proposed to be assessed" after issuing a citation or order for an alleged violation. 30 U.S.C. § 815(a). Section 105(a) allows the operator 30 days to contest the proposed penalty and further provides that, if the party fails to contest it, the assessment "shall be deemed a final order of the Commission and not subject to review by any court or agency." *Id.*

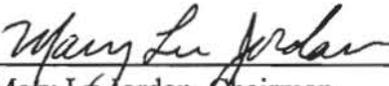
The Commission's procedural rules permit a party to serve a request for a hearing by first class mail. 29 C.F.R. § 2700.7(c) (1993). Here, Miller contends that he timely notified the Secretary of his request by mailing the Green Card on September 26. He states that, although he gave the Green Card to his secretary on August 29, it was not mailed until September 26 due to

his secretary's absence related to her mother's terminal illness. In its October 11, 1994, letter to Miller MSHA states that Miller's request was mailed on September 27, beyond the 30-day period, and that, accordingly, it has become a final order of the Commission.

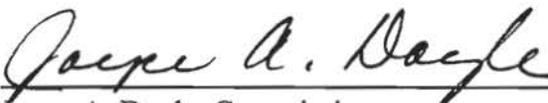
The Commission has held that, pursuant to Fed. R. Civ. P. 60(b) ("Rule 60(b)"), it possesses jurisdiction to reopen uncontested assessments that have become final orders of the Commission under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *see also, Rocky Hollow Coal Co., Inc.*, 16 FMSHRC 1931, 1932 (September 1994). Relief from a final order is available in circumstances such as a party's mistake, inadvertence, or excusable neglect.

On the basis of the present record, we are unable to evaluate the merits of Miller's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Miller timely notified the Secretary of his contest. If the judge finds that Miller timely mailed the Green Card, this case shall proceed pursuant to the Mine Act and Commission's Procedural Rules, 29 C.F.R. Part 2700. If the judge finds that Miller failed to timely mail the Green Card and that the proposed penalty became a final Commission order, the judge shall determine whether Miller has met the criteria for relief under Rule 60(b). If the judge determines that relief under Rule 60(b) is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules.

For the foregoing reasons, this matter is remanded for assignment to a judge for consideration consistent with this order.



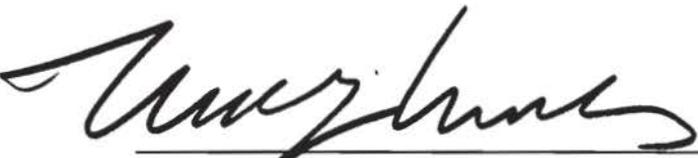
Mary Lu Jordan, Chairman



Joyce A. Doyle, Commissioner



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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
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Dec. 6, 1994:

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 95-56-M
	:	A.C. No. 42-01975-05510
LAKEVIEW ROCK PRODUCTS, INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen, and Marks, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). On November 16, 1994, the Commission received from Lakeview Rock Products, Inc. ("Lakeview") a request to reopen an uncontested civil penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

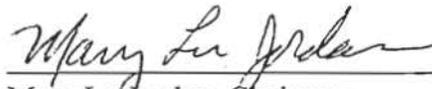
Section 105(a) requires the Secretary of Labor to notify the operator of "the civil penalty proposed to be assessed" after issuing a citation or order for an alleged violation. 30 U.S.C. § 815(a). Section 105(a) allows the operator 30 days to contest a proposed penalty and further provides that, if the operator fails to contest it, the assessment "shall be deemed a final order of the Commission and not subject to review by any court or agency." *Id.* Lakeview failed to contest within 30 days a notice of proposed assessment of civil penalties in the amount of \$32,250 and, accordingly, it has become a final order of the Commission.

Lakeview states that it failed to file with the Department of Labor's Mine Safety and Health Administration ("MSHA") a "Green Card" notice of contest challenging MSHA's proposed civil penalties within the 30-day period set forth in section 105(a), due to a mistake in calculating that period. It asserts that it filed only one day late, that the Secretary was not prejudiced by the delay, and that "the existence of its business is threatened" by the amount of

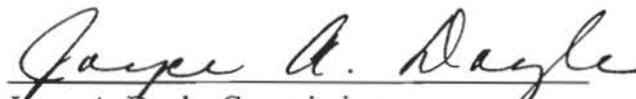
the penalties. Petition at 6. The Commission has held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b) ("Rule 60(b)"), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *see also, Rocky Hollow Coal Company, Inc.*, 16 FMSHRC 1931, 1932 (September 1994). Relief from a final order is available in circumstances such as a party's mistake, inadvertence, or excusable neglect.

On the basis of the present record, we are unable to evaluate the merits of Lakeview's position. In the interest of justice, we reopen the matter and remand it for assignment to a judge to determine whether Lakeview has met the criteria for relief under Rule 60(b). If the judge determines that relief under Rule 60(b) is appropriate and permits Lakeview to file its notice of contest, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

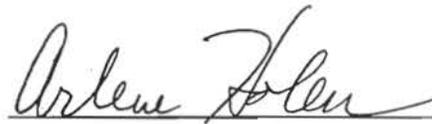
For the foregoing reasons, Lakeview's request is granted and this matter is remanded for assignment.



Mary Lu Jordan, Chairman



Joyce A. Doyle, Commissioner



Arlene Holen, Commissioner



Marc L. Marks, Commissioner

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Drillex's operations were subject to Mine Act jurisdiction. He affirmed the citations and orders issued to Drillex and assessed civil penalties. 15 FMSHRC 1941 (September 1993) (ALJ). The Commission granted Drillex's petition for discretionary review, which challenges only the judge's determination of jurisdiction. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

The parties stipulated as follows:

1. [O]n February 1, 1993, the U.S. Department of Labor filed a proposed Assessment of Civil Penalty with the . . . Commission against Drillex . . . for alleged violations of the [Mine Act] at the . . . Project.
2. [Drillex] contested the proposed assessment of civil penalties on the grounds that the operation conducted by Drillex . . . at the . . . Project does not fall within the jurisdictional scope of the [Mine Act]
3. [T]he following stipulation of facts is submitted by the parties in order to resolve the jurisdictional issue presented by . . . [Drillex]:
 - a. [O]n or about July 10, 1992 . . . Drillex . . . entered into an agreement with A.H. Development Corporation under which Drillex was to perform drilling, blasting, rock excavation and crushing of a minimum of 20,000 cubic meters of stone to be used as fill for embankment and road base at the . . . Project. The specified work was the only work performed by Drillex at the . . . Project and the material was processed an average of three . . . times a week.
 - b. The [Project] . . . is a privately owned construction project wherein over two-hundred . . . residential units are being built.
 - c. The material processed by Drillex . . . was extracted from the project site and hauled to the crusher area located within the project.

d. The extracted material was to be reduced to gabion size by one . . . employee using a hydraulic hammer.^[2] The remaining stone was reduced to three . . . inches . . . in size with the use of a portable jaw crusher plant. Two . . . employees were retained for this purpose including the project supervisor.

e. Drillex . . . removed six trucks of contaminated material (stone mixed with clay) from the project site. Said material was deposited in a property adjacent to Canteras de Puerto Rico in Guaynabo, . . . to be acquired by Drillex. Said material will be used to provide temporary access road for trucks and equipment in the property.

f. None of the referred material was marketed or sold.

15 FMSHRC at 1942-43 (footnotes omitted). The parties further stipulated that the only matter to be determined was whether Drillex's operations were subject to Mine Act jurisdiction. Tr. 7. Drillex did not otherwise contest the alleged violations. *Id.*

The judge determined that Drillex's operation constituted a "mine" within the meaning of section 3(h)(1) of the Mine Act. 15 FMSHRC at 1945-48. He reasoned that Drillex had engaged in both mineral "extraction" and "milling" and that the Secretary of Labor's interpretation of the term "mine," as demonstrated by his exercise of jurisdiction, was entitled to deference. *Id.* at 1946-47. The judge also found that, because Drillex did not extract minerals on a one-time or intermittent basis and milled minerals for a specific purpose, its work site differed from a "borrow pit," which would have been subject to the jurisdiction of the Department of Labor's Occupational Safety and Health Administration ("OSHA") rather than its Mine Safety and Health Administration ("MSHA") pursuant to the MSHA-OSHA Interagency Agreement, 44 Fed. Reg. 22827 (April 17, 1979), *amended*, 48 Fed. Reg. 7521 (February 22, 1983) ("Interagency Agreement"). *Id.* at 1948. Accordingly, the judge affirmed the alleged violations and assessed the civil penalties of \$1,567 proposed by the Secretary. *Id.* at 1949.

² Gabion size is approximately 12 inches. Tr. 8.

II. Disposition

Drillex argues that MSHA's assertion of jurisdiction over its work site was unauthorized. It contends that it did not extract and process rock for the material's intrinsic qualities but, rather, performed such activities merely as an "incidental operation . . . for the construction of . . . roads" Petition for Discretionary Review ("PDR") at 6.³ Additionally, Drillex asserts that, under the terms of the Interagency Agreement, its site was subject to OSHA jurisdiction as a borrow pit because extraction occurred only intermittently and no milling was involved. *Id.* at 7-8.

The Secretary responds that "the crushing, sizing, and separation of . . . stone from contaminants [performed by Drillex] cannot be characterized as 'an incidental operation,' but rather constitutes 'mineral milling' as contemplated in the Mine Act and as defined in the Interagency Agreement." S. Br. at 9 (citations omitted). He also contends that the judge correctly distinguished Drillex's operation from a borrow pit and that, in any event, the Interagency Agreement is not legally binding on the Secretary. The Secretary argues further that deference must be accorded to his interpretation of the Act.

Section 4 of the Mine Act, 30 U.S.C. § 803, provides that each "coal or other mine" affecting commerce shall be subject to the Act. Section 3(h)(1) of the Mine Act defines "coal or other mine," in part, as "an area of land from which minerals are extracted . . . and . . . lands, excavations, . . . facilities, equipment, . . . used in, or to be used in, the milling of such minerals" 30 U.S.C. § 802(h)(1). The Act does not further define "extracted" or "the milling of . . . minerals." The Commission and courts have recognized, however, that the legislative history of the Mine Act indicates that a broad interpretation is to be applied to the Act's definition of a mine. *See, e.g., Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 592 (3rd Cir. 1979); *Cyprus Indus. Minerals Corp.*, 3 FMSHRC 1, 2-3 (January 1981), *aff'd*, 664 F.2d 1116 (9th Cir. 1981), *citing* S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) ("*Legis. Hist.*").⁴

³ Drillex designated its PDR as its brief.

⁴ The report of the Senate Committee on Human Resources states:

the definition of 'mine' is clarified to include the areas, both underground and on the surface, from which minerals are extracted . . . and areas appurtenant thereto. . . . The Committee notes that there may be a need to resolve jurisdictional conflicts,

We conclude that Drillex engaged in both mineral extraction and milling, either of which independently qualifies its operation as a "mine" within the meaning of the Act.⁵ In general, absent express definitions, statutory terms should be defined according to their commonly understood definitions. See 73 Am. Jur. 2d *Statutes* § 223 (1974). The term "extraction" means the separation of a mineral from its natural deposit in the earth. See Bureau of Mines, U.S. Dept. of Interior, *Dictionary of Mining, Mineral, and Related Terms* 404 (1968) ("*DMMRT*"). As the judge correctly found, Drillex engaged in mineral extraction by drilling, blasting, excavating and, thereby, separating rock, "a mineral or a composite of minerals," from its deposit in the earth. 15 FMSHRC at 1946-47. See *DMMRT* at 932.

The term "milling" includes processes by which minerals are made ready for use. See *DMMRT* at 706; *Webster's Third New International Dictionary, Unabridged* 1434 (1971). The Interagency Agreement further defines "milling" as:

the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.

44 Fed. Reg. at 22829. The Interagency Agreement includes "crushing," "the process used to reduce the size of mined materials into smaller, relatively coarse particles," among milling processes subject to MSHA's regulatory authority. *Id.* Drillex crushed stone into gabion and smaller particles and separated usable stone from undesired contaminants. Therefore, Drillex engaged in milling. See *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1551-54 (D.C. Cir. 1984).

We also conclude that substantial evidence supports the judge's determination that the site did not qualify as a borrow pit subject to OSHA jurisdiction. The Interagency Agreement provides:

but it is the Committee's intention that what is considered to be a mine and to be regulated under [the] Act be given the broadest possibl[e] interpretation, and . . . that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

Legis. Hist. at 602.

⁵ We need not reach the issue of whether deference must be accorded to the Secretary's interpretation of the Act.

"Borrow Pits" are subject to OSHA jurisdiction except those borrow pits located on mine property or related to mining. (For example, a borrow pit used to build a road or construct a surface facility on mine property is subject to MSHA jurisdiction). "Borrow pit" means an area of land where the overburden, consisting of unconsolidated rock, glacial debris, or other earth material overlying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit.

44 Fed. Reg. at 22828. As the judge found, extraction did not occur intermittently or on a one-time basis. Drillex excavated and processed material approximately three times each week in order to fulfill its agreement to produce at least 20,000 cubic meters of stone. Tr. 6. It also performed milling processes, beyond merely using the scalping screen, by crushing stone into smaller particles. Furthermore, the stone was not used for its bulk alone but was sized for its intended use as fill.⁶

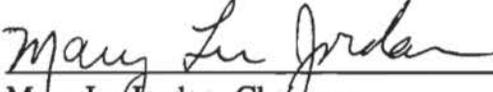
Substantial evidence also supports the judge's conclusion that Drillex's extraction and processing of minerals were not merely incidental to road construction and, thus, its operations do not fall within the exception for such activities referenced in MSHA's *Program Policy Manual*, Vol. I at 3. Cf. *RBK Constr. Inc.*, 15 FMSHRC 2099, 2100-01 (October 1993). Drillex contracted with A.H. Development Corporation expressly to extract and crush a specific quantity and quality of stone needed for the Project. Tr. 6.

⁶ We need not reach the issue of whether the Interagency Agreement is legally binding on the Secretary.

III.

Conclusion

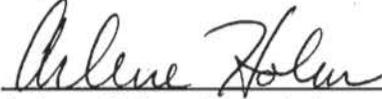
For the foregoing reasons, we conclude that Drillex engaged in mineral extraction and milling and affirm the judge's determination that its site constituted a "mine" within the meaning of section 3(h)(1) of the Mine Act.



Mary Lu Jordan, Chairman



Joyce A. Doyle, Commissioner



Arlene Holen, Commissioner



Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 19, 1994

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 94-80
	:	
FIELDING HYDROSEEDING	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

ORDER

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). On July 14, 1994, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Fielding Hydroseeding ("Fielding") for its failure to answer the Secretary of Labor's proposal for assessment of civil penalty or the judge's April 22, 1994, Order to Respondent to Show Cause. The judge ordered the payment of civil penalties of \$6,000.

In a letter to the Commission dated July 29, 1994, Steve Gannon, Fielding's safety director, states that he did not receive the Secretary's penalty proposal due to an address change and a misunderstanding in the mail pickup. Gannon requests that a copy of the penalty proposal be sent to him and that he be given another opportunity to answer.

The judge's jurisdiction over this case terminated when his default order was issued on July 14, 1994. 29 C.F.R. § 2700.69(b) (1993). Due to clerical oversight, the Commission did not act on the July 29 letter within the required statutory period for considering requests for discretionary review. The judge's default order became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1).

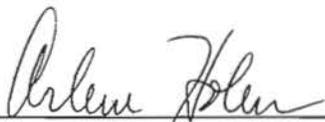
Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of

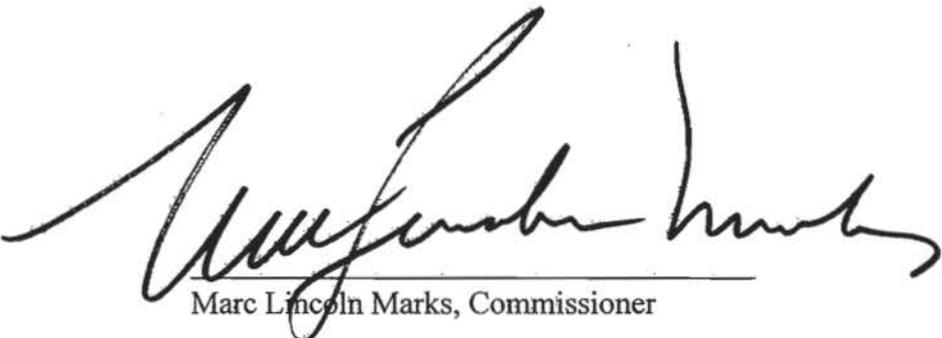
applicable Commission rules); *see, e.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). On the basis of the present record, we are unable to evaluate the merits of Fielding's proffered explanation for its failure to answer the Secretary's penalty proposal. In the interest of justice, we reopen this proceeding and deem the July 29 letter to be a petition for discretionary review, which we grant. We remand the matter to the judge, who shall determine whether final relief from default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

For the reasons set forth above, we reopen this matter, vacate the judge's default order, and remand this matter for further proceedings.


Mary Lu Jordan, Chairman


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


Marc Lincoln Marks, Commissioner

Distribution

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

December 19, 1994

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. SE 93-262
	:	93-263
JEN INCORPORATED	:	93-288
	:	93-313
	:	93-329
	:	93-330
	:	93-331
	:	93-332
	:	93-346

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988). On June 1 and June 28, 1993, the Secretary of Labor filed civil penalty proposals against JEN Incorporated ("JEN") for allegedly violating various mandatory standards. On August 20 and September 15, 1993, Chief Administrative Law Judge Paul Merlin issued orders to show cause that directed JEN to answer the Secretary's penalty proposals within 30 days. On March 8, 1994, the judge issued an Order to Submit Information/Second Order to Show Cause, in which he stated that the citations and orders giving rise to these cases had been subsequently modified by the Department of Labor's Mine Safety and Health Administration ("MSHA") to add Tennessee Consolidated Coal Company ("TCC") as an operator of the mine and were the subject of a separate contest proceeding initiated by TCC before Administrative Law Judge Roy Maurer. Judge Merlin provided JEN with another opportunity to file its answers and ordered the Secretary to advise him whether he wished these cases consolidated with TCC's contest proceeding or treated separately with JEN held in default.

On April 15, 1994, the Secretary responded that JEN should be held in default. When JEN failed to file its answers by May 9, 1994, the judge issued an Order of Default, entering judgment in favor of the Secretary and ordering JEN to pay civil penalties of \$37,832.

On October 7, 1994, the Commission received a letter from JEN's president, James Nunley, in which he requested relief from the default order. He asserted his belief that TCC, as the owner of the mine, is responsible for the civil penalties. He also requested a hearing on the citations and orders. Nunley stated that JEN has no funds and cannot afford counsel because it made no profit from its agreement with TCC.

The judge's jurisdiction over these cases terminated when his order was issued on May 9, 1994. 29 C.F.R. § 2700.69(b)(1993). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A); 29 C.F.R. § 2700.70(a). JEN did not file a timely petition for discretionary review within the 30-day period, nor did the Commission direct review on its own motion within that period. 30 U.S.C. § 823(d)(2)(B). Thus, the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1).

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b) ("Rule 60(b)") in circumstances such as a party's mistake, inadvertence, or excusable neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *see, e.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). Although JEN, who is proceeding without benefit of counsel, asserts that a separate party, TCC, should be held liable for the civil penalties assessed by the judge (\$37,832), it does not set forth the reasons for its failure to file an answer as required by 29 C.F.R. § 2700.29, or respond to the judge's orders to show cause.

On the basis of the present record, we are unable to evaluate the merits of JEN's position. In the interest of justice, we reopen this proceeding, treat JEN's October 7 letter as a late-filed petition for discretionary review requesting relief from a final Commission decision, and excuse its late filing. *See, e.g., Bentley Coal Co.*, 12 FMSHRC 1197-98 (June 1990); *Westrick Coal Co.*, 10 FMSHRC 853 (July 1988). We remand the matter to Judge Merlin for appropriate assignment to a judge, who shall determine whether final relief from default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

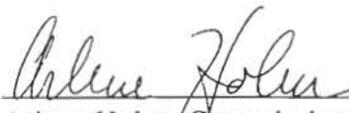
For the reasons set forth above, we reopen this matter, vacate the judge's default order, and remand for further proceedings.



Mary Lu Jordan, Chairman



Joyce A. Doyle, Commissioner



Arlene Holen, Commissioner



Marc Lincoln Marks, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 1 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 92-746
Petitioner : A.C. No. 46-05801-03618
v. :
: No. 21 Mine
W-P COAL COMPANY, :
Respondent :

DECISION

Appearances: Mark Malecki, Esq. (on the remand brief),
Gretchen Lucken, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
Kurt A. Miller, Thorp, Reed and Armstrong,
Pittsburgh, Pennsylvania, for Respondent;
Michael Heenan, Esq., Smith, Heenan and Althen,
Washington, D.C., for Amicus Curiae, American
Mining Congress.

Before: Judge Melick

This case is before me upon remand by the Commission, 16 FMSHRC 1407, 1412 (1994). Issues directed to be reviewed on remand include arguments framed by Respondent, W-P Coal Company (W-P) that the Secretary failed to issue the citation at bar with reasonable promptness; that the section 104(b) order was improperly based upon a terminated citation;¹ that W-P was deprived of its constitutional rights when it was purportedly not accorded the procedural due process attendant to Mine Safety and Health Administration (MSHA) inspections; and that the Secretary's enforcement action was an unfair departure from its purported past practice of regulating the West Virginia contract mining industry. Depending upon the disposition of these procedural issues, it may then be necessary to determine whether the violation existed as charged and, if so, what is

¹ In a supplemental brief filed after the Commission remand, the Secretary stated that he had since vacated this order. Issues regarding the validity of that order are accordingly now moot.

the appropriate civil penalty to be assessed considering the criteria under section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act."

Background

Under a 1969 lease with the owner, Cole and Crane, W-P holds the mining rights to the subject No. 21 Mine, a deep coal mine in Logan County, West Virginia. Originally W-P engaged in coal extraction at the mine but, in 1988, shifted to contract mining. In December 1989, W-P contracted with Top Kat Mining, Inc. (Top Kat) to extract the coal in return for royalty payments from W-P based upon the tonnage of clean coal produced. At that time Top Kat filed a legal identity report with MSHA as operator of the No. 21 Mine.

The agreement between W-P and Top Kat identified Top Kat as an independent contractor responsible for controlling the mine, hiring miners and complying with mine safety and health laws. During 1990 and 1991, MSHA conducted a number of inspections at the No. 21 Mine and issued a number of citations and withdrawal orders to Top Kat. During this time W-P participated in discussions with MSHA personnel about enforcement problems at the mine. On September 4, 1991, an MSHA inspector issued a number of citations to Top Kat including Citation No. 3750647, alleging a violation of 30 C.F.R. § 77.201 (later amended to charge a violation of 30 C.F.R. § 77.200) for failing to properly maintain the bathhouse floor.² The mine was placed on a "special emphasis" inspection program on October 10, 1991, because of its alleged safety and health problems. Shortly thereafter, W-P terminated Top Kat's contract, shut down the No. 21 Mine, and submitted to MSHA a legal identity report listing Bear Run Coal Company (Bear Run) as the successor contractor-operator.

On November 14, 1991, MSHA modified the citations, including the bathhouse citation at issue, to name W-P as the "co-operator" of the mine and also issued a withdrawal order, pursuant to section 104(b) of the Act, alleging failure by W-P to abate the cited condition. As noted, that order has since been vacated by the Secretary. MSHA subsequently served W-P with the modified citation and filed a civil penalty petition against Top Kat, against W-P on the theory that it was a "co-operator" and against

² This case involved one of some 138 civil penalty petitions filed by MSHA against W-P for a number of alleged violations at the No. 21 Mine during the time Top Kat was the contract miner. The other cases have been stayed pending resolution of the common issues.

Bear Run as successor-in-interest.³ The petitions against Top Kat and Bear Run were dismissed at hearing because those parties had not been served, and only W-P's liability remained at issue.

Following trial, it was held in the initial decision that W-P was a mine operator under the Act, but under the criteria established by the Commission in Phillips Uranium Corp., 4 FMSHRC 549 (1982), the Secretary had not met his burden of proving that he acted permissibly in proceeding against W-P. As noted, the Commission reversed the latter findings holding that too much reliance was placed upon the Phillips Uranium decision and remanded the case for determination of remaining issues.

Issues on Remand

W-P claims that the Secretary's enforcement action in this case was an unfair departure from its purported past practice of regulating the West Virginia contract mining industry. In this regard, W-P appears to assert that it had been the uniform MSHA policy prior to the instant enforcement action to cite only the contract miner for health and safety violations in contract mining situations.

While there is record support that MSHA had never before cited W-P as lessee/operator for violations at the No. 21 Mine during its contract with Top Kat and that, at least in the areas under the inspection authority of the Logan, West Virginia, MSHA Subdistrict Office, it was probably not the practice to cite such lessee/operators, W-P certainly has not established by record evidence the proposition that there was such a uniform industry-wide Secretarial policy (Tr. I-119, 200, 236 and 237).⁴ No such inference can properly be drawn from the record evidence cited by W-P. Clearly, Noah Ooten, a supervisor for the Logan, West Virginia, MSHA Field Office was not speaking in the context of a national or even a West Virginia Secretarial policy when he testified. More particularly, the fact that Ooten was unaware of instances in which MSHA had previously cited a mineral rights owner or lessee for violations of a contract miner clearly does

³ In his original petition filed in this case, the Secretary proposed a civil penalty of \$1,176 for the violation. At oral argument following remand, the Secretary acknowledged that a 35 percent reduction of this proposed penalty would be appropriate since he had vacated the "section 104(b)" failure-to-abate order, and now acknowledges that whoever the mine operator is, it is entitled to full credit for good faith abatement.

⁴ Transcript references to the September 24, 1992, proceedings will be prefaced by "I," to the September 25, 1992 proceedings by a "II," and oral argument on October 17, 1994, by a "III."

not prove that in fact it had never before occurred (Tr. I-119). It is disingenuous to suggest otherwise. The same is true for W-P's references to the testimony of MSHA Inspector Stepp (Tr. I-200, 236-237). The Secretary maintains moreover that as a matter of law no such regulation or uniform policy statement existed then or now exists. In any event, W-P has failed to establish by record evidence that any such uniform industry-wide Secretarial policy existed and this being an essential premise to its argument, that argument must accordingly fail.⁵

Moreover, W-P cannot fairly claim lack of prior notice that the acts of its contractor could lead to liability in light of the long established case law. In one of its earliest decisions, the Commission placed the mining industry on notice that private contractual assignments of liability and private characterizations of parties would not shield operators from liability. In Secretary v. Republic Steel Corp., 1 FMSHRC 5, 11 (1979), issued 10 years before W-P contracted with Top Kat, the Commission concluded, within the framework of the identical definition of "operator" in the Federal Coal Mine Health and Safety Act of 1969, that a "mine operator cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted."

In the case of Cyprus Industrial Minerals Co. v. Federal Mine Safety and Health Review Commission, 664 F.2d 1116 (9th Cir. 1981), the Federal Circuit Court of Appeals also anticipated the situation herein, where the owner/lessee contracts extraction and safety functions to another entity and then argues that the owner/lessee is not liable for ensuing violations. In the Cyprus case, the Court stated:

The Secretary presents sound policy reasons for holding owners liable for violations committed by independent contractors. For one thing the owner is generally in continuous control of the conditions at the entire mine. The owner is more likely to know the federal safety and health requirements. If the Secretary could not cite the owner, the owner could evade responsibility for safety and health requirements by using independent contractors for most of the work. The Secretary should be able to

⁵ The evidence that MSHA had not previously taken enforcement action against W-P as lessee/operator of the No. 21 Mine may nevertheless be considered in mitigation of negligence. See King Knob Coal Co., 3 FMSHRC 1417 (1981) and Decision infra, p. 10-11.

cite either the independent contractor or the owner depending on the circumstances. Id. at 1119.

More recently the rationale for holding owner/lessee operators liable under the Act was restated and reinforced in Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1359 (1991), wherein the Commission wrote:

Thus, an owner is held liable for the acts of its contractor not merely because the owner has continuous control of the entire mine but, rather, because the Act's scheme of liability provides that an operator, although faultless itself, may be held liable for the violative acts of its employees, agents and contractors.

It is further noted that W-P actually anticipated its liability for violations of the Act when it provided in its contract with Top Kat a duty for Top Kat to indemnify W-P for any penalties assessed against W-P for the actions of Top Kat (Respondent's Exhibit No. 3, pps. 13-14, 58-59).

In any event, even assuming that the Secretary had not always cited off-site owner/lessee operators in the past, the Secretary cannot, because of such inaction, be estopped from otherwise legal enforcement action under the Act. See King Knob Coal Co., 3 FMSHRC 1417, 1421-1422 (1981), Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1361 (fn. 3), and U.S. Steel, 15 FMSHRC 1541, 1546-47 (1993).

The next claim presented on remand is the assertion that W-P was deprived of its constitutional rights when it was purportedly not accorded the procedural due process attendant to MSHA inspections.⁶ In particular, however, W-P asserts it was denied rights provided mine operators under Section 103(f) of the Act. Section 103(f) provides in pertinent part that "a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post- inspection conferences held at the mine."

The short answer to this contention, however, is that W-P waived these rights granted to mine operators by failing to file a legal identity report identifying itself as a mine operator as required by Section 109(d) of the Act and under 30 C.F.R.

⁶ At oral argument W-P counsel added that this "due process" claim was intended to fall within the protections of the Fifth Amendment, U.S. Constitution.

§ 41.10 -41.13 and 41.20.⁷ It is, of course, a well established principle of law that even constitutional rights may be waived and forfeited. See Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944), and Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). As noted at trial, the rights accorded mine operators under Section 103(f) of the Act can only be provided to an entity if the Secretary is appropriately informed through a legal identity report that he is in fact an operator of the mine (Tr. I-119, 155, 205-207). In the instant case, it is undisputed that W-P had not filed the requisite legal identity report as an operator of the No. 21 Mine during relevant times and accordingly I find that it has waived its rights under Section 103(f) to be informed of the right to accompany an inspector and the right to attend any pre-inspection conference.⁸

W-P also maintains that MSHA failed to include it in a post-inspection "close-out" conference and "10-day" safety and health conference. However, according to the testimony of MSHA Inspector George Cavendish, which I find credible, W-P President Vernon Cornett was in fact informed of W-P's right to post-inspection conferences following the issuance to him of, among other things, the citation at bar (Tr. I-230-231) and that Cornett did not request any such conferences (Tr. I-138). In addition, it is acknowledged that W-P officials were aware of their rights to such conferences and elected not to seek such conferences (Tr. III-120-124). In this regard, W-P also maintains that such post-inspection conferences would in any event have been meaningless. Under the circumstances, I find that W-P waived its rights to post-inspection conferences by knowingly electing not to seek such conferences.

In its final argument to vacate the citation, W-P argues that MSHA failed to issue the citation with "reasonable promptness" as prescribed by Section 104(a) of the Act. That section provides in part as follows:

If upon inspection or investigation the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has

⁷ 30 C.F.R. § 41.11(a), for example, provides in part that "the operator of a coal or other mine shall, in writing, notify the appropriate district manager of the Mine Safety and Health Administration in the district in which the mine is located of the legal identity of the operator."

⁸ Alternatively, W-P may be barred by estoppel from claiming a denial of such rights by having failed to have properly notified the Secretary through a legal identity report that it was an operator entitled to such rights.

violated any mandatory health or safety standard, he shall with reasonable promptness issue a citation to the operator The requirements for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

It is undisputed that in the present case the inspection that resulted in the issuance of Citation No. 3750647 took place on September 4, 1991. The Secretary issued the citation against Top Kat on that date and modified the citation to name W-P as a co-operator on November 14, 1991. The Secretary served W-P with a copy of the modified citation in December 1991 or January 1992. Accordingly, there was a delay of approximately 71 days between the date of the inspection and the date of the issuance of the citation against W-P and a delay of approximately 3 to 4 months between the date of the inspection and the date of service of the citation on W-P.

W-P argues that this delay violates the mandate of Section 104(a). This argument ignores, however, the effect of the last sentence of Section 104(a) that "the requirement for the issuance of the citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." Moreover, the Act's legislative history explains:

There may be occasions where a citation will be delayed because of the complexity of issues raised by the violations, because of a protract[ed] accident investigation, or for other legitimate reasons. For this reason, Section [104(a)] provides that the issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action. H.Rep. No. 181, 95th Cong. 1st Sess. 30 (1977), reprinted in Senate Sub-Committee on Labor, Legislative History of the Federal Mine Safety and Health Act of 1977 (Leg. Hist.), at 618 (1978).

In the case at bar, I do not find that a delay of as long as four months would not have been reasonably prompt under the circumstances. It is readily apparent from the background of this case that the delay herein was due in large part to uncertainty regarding the identity and degree of liability of all responsible mine operators. Indeed, part of the uncertainty may have been the result of W-P's own failure to have filed a legal identity report with the Secretary identifying itself as an operator of the subject mine. Had W-P filed a legal identity report as an operator it may reasonably be inferred that the citation would have been served upon W-P at a much earlier time (See Tr. I-119, 155, 205-207). Thus, not only do I find that the citation was issued with "reasonable promptness"

within the meaning of Section 104(a) of the Act, but that, in addition, I find that W-P waived its right to any earlier service of the citation by its own failure to have filed a legal identity report. See Old Dominion Coal Power Co., 6 FMSHRC 1886, 1894 (1984), rev'd on other grounds, Old Dominion v. Donovan, 772 F.2d 92 (4th Cir. 1985).

Since the procedural objections raised by W-P have been rejected herein, the only remaining issue is whether the violation charged in Citation No. 3750647 did in fact occur and, if so, was it a "significant and substantial" violation and what is the appropriate civil penalty to be assessed. The citation charges as follows:

The # 20 bath house facility was not maintained in good repair to prevent accidents and injuries to employees in that there was an area of the bath house floor approximately 2-1/2 foot by 2-1/2 foot that was rotten and the wood was wet and weak, (ready to collapse anytime)

The cited standard, 30 C.F.R. § 77.200, provides that "all mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees."

The testimony of MSHA Inspector Tyronne Stepp is undisputed that the bathhouse floor was "basically rotten." Indeed, Top Kat official William Adkins, sole officer and stockholder of Top Kat, admitted that there was a "big hole" in the floor. The bathhouse door was unlocked and according to Stepp "any person walking on a rotten deteriorated floor . . . are [sic] subject to slip[ping] and hurt[ing] an ankle [and] if it gives way you are subject to break[ing] a leg." Within this framework of evidence the violation has clearly been proven as charged.

Stepp further opined that the violation was "significant and substantial" because "it's reasonably likely . . . due to the amount of traffic in the bathhouse . . . you have several coal miners in and out different shifts occasionally." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981). In Mathies Coal Co., 6 FMSHRC 1,3-4 (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 (1987) (approving Mathies criteria).

The third element of the Mathies formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., Inc., 6 FMSHRC 1473, 1574 (1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (1986) and Southern Oil Coal Co., 13 FMSHRC 912, 916-17 (1991).

With the above framework I conclude that the violation was indeed "significant and substantial" and of high gravity. In reaching these conclusions I have not disregarded the testimony of William Adkins that the bathhouse was "not supposed to have been used." However, I can give such speculative and self-serving testimony but little weight in light of the fact that the bathhouse door was unlocked and the premises openly accessible.

In determining an appropriate civil penalty under section 110(i) of the Act, the following factors must be considered: "[t]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation."

The Secretary acknowledges that there is nothing in the record to support a finding regarding "the size of the business of the operator charged," and notes that this was a small mine (Tr. III-31). The Secretary also acknowledges that whoever the operator is deemed to have been, it is entitled to full credit for good faith abatement (Tr. III-29). The Secretary further acknowledges that there is nothing in the record regarding the history of violations of any operator at the subject mine (Tr. III-37). W-P has not shown how a civil penalty would affect its ability to continue in business. Gravity has already been determined to be high.

The Secretary argues, finally, that W-P's negligence should be based upon both its own negligence in contracting with Top Kat and upon an imputation of Top Kat's negligence. The record is devoid, however, of any evidence that before contracting with Top Kat, W-P had knowledge of, or that in fact Top Kat had a prior history of, safety and/or health violations or that W-P should in any way have been placed on notice of any deficiencies in Top Kat's past safety and/or health performance. Accordingly, there is no basis for the Secretary's contention that W-P was negligent in its selection of Top Kat as its contractor.

The Secretary further argues, but without reference to record evidence, that W-P was negligent in "failing to intervene when it became evident that [Top Kat] was in serious non-compliance." While there is record evidence that Top Kat had received prior citations, the record also shows, contrary to the Secretary's allegations, that W-P officials in fact met with MSHA representatives in an attempt to resolve safety problems between MSHA and Top Kat. Indeed, this is the same evidence the Secretary has cited in maintaining that W-P was a co-operator. More specifically, however, there is no evidence that W-P had any knowledge of Top Kat's non-compliance with the mandatory standard at issue in this case. Accordingly, I find the Secretary's argument herein to be without merit.

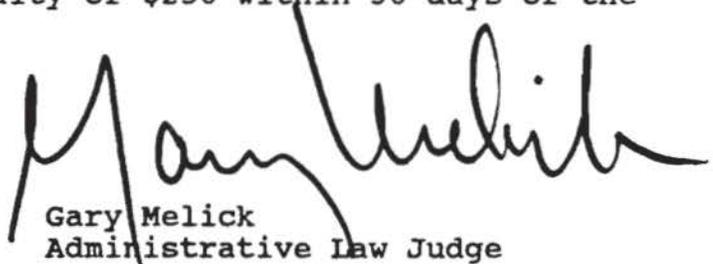
I further reject the Secretary's attempt to impute Top Kat's negligence to W-P through an agency theory at this late stage in the proceedings. In this regard, the Secretary has claimed Top Kat was negligent in this case because it should have known of the violation. According to Inspector Stepp "you walk on [the bathhouse floor] every day . . . it's obvious (Tr. I-197). However, the Secretary's theory, from the beginning of this case when the civil penalty petition was filed, has been that W-P was a "co-operator" responsible based upon its own exercise of "control and supervision over the operation of the No. 21 Mine" (See also Tr. I-11, 15-16). It is only since trial and Commission remand after the "co-operator" theory had been twice rejected that the Secretary changed his theory of W-P's responsibility to one based upon the imputed negligence of Top Kat as an agent of W-P. While this additional theory could perhaps have at some point in time been included in an amended pleading (amended petition for civil penalty) upon appropriate motion under FED. R. CIV. P. 15, it comes too late at this stage of the proceedings and would clearly be prejudicial to W-P. See 3 Moore's Federal Practice ¶ 15.08[4]. To allow an amendment to the petition now would deny W-P an opportunity it would otherwise have had at trial to defend against such a theory by presenting evidence that an agency relationship may not in fact have existed between Top Kat and W-P.

In any event, overriding any finding of negligence against W-P is the fact that even though the Secretary had knowledge of

W-P's relationship as lessee of the mining rights at the No. 21 Mine, he had never previously charged W-P with any violations at the mine (Tr. I-166). This lack of prior enforcement against W-P (as well apparently as against other mineral rights owners and lessees under the inspection authority of the Logan, West Virginia MSHA Field Office), including the failure to enforce the legal identity reporting requirements against W-P, may properly be considered in mitigation. See King Knob Coal Co., 3 FMSHRC 1417 (1981). Under the circumstances, I find W-P chargeable with but little negligence and find that a significant reduction in civil penalty to \$250 is appropriate.

ORDER

Citation No. 3750647 is **AFFIRMED** and W-P Coal Company is directed to pay a civil penalty of \$250 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DEC 5 1994

JAMES D. WATERS, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. CENT 93-261-DM
: MSHA Case No. SE MD 93-04
IMC FERTILIZER, INC., : Carlsbad Facility
Respondent :

DECISION

Appearances: David W. Strickler, Esq., and W.T. Martin, Jr.,
Esq., Carlsbad, New Mexico, for Complainant;
Charles C. High, Jr., Esq., Kemp, Smith, Duncan &
Hammond, El Paso, Texas, for Respondent.

Before: Judge Fauver

This is a discrimination action under § 105(c) 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, probative
and reliable evidence establishes the Findings of Fact and
further findings in the Discussion below:

FINDINGS OF FACT

1. Complainant, James Waters, began working for Respondent,
IMC Fertilizer, Inc., on April 15, 1985, at IMC's Carlsbad, New
Mexico mine. Mr. Waters has a Bachelor of Science Degree in
Metallurgical Engineering, a Master's Degree in Business
Administration, with a specialty in Industrial Management, and
substantial experience in mineral chemical processing,
engineering and plant operations. IMC's annual pay evaluations
of Mr. Waters were very favorable. The company does not contend
that he was discharged for cause, but contends he was terminated
in a reduction in force due entirely to business reasons.

2. IMC owns a large underground mine near Carlsbad, New
Mexico where it mines potash and other minerals for sale or use
in interstate commerce. Respondent also has mining and
processing operations in Louisiana, Florida, and Canada and
maintains corporate headquarters in Northbrook, Illinois. The
Carlsbad mine employs about 600 employees.

3. Complainant was hired at the Carlsbad mine in 1985 as Superintendent of Construction and Engineering. He transferred to Surface Production Superintendent in 1989 and was promoted to Manager of Surface Operations on July 1, 1992. This was the number two position in surface operations. Dale Willhoit, Production Manager, was Complainant's supervisor for his entire employment.

4. On April 29, 1993, Complainant's position was eliminated and his employment terminated along with four other employees in a reduction in force at the Carlsbad mine.

5. Following his termination, Complainant filed a complaint with the Mine Safety and Health Administration claiming that he was terminated in violation of § 105(c) of the Act. MSHA investigated the complaint and concluded that no violation had occurred.

The Company's Financial Problems

6. In 1992 and continuing into 1993, the company experienced major financial problems. These were brought on by a combination of factors, including, a sharp decline in the price of phosphate, expenses associated with an inrush of water into the company's Canadian mine, poor performance of a sulphur operation in which the company invested heavily, and the settlement of litigation arising out of an explosion at the company's facility in Sterlington, Louisiana. For the third quarter ending on March 31, 1993 (the fiscal quarter ending just prior to the April 1993 reduction in force), the company reported a net loss of \$113.7 million. This included a litigation settlement of \$108.5 million. Throughout this period, the Carlsbad mine remained profitable.

7. Concerned that its bank creditors would call its loans, which were in excess of \$50 million, the Company retained outside bankruptcy counsel and prepared the necessary filings in the event they were needed.

Reductions in Force

8. Because of its financial difficulties, the company implemented reductions in force in 1992 and 1993, terminating over 600 employees.

Effect On Carlsbad Mine In 1992

9. Although the Carlsbad mine remained profitable, it was required to share the Company's financial burden by reducing costs. In November 1992, Walt Thayer, Vice President and General Manager of the Carlsbad mine, was asked by his supervisor,

corporate Executive Vice President Jim Spier, to contribute as much as he could to cash flow, to produce at the best margin possible, and to cut costs as much as possible. This meant that the Carlsbad mine was being asked to increase production at the same time it was being asked to cut costs.

10. In 1992, Thayer was able to accomplish this without laying off many people. Because additional employees were needed to increase production and therefore increase cash flow, Thayer held off hiring the additional people and, instead, transferred people from other positions into underground miner positions which were necessary to increase production. In addition, some positions were eliminated while others were not filled. A few employees were either offered a retirement package, a severance package, or laid off. All decisions on cost reduction at Carlsbad were made by Thayer. A total of five employees were separated from the payroll during this reduction in force.

In 1993

11. The company's financial problems continued and in early 1993 the Carlsbad mine was again asked to cut costs. On March 22, 1993, Executive Vice President Spier, Thayer's supervisor, called from the corporate office and in Thayer's absence talked to Dale Willhoit, the Production Manager. Spier told Willhoit that the Carlsbad mine was behind in production, was \$32,500 unfavorable in labor and salaries, and there was "no choice" but to have a further reduction in costs.

12. Willhoit immediately called Thayer, who was on vacation, and told him of Spier's instructions. Thayer told Willhoit to start making a list of what he thought could be done to reduce costs.

13. As requested, Willhoit prepared a list of recommended moves and terminations. The list included 19 individuals and listed their salaries and Willhoit's recommended personnel actions. Among his recommendations were to move Cy Bullen to Manager Mine Operations, Morehouse to Mine Engineer, and Complainant to Production Superintendent.

14. Thayer did not accept all of Willhoit's recommendations. He decided to eliminate the level of management directly below Production Manager (Willhoit). This level consisted of three positions: Mine Manager, held by Dan Morehouse; Surface Operations Manager, held by Complainant; and Mine Operations Coordinator, held by Cy Bullen. Upon elimination of this level, the employees previously reporting to these positions were to report directly to the Production Manager (Willhoit).

15. Thayer retained Morehouse by offering him a demotion to Mine Engineer in the Mine Engineering Department.

16. Cy Bullen was 66 and entitled to retirement. Thayer placed him on full retirement and gave him a generous severance package that Bullen found to be "very good."

17. Complainant was terminated without an offer of transfer or demotion.

18. In addition to eliminating Complainant's level of management, Thayer eliminated three lower positions and terminated the employees. In total, five employees had their jobs eliminated and were terminated: Linda Carr, Receptionist; Scot Bendixsen, Personnel Supervisor; Myra Jacks, Data Entry Operator; Cy Bullen, Mine Operations Coordinator (placed on full retirement); and Complainant, Manager of Surface Operations.

19. Once Thayer decided on the cost reductions, his plan was sent to the corporate office for review and approval. The corporation promptly approved.

20. Originally, it was planned to have the immediate supervisor meet with each employee being terminated. However, Thayer decided that he would meet with them individually.

21. On April 29, 1993, Thayer summoned Complainant to his office at the end of the shift. He told him his job was eliminated immediately, that he was to leave the property immediately, and that the company would empty his desk and send his personal belongings to him. Complainant tried to ask him whether he could take a demotion or transfer, but Thayer cut him off and told him he had someone else coming in and could not talk to him and that if he had any questions he should call Wilcox (in Human Resources). Complainant insisted on taking some of his personal belongings with him, and Thayer assigned a subordinate employee to escort him to his office, watch him as he removed personal belongings and escort him to the front gate. I find that Thayer's abrupt and insulting treatment of Complainant resulted from substantial management hostility toward Complainant.

22. Shortly after Complainant's termination, Willhoit prepared a "Confidential" evaluation on Complainant, which was placed in Complainant's file. Willhoit rated him average in performance and below average in "attitude." Willhoit's evaluation effectively eradicated years of very favorable performance evaluations received by Complainant. I find that Willhoit's downgrading evaluation resulted from substantial management hostility toward Complainant.

The Robbie Slusher Matter

23. In his complaint to MSHA, Complainant alleged that he was terminated in retaliation for his conduct in connection with

an incident involving Foreman Robbie Slusher. Specifically, Complainant alleged that:

Mr. Waters became aware of an incident resulting in injury to a miner that involved the possibility that the injured miner's front-line supervisor had willfully or knowingly placed the miner in an unsafe condition. Further, it came to Waters' attention that IMC's report to MSHA had intentionally misstated the nature of the supervisor's involvement in the injury. Mr. Waters brought the matter to the attention of his supervisors at IMC, and recommended that front-line supervisors be given additional training, with particular emphasis on knowingly or willfully subjecting miners to unsafe working conditions. Despite Mr. Waters' exemplary record, he was discharged six weeks later.

24. This incident involved an accident on March 11, 1993, when Foreman Robbie Slusher (one of the supervisors under Complainant) was sent to measure a pipe for a blueprint. When he arrived, he saw that the pipe was higher than he could reach. He observed a 6 x 6 x 40 inch timber nearby, stood it on its end and leaned it against a feed pump, thinking that he could stand on it and reach the pipe. A miner, Mike Sensibaugh, offered to help. Sensibaugh climbed on the timber while Slusher steadied it with his foot. The miner attached a safety belt to climb up to the pipe to be measured. When he was finished and stepped on the timber to descend, the timber slipped and he caught himself on another pipe. The sudden move and pressure dislocated his shoulder. He was out for several weeks and returned for restricted duties.

25. The following morning, Thayer called a meeting to find out what happened, whether any discipline was needed and what could be done to prevent similar accidents. This was attended by Thayer, Willhoit, Wilcox, Complainant, and Jim Spearman, the Maintenance Superintendent. Complainant's principal concern going into the meeting was that the company "would take this young man (Slusher) who had been a supervisor for at that time I am going to think a year and a half or so and terminate his employment. . . ." Tr. 508.

26. During the meeting Complainant expressed his concern for Slusher and said he did not want to see him terminated or charged by MSHA. He also recommended that front-line supervisors be given special training on potential liability for willful or knowing violations that place miners in danger. After reviewing the incident, the group decided that Slusher should not be terminated but that he should be suspended from regular duties for three days with pay, required to present safety seminars on the use of ladders, receive a written reprimand, and be protected in the report to MSHA. With respect to reporting the accident to MSHA, Complainant asked, "How are we going to take care of the

accident report to MSHA?" Tr. 518. Wilcox, who had responsibility for safety as well as human resources, said that was his responsibility and he would "take care of it." Complainant thought that Wilcox's statement meant that Slusher would be written out of the MSHA report. He had no objection to this and expressed no disagreement.

27. At the conclusion of the meeting, Thayer polled everyone to see if there was a consensus on how the matter should be handled. Everyone agreed, including Complainant.

28. IMC's accident report to MSHA was prepared a few days later, on March 16, 1993, but was not sent to MSHA until May 6, 1993, the day Sensibaugh returned to work for restricted duties. The report was filed with MSHA after Complainant's termination. A comparison of IMC's internal accident report (Exh. C-2) and the report to MSHA (Exh. C-3) shows that Slusher's involvement and the failure to use a ladder were written out of the report to MSHA. The report to MSHA was deceptive and covered up the safety accident as a mere "slipping" accident without fault.

29. On the date of the meeting, March 12, 1993, Complainant had prepared an advance memorandum to Dale Willhoit. The memorandum (Exh. C-4) argued to save Slusher from discharge by pointing out a perceived failure of the company to train front-line supervisors as to "the implications of knowingly or willfully placing an employee in an unsafe situation" and the "potential liabilities for both the salaried employee and IMC-Fertilizer" It concluded with the statement:

Had we had an ongoing program to reinforce our position on this and thoroughly explain the law, I would be forced to recommend termination.

30. Complainant gave copies of his memorandum to a secretary before the meeting on March 12, expecting her to deliver the memorandum to Willhoit and Wilcox before the meeting. However, she did not deliver it until shortly after the meeting.

31. Willhoit and Wilcox were both upset by the memorandum, which exposed IMC to potential liability for Foreman Slusher's failure to use a ladder and for IMC's (planned) deceptive accident report to MSHA. They told Complainant to destroy the memorandum. Complainant destroyed the memorandum except for one copy. On prior occasions, he had been instructed to destroy memoranda dealing with various matters, some involving safety and some unrelated to safety.

32. At times, Willhoit (Complainant's supervisor) had warned Complainant about writing memoranda that put the company in a bad light. He advised him not to write memoranda on safety problems and counseled him that any memoranda containing unfavorable

information on safety would not be well received by higher management. Complainant felt intimidated by Willhoit's remarks. In one instance, he removed any reference to safety in a memorandum requesting that UHF radios be purchased for communications with miners. He did not realize his Slusher memorandum was controversial until Wilcox and Willhoit became upset and told him to destroy it.

The Air Transfer/Cullins Matter

33. Although not mentioned in his MSHA complaint,¹ Complainant contended at the hearing that his termination was also motivated by his memorandum of October 10, 1990, and his continuing efforts up to February 1993, to persuade the company to correct what he considered to be a serious hazard in using PVC pipe to transfer acid.

34. In its reagent plant, the company uses hydrochloric acid in the processing of ore. The acid is stored in a tank and must be transferred at specified times. This has been a part of the processing operation for over 30 years. A storage building contains three mixing tanks and storage tank of amine. Outside, there is a storage tank containing hydrochloric acid. Amine must be neutralized with hydrochloric acid to render it usable for IMC's purposes.

35. At various times, the acid has been transferred into the storage building by one of two methods: pressurized air or an acid pump. Prior to Complainant's arrival, acid had been transferred by a Wilfrey pump before the company switched to an air transfer system. The Wilfrey pump leaked acid around the shaft, causing some maintenance and repair problems.

37. When Complainant was hired, the company was using the air transfer system with PVC pipe as the conduit for the acid.

38. On October 9, 1990, Complainant inspected the air transfer system in response to an employee complaint about fumes in the reagent plant. Complainant had not examined the system

¹ Extensive evidence was introduced at the hearing by Complainant and Respondent on the Slusher matter, the air transfer/Cullins matter and the reduction in force, without objection by Respondent or Complainant as to the issues being tried. The case was tried on the key issues whether the Slusher matter and the air transfer/Cullins matter involved protected activities by Complainant, whether his termination in the reduction in force was motivated "in any part" by protected activities, and, if so, whether Respondent proved an affirmative defense.

before. Complainant had substantial experience with PVC pipe and believed it was not safe as a conduit for acid. When he inspected the air transfer system, he saw an immediate hazard in the company's use of PVC pipe. Complainant then prepared a memorandum to Willhoit, dated October 10, 1990, in which he informed Willhoit of the problem and recommended that a regular acid pump be purchased immediately and that the company stop using the air transfer system. His memorandum stated in part:

I further recommend we use acid grade stainless, hastelloy, or FRP piping and do away with the cheap PVC we are currently using. I doubt if you would get the manufacturers to certify the contractor grade PVC we use for concentrated HCl.

We are now highly exposed to a potential accident in this area and cost of a pump and piping at \$4,000 - \$5,000 is a very cheap policy.

Copies were sent to Daily Jones, Jim Spearman, and J. McKenny.

39. Willhoit was upset by this memorandum and told Complainant to shred it. When Complainant said it had already been distributed to others, Willhoit wrote a number of items on the memorandum for further study.

40. Complainant gave a copy of Willhoit's questions to Daily Jones and asked him to "check it out." Jones never finished the project because Complainant determined his work priorities and assigned him to other tasks.

41. Complainant did not respond to the questions asked by Willhoit because he thought Willhoit had made up his mind and a further reply would be futile. He also was intimidated by Willhoit's strong reaction to his memorandum and to his warning, after the memorandum, not to put safety problems in writing.

42. On July 1, 1992 Complainant was promoted to Manager of Surface Operations, based upon Willhoit's recommendation.

43. Purchases on requisitions required Willhoit's approval if they were for his department. However, if an item could be found in the city of Carlsbad in the range of \$1,000 - \$2,000 it could be purchased without his approval.

44. On August 26, 1992, a Teel acid pump had been received on a "city ticket" in the company's warehouse. Five days later, August 31, 1992, the Complainant instructed Jim Spearman to have the "new acid pump" installed. Copies of these instructions were sent to Willhoit. The pump was installed September 23, 1992.

This pump proved to be unsatisfactory and the company returned to the air transfer system. Complainant also tried another pump and it likewise did not work.

45. Complainant received very favorable annual evaluations for 1991 and 1992.

46. On February 7, 1993, Reagent Helper Cheryl Cullins was working on the air transfer system when the PVC pipe burst and spewed acid on her. She immediately washed off in an emergency shower and was taken to a hospital emergency room. She suffered no lost time for injury. The pipe burst with such force that she was knocked down on her face and several pieces of pipe struck her.

47. Complainant promptly asked Daily Jones to determine the best kind of pump and pipe to use and to prepare the necessary purchase orders for recommendation to Willhoit. Jones recommended a Fybroc pump which he believed to be better than a Wilfley pump. The pump and pipe were approved by Willhoit, ordered and installed in June 1993, after Complainant's termination.

Acts of Management Hostility

48. Following the Slusher matter on March 12, 1993, and the Cullins accident in February 1993, there were a number of management acts of hostility toward Complainant: (A) Complainant was excluded from meetings to which he ordinarily would have been invited and expected to participate; (B) the discussions in such meetings were kept secret from him; (C) Complainant's authority in his department was bypassed; (D) Dale Willhoit deliberately deceived him two days before his termination, by telling him that he was doing a good job and there was nothing to worry about and that he was not being deliberately excluded from meetings; (E) the company accorded Complainant disparate treatment in the reduction in force; (F) the company showed hostility toward Complainant by its abrupt, insulting treatment of him when he was terminated, by giving him short shrift, cutting off his questions, and having him guarded while he removed personal belongings from his office and physically escorted to the front gate; and (G) shortly after his termination, Willhoit wrote a "Confidential" evaluation for Complainant's file that downgraded his evaluation for performance and attitude despite years of outstanding evaluations.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

General Principles

Section 105(c)(1) of the Act ² protects miners from retaliation for exercising rights under the Act, including the right to notify the operator of an alleged danger or violation of the Act.

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

This provision is a key part of remedial legislation, which is to be liberally construed to effectuate its purposes.

To establish a prima facie case of discrimination under § 105(c) a miner must prove (1) that he or she engaged in protected activity and (2) that the adverse action complained of was motivated "in any part" by that activity. The operator may rebut the prima facie case by showing either that no protected

² Section 105(c)(1) provides:

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

activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982); National Cement, 16 FMSHRC 1595 (1994) (and cases cited).

A prima facie case of discriminatory intent may be established solely through circumstantial evidence. The most common indicia of discriminatory intent are: (1) knowledge that the miner was engaged in protected activity; (2) hostility toward the protected activity; (3) coincidence of timing between the protected activity and the adverse action; and (4) disparate treatment of the miner.

A miner need not prove disparate treatment to establish a prima facie case. Knowledge of the miner's protected activity is "probably the single most important aspect of a circumstantial case," and may itself be proved by circumstantial evidence. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (1981), rev'd in part on other grounds sbu non. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983).

Protected Activities

The first element Complainant must prove is that he was engaged in "protected activity."

The Slusher Matter

Complainant alleges discrimination because of the Slusher matter, contending (1) that he "brought to the attention of his supervisors" an "incident that involved the possibility that [an] injured miner's front-line supervisor had willfully or knowingly placed the miner in an unsafe condition" and the fact that "IMC's report to MSHA had intentionally misstated the nature of the supervisor's involvement in the injury"; and (2) that Complainant recommended that "front-line supervisors be given additional training, with particular emphasis on knowingly or willfully subjecting miners to unsafe working conditions." Exh. R-37.

Complainant's participation in the Slusher matter involved writing a memorandum and attending a meeting on March 12, 1993.

I find that Complainant's statements at the meeting, and in his memorandum, concerning his view that better safety training was needed to instruct supervisors on their potential liability for knowing or willful violations that place miners in danger were protected activities under § 105(c) of the Act. Deficiency

in the safety training of supervisors can present a danger to miners.

The Air Transfer/Cullins Matter

At the hearing Complainant also introduced evidence of an air transfer/Cullins matter that began with his memorandum on October 10, 1990, and extended to his efforts in February 1993, to persuade the company to correct what he believed to be a serious hazard in the use of PVC pipe to transfer acid. In clarifying the basis of his discrimination complaint, Complainant testified that the other incidents he mentioned at the hearing were only for purposes of "background" and that "the two items that are involved with my termination, sir, are the Cullins accident and the memo that I wrote (about) Mr. Slusher." Tr. 475-476.

I find that Complainant's October 1990 memorandum and continuing efforts to persuade management to change the air transfer system were protected activities. The risk of injury was serious and in fact the accident forecast by Complainant occurred.

Did Complainant Show Management Hostility Toward His Protected Activities?

The Slusher Matter

I find that the evidence as to the first part of the Slusher matter (item (1) above) does not show management hostility. Rather than his bringing to the attention of management the Slusher matter or the fact that IMC's report to MSHA intentionally misstated the supervisor's involvement, Complainant was actually called to a meeting by management before the IMC report to MSHA, and at the meeting he and everyone else agreed to a plan to protect Slusher from being charged by MSHA by writing Slusher out of the IMC accident report to MSHA. After the meeting, the IMC report to MSHA not only wrote Slusher's involvement out of the accident report, but even omitted the need to use a ladder instead a piece of timber for climbing, and recast the incident as a mere "slipping" accident without fault or risk of IMC liability. Complainant had no objection to this plan. In fact, he participated in it. Complainant made no effort to see the actual report to MSHA, which was prepared on March 16, 1993, and was not sent to MSHA until May 1993, after Complainant was terminated.

In summary, Complainant went to the Slusher meeting to try to protect Slusher from being discharged by IMC or being charged by MSHA. He succeeded and had no objections to the meeting and its outcome. There is no evidence that item (1) generated any hostility by management.

However, the second part of the Slusher matter, item (2) above, shows management hostility toward a protected activity. At the March 12 meeting, Complainant recommended (1) special training of front-line supervisors on their potential liability for willful or knowing violations that place miners in danger; (2) leniency for Foreman Slusher, and (3) protection of Slusher in the accident report to MSHA. The meeting reached a unanimous agreement as to how to resolve the Slusher matter i.e., to suspend Slusher from regular duties for three days with pay, with an assignment to conduct safety training on the use of ladders, to give him a letter of reprimand, and to protect him in IMC's accident report to MSHA.

Complainant prepared a memorandum on the Slusher matter and gave it to a secretary to deliver to Willhoit and Wilcox before the meeting. However, it was not delivered to them until shortly after the meeting. Willhoit and Wilcox were upset by Complainant's memorandum because, among other things, it exposed Respondent to potential liability for Slusher's failure to use a ladder or other safe means in having a miner do elevated work and it exposed Respondent to potential liability for its (planned) deceptive accident report to MSHA.

I find that Complainant's Slusher memorandum was a protected activity that generated substantial management hostility toward Complainant.

The Air Transfer/Cullins Matter

I also find that the Air Transfer/Cullins Matter involved protected activities that generated substantial management hostility toward Complainant.

In his memorandum of October 10, 1990, Complainant warned Respondent that the PVC pipe in the air transfer system presented a high risk of rupturing and spraying acid on miners. His warning proved prophetic when the PVC pipe ruptured on February 7, 1993, and sprayed acid on Cheryl Cullins. While she was able to get to an emergency shower, she could have been seriously injured.

Willhoit was upset by Complainant's 1990 memorandum and told him to shred it. He believed the memorandum could subject IMC to liability. The PVC pipe was used without incident until the Cullins accident in February 1993. Complainant was promoted on July 1, 1992, based on Willhoit's recommendation. When the PVC pipe burst in February 1993, spraying acid on Cheryl Cullins, Complainant promptly came up with recommendations (through his subordinate Daily Jones) for a pump and replacement of the PVC pipe.

Management Acts of Hostility

Complainant's memoranda as to the PVC pipe and the Slusher matter were met by hostility from management, who told him to destroy the memoranda. In addition, shortly after the Cullins accident (February 1993) and the Slusher matter (March 1993) there were a number of hostile acts of management toward Complainant: (A) excluding Complainant from meetings to which he would have ordinarily been invited and be expected to participate; (B) keeping such meetings a secret from Complainant; (C) bypassing Complainant's authority in his department; (D) Willhoit's deliberate deception of Complainant, two days before his termination, by telling him he was doing a good job, there was nothing to worry about, and he was not being excluded from meetings; (E) IMC's disparate treatment of Complainant in the reduction in force; (F) the abrupt, insulting treatment of Complainant when he was terminated, by cutting off his questions and having him guarded while he removed personal belongings from his office and physically escorted to the front gate; and (G) Willhoit's "Confidential" post-employment evaluation of Complainant in which Willhoit eradicated the benefit of years of very favorable performance evaluations by evaluating him as average in performance and below average in "attitude."

Was Complainant's Termination Motivated "In Any Part" by Protected Activities?

In the reduction in force in 1993, the Carlsbad Mine Manager, Walter Thayer, had discretion as to how and where to cut costs. Corporate headquarters did not prescribe for Carlsbad any names or positions that had to be cut or any ratio between positions and non-personnel items to be reduced.

Thayer had input from Willhoit and Wilcox as to recommended personnel reductions and changes. Willhoit recommended eliminating Complainant's position but retaining him in a demoted position. Wilcox recommended eliminating Complainant's position and terminating him.

Thayer had a number of options with regard to Complainant, including: (1) retain Complainant without change, (2) eliminate his position but offer him a transfer or demotion, and (3) eliminate his position and terminate his employment.

Thayer decided to eliminate the "level of management" at which Complainant was employed, which involved the positions held by Cy Bullen, Dan Morehouse, and Complainant. Bullen was 66 and eligible for retirement. He was put on full retirement with a generous severance package that Bullen found to be "very good." Morehouse was offered and accepted a lower position in the Mine Engineering Department. Complainant was terminated without an offer of transfer or demotion. In making these decisions, Thayer

did not consider eliminating or reducing various non-payroll costs (exceeding \$500,000 a year) such as company cars to supervisors, free bus transportation, free coffee service, and a recreation lake resort provided by the Carlsbad mine.

Complainant was given disparate treatment in that he alone at his management level was terminated without an offer of transfer, demotion or retirement. Also, as found above, Complainant's Slusher memorandum of March 12, 1993, and his efforts (from October 1990 to February 1993) to persuade IMC to correct the hazard of using PVC pipe to transfer acid were protected activities that were met with marked hostility by management.

Taken as a whole, I find that the reliable evidence shows that Complainant's termination on April 29, 1993, was motivated at least in part by his protected activities.

Did Respondent Establish An Affirmative Defense?

If an operator fails to rebut a *prima facie* case of discrimination, it may raise an affirmative defense in a "mixed motive" case. It then has the burden to prove that, while it considered both protected and unprotected activities, the unprotected activities were of such weight that the operator would have taken the adverse action in any event for those activities alone.

Respondent contends that it would have terminated Complainant in the reduction in force even if he had not engaged in protected activities. However, its evidence does not point to any objective or other compelling factor, e.g., a seniority system, misconduct, or orders from corporate headquarters, that required Complainant's termination.

Respondent's mine manager, Thayer, had discretion to select employees for retention, termination, transfer or demotion as part of the reduction in force, and to choose between personnel and non-payroll items in reducing costs. As stated, Thayer had a number of options with regard to Complainant, including: (1) retaining him without change; (2) eliminating his position with an offer of transfer or demotion; and (3) eliminating his position and terminating his employment. The fact that Thayer exercised discretion in terminating Complainant does not show -- let alone carry a burden of proving -- that Thayer would have chosen to terminate Complainant in any event had there been no protected activities.

Given the force of management's hostility toward Complainant's protected activities, it is unlikely that, but for his protected activities, a person of Complainant's education, experience, and performance as reflected by his record and career

at IMC would have been terminated without at least an offer of transfer or demotion as was accorded to Dan Morehouse.

I find that Respondent has failed to prove an affirmative defense.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Respondent terminated Complainant's employment on April 29, 1993, in violation of § 105(c) of the Act.

ORDER

WHEREFORE IT IS ORDERED that:

1. Within 15 days of this decision, the parties shall confer (by telephone or otherwise) in an effort to stipulate (A) the position which Complainant should be offered for reinstatement at the Carlsbad mine or an economic reinstatement agreement (i.e., a lump sum agreed to in lieu of reinstatement); (B) back pay and interest computed from April 29, 1993, after legal deductions e.g., earnings from other employment, (C) reimbursement for any other economic or tax losses caused by his termination, and (D) a reasonable attorney's fee and reimbursement for Complainant's litigation costs reasonably incurred in this action. Provided: Respondent's stipulation of any matter regarding relief shall not waive or lessen its right to seek review of the judge's decision on liability or relief.

2. If the parties are able to stipulate the relief, they shall file with the judge, within 30 days of this decision, a proposed Order for Relief.

3. If the parties are unable to stipulate the relief, Complainant shall file with the judge, within 30 days of this decision, a proposed Order for Relief. Respondent shall have 10 days to reply. If issues or relief are raised, a separate hearing on relief shall be scheduled.

4. This decision shall not constitute the judge's final disposition of this case until a final Order for Relief is entered.


William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 5 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 93-416-M
Petitioner	:	A.C. No. 46-02793-05533-A
v.	:	
	:	Mercer Crushed Stone Mine
THOMAS DETAMORE, employed by	:	
POUNING MILL QUARRY CORP.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 93-417-M
Petitioner	:	A.C. No. 46-02793-05534-A
v.	:	
	:	Mercer Crushed Stone Mine
EDWARD T. SONGER, employed by	:	
POUNING MILL QUARRY CORP.,	:	
Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Mr. Edward T. Songer, Ripplemead, Virginia, pro se;
Mr. Thomas Detamore, Rocky Gap, Virginia, pro se.

Before: Judge Fauver

These consolidated civil penalty proceedings were brought by the Secretary of Labor under § 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Section 110(c) of the Act provides:

(c) Whenever a corporate operator violates a mandatory health or safety standard . . . , any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

Respondents are each charged with knowingly authorizing, ordering, or carrying out two corporate violations: a violation of 30 C.F.R. § 56.6311(b) and a violation of 30 C.F.R. § 56.9314.

Section 56.6311(b) provides:

Only work necessary to remove a misfire and protect the safety of miners engaged in the removal shall be permitted in the affected area until the misfire is disposed of in a safe manner.

Section 56.9314 provides:

Stockpile and muckpile faces shall be trimmed to prevent hazards to persons.

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

FINDINGS OF FACT

1. The Mercer Crushed Stone Mine is a limestone operation in Mercer County, West Virginia. At all relevant times, it was operated by Pounding Mill Quarry Corporation, employing 27 miners, in producing limestone for sale in or substantially affecting interstate commerce.

2. At all relevant times, Respondent Thomas Detamore was General Superintendent at the mine, and Respondent Edward T. Songer was Foreman at the mine, and each Respondent supervised miners and was responsible for the operation of all or part of the mine.

3. On July 1, 1992, a fatal explosives accident occurred at the Mercer Crushed Stone Mine. The accident was investigated by Charles W. McNeal, MSHA Supervisory Inspector, and Carl W. Liddeke, MSHA Inspector, and they co-authored MSHA's official Accident Investigation Report regarding the accident.

4. The following material facts are provided in the official MSHA Accident Investigation Report and were proved at the hearing:

Danny R. Whitt, shovel operator, age 39, was fatally injured at about 9:40 a.m., on July 1, 1992, when explosives in the muckpile detonated dislodging boulders which struck the shovel and crushed him. Whitt had a total of 10 years mining experience; 8 years as an equipment operator with this company.

* * *

The last production shot on this bench was fired on June 18, 1992. At least four holes misfired and were re-shot. On June 26, an undetonated cast primer and blasting cap were found in the muckpile. When this discovery was reported to Edward Songer, foreman, he removed the explosives from the site. He instructed the shovel operator to continue mucking and to be careful. On June 29, another undetonated cap and part of a primer were discovered. Again, the foreman was summoned and took the explosives away.

* * *

On the day of the accident, Danny Whitt (victim) reported for work at 7:30 a.m., his normal starting time. He was to operate the shovel on the lower bench. Although this was not his regular job, he was a relief shovel operator and had performed this job before. Whitt had loaded about 12 truckloads of rock when an explosion occurred in front of and above the shovel in the muckpile. This explosion and subsequent movement of material apparently dislodged a large boulder from the spoil pile which sheered the cab from the shovel crushing the victim. Other large rocks struck the front of the shovel boom and broke off the bucket.

5. MSHA Supervisory Inspector McNeal issued two citations to the corporate mine operator, Pounding Mill Quarry Corporation, on July 6, 1992. Citation No. 3871242 charged a violation of 30 C.F.R. § 56.6311(b), as follows:

A production shot was fired on June 18, 1992. Four misfired holes were discovered and re-blasted. On June 29 and 30, 1992, undetonated explosives (PETN primers and caps) were found in the muckpile and given to the mine operator. The mine operator did not change the loading cycle in order to dispose of any other undetonated explosives in a safe manner. An unplanned detonation of explosives occurred in the muckpile on July 1, 1992, which caused a slide of material on the muckpile which resulted in the death of the shovel operator.

6. Citation No. 3871243 charged a violation of 30 C.F.R. § 56.9314, as follows:

A fatal accident occurred at this operation on July 1, 1992, on the bottom bench at the base of the muckpile at the west end of the quarry. A large boulder estimated to weigh 190 tons slid down the muckpile, struck the operator's cab of the 180-D track mounted shovel that was being used to load out the shot rock. The shovel operator was fatally injured.

7. Pursuant to § 110(a) of the Act, Pounding Mill Quarry Corporation paid a civil penalty of \$9,500 for the corporate violation of 30 C.F.R. § 56.6311(b), and a civil penalty of \$9,500 for the corporate violation of 30 C.F.R. § 56.9314. These are the two underlying violations for which Respondents are charged with knowing violations as agents of the corporation, under § 110(c) of the Act.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

The Commission has defined the term "knowingly" as used in § 110(c) of the Act as follows:

"Knowingly," as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. [Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8, 16 (1981), 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).]

The Commission has also ruled that a "knowing violation under § 110(c) involves aggravated conduct, not ordinary negligence." Bethenergy Mines, Inc., 14 FMSHRC 1232, 1245 (1992).

Violation of 30 C.F.R. § 56.6311(b)

A preponderance of the evidence shows that each of the Respondents knowingly authorized, ordered, or carried out the cited violation of § 56.6311(b).

Five miners testified at the hearing: (1) Roger Whitt, lead man, (2) Dewey Whitt, shovel operator, (3) Robert Musick, drill helper, (4) Jack Billings, front-end loader operator, and (5) Jess Fisher, haulage truck operator. Each of them testified that both Respondents, Detamore and Songer, knew that there were undetonated explosives still left in the muckpile prior to the fatal accident.

Prior to the fatal accident, Dewey Whitt, the regular shovel operator, found an undetonated cast primer and blasting cap in the muckpile on June 26, 1992. He reported this to Respondent

Songer and gave him the cast primer and blasting cap for disposal. On June 29, 1992, Dewey Whitt discovered another undetonated cap and part of a primer in the muckpile. Again, Respondent Songer was summoned and took the explosives away.

After finding the undetonated primers and caps in the muckpile and giving them to Songer, Dewey Whitt asked to be pulled out of the area and told Songer that he was concerned about remaining explosives going off in the muckpile. However, he was told by Songer that the company wanted to get the clean rock that was in there and that after the July 4th holiday, they would pull out. Dewey Whitt also complained to Detamore about the misfires, but Detamore would not listen, and told Whitt that if he did not want to work in that area, "get your dinner bucket and go home." Tr. 113.

After these incidents, and before the fatal accident, Songer, the Foreman, reported to Detamore, the General Superintendent, that the undetonated explosives had been found in the muckpile. Despite this information, Detamore told Songer to instruct the miners to keep mining. Songer ordered the miners to just go ahead and keep digging, that is to keep producing limestone in the regular production mode, but to "be careful."

The discovery of the undetonated primers and blasting caps in the muckpile clearly indicated that at least one unfired hole was still left in the muckpile. Despite this extremely hazardous situation, both Detamore and Songer ordered the men to just keep on digging and producing the limestone, but to "be careful." This was like playing "Russian Roulette" with the lives of the miners working in the muckpile.

Under 30 C.F.R. § 56.6311(b), only work necessary to remove a misfire and protect the safety of miners engaged in the removal shall be permitted in the affected area until the misfire is disposed of in a safe manner. Both Detamore and Songer clearly violated this mandatory safety standard when they ordered the miners to keep mining in the regular production mode after they (Detamore and Songer) were informed of the undetonated explosives in the muckpile.

When the undetonated primers and blasting caps were discovered in the muckpile before the accident, Detamore and Songer should have stopped production in the muckpile and called the blasting company, Austin Sales, Inc., to come back to search for the remaining misfired holes. Or, if they were going to search on their own, the search had to be done with great precaution in order to protect the safety of the miners, as they did when they abated the violation after the fatal accident.

However, Detamore and Songer did not call the blasting company to come back to search for misfired holes after the

undetonated primers and blasting caps were discovered in the muckpile. Nor did they stop production and proceed on their own with great precaution to search out the misfired holes. Instead, Detamore and Songer ordered the miners to continue mining in the regular production mode, but to be careful. This was a knowing violation of 30 C.F.R. § 56.6311(b) and each of the Respondents is responsible.

Violation of 30 C.F.R. § 56.9314

The boulder dislodged by the explosion weighed about 110 tons and was situated about 100 feet above the muckpile where the miners were working.

About two years earlier, MSHA Inspectors Darrel Porter and Charles Vance told Detamore and Songer that the area below the large boulder was dangerous and had to be bermed or barricaded off, and that if they were going to do any work in that area in the future, they needed to get up on top and cut the boulder down or shoot it down so that it would not fall on the miners. At that time, the area below the large boulder was not being worked, and Detamore and Songer did berm the area.

Both Detamore and Songer were thus pre-warned by MSHA that the large boulder was hazardous, and that if they decided to work in the area below it, they had to remove it so that it would not injure anyone. Cutting the boulder down, shooting it down, or pushing it down with a dozer would each come under the term of "trimming" required in 30 C.F.R. § 56.9314.

At the time of the accident, only about one third of the boulder was visible but observers could easily see that it was big. After the undetonated primers and blasting caps were found, Dewey Whitt, Danny Whitt, and some of the other miners expressed their fear that somebody was going to get killed either by the explosives or the big rock. Danny Whitt tried to get Detamore to let him push the large rock down with the dozer, but Detamore would not let him do it.

Section 56.9314 requires that any place that presents a hazard of material falling off a highwall, a muckpile, or a spoil pile must be trimmed for the safety of the miners working below. This mandatory safety standard applied to the large boulder. The boulder was clearly hazardous and Detamore and Songer should have gotten rid of it, particularly since they had reason to know that there were undetonated explosives still left in the muckpile where the miners were working.

I find that Respondents Detamore and Songer each knowingly violated 30 C.F.R. § 56.9314 as charged.

The actions of Respondents with regard to both violations were highly negligent. Both violations were very serious in that they were contributing factors to the fatal accident.

Taking into consideration the criteria in § 110(i) of the Act, I find that the following civil penalties are appropriate:

(a) A civil penalty of \$5,500.00 against Respondent Thomas Detamore for knowingly violating 30 C.F.R. § 56.6311(b);

(b) a civil penalty of \$5,000.00 against Respondent Thomas Detamore for knowingly violating 30 C.F.R. § 56.9314;

(c) a civil penalty of \$4,500.00 against Respondent Edward T. Songer for knowingly violating 30 C.F.R. § 56.6311(b);
and

(d) a civil penalty of \$4,000.00 against Respondent Edward T. Songer for knowingly violating 30 C.F.R. § 56.9314.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Respondent Thomas Detamore knowingly violated 30 C.F.R. § 56.6311(b) as charged.
3. Respondent Thomas Detamore knowingly violated 30 C.F.R. § 56.9314 as charged.
4. Respondent Edward T. Songer knowingly violated 30 C.F.R. § 56.6311(b) as charged.
5. Respondent Edward T. Songer knowingly violated 30 C.F.R. § 56.9314 as charged.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondent Thomas Detamore shall pay civil penalties of \$10,500 within 30 days of this decision.

2. Respondent Edward T. Songer shall pay civil penalties of \$8,500 within 30 days of this decision.


William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 5 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. WEVA 93-471
	:	A.C. No. 46-08174-03528
v.	:	
	:	Docket No. WEVA 93-472
KENNIE-WAYNE INCORPORATED, Respondent	:	A.C. No. 46-08174-03529
	:	
	:	Docket No. WEVA 93-473
	:	A.C. No. 46-08174-03530
	:	
	:	Kennie-Wayne No. 1-A

DECISION

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Daniel E. Durden, Esq., Howe, Anderson & Steyer, Washington, D.C., for Respondent.

Before: Judge Fauver

These are consolidated actions for civil penalties totalling \$40,454 under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The citations and orders are not contested and have been affirmed by the judge. The only issue is whether payment of the proposed civil penalties will adversely affect Respondent's ability to continue in business. The burden of proof rests with Respondent on this issue.

Glenn Hall and Stephen Hairston testified as to Respondent's financial condition. Hall testified that Kennie-Wayne, Inc. is a contract miner for M & H Coal Company. M & H is the lessee of a tract of property owned by McDonald Land Company. According to Hall, M & H has "total rights of ownership to sell, ship or retain the coal" that is mined by Kennie-Wayne at the property leased by M & H from McDonald. Tr. 40. He also said that Kennie-Wayne was incorporated around August 15, 1991, and signed a contract mining agreement with M & H around March or April 1992. Notwithstanding this testimony, it does not appear that Kennie-Wayne has in fact signed a formal agreement with M & H. See Exh. R-7. He stated that according to this agreement Kennie-

Wayne has the right to mine coal from M & H's land and M & H is to pay Kennie-Wayne \$19.60 per ton with a deduction of \$0.60 per ton for power, and the payment terms have been modified two or three times since the agreement was signed. M & H is also supposed to pay Kennie-Wayne on the 10th and the 25th day of each month, and Hall represented that although M & H has usually been timely in its payments, as of the hearing date, August 30, 1994, it had not made its payment that was due on August 25, 1994.

In addition, Hall said that Kennie-Wayne does not have the discretion to sell the coal it mines to any coal company besides M & H "who is willing to take all the coal that Kennie-Wayne sends it." Tr. 62, 63, 77. However, before Stephen Hairston became the owner of Kennie-Wayne (July 19, 1994), M & H had periodically allowed Kennie-Wayne to ship coal to Hampden Coal Company in the previous 2 years, and it had been more profitable for Kennie-Wayne to ship its coal to Hampden than to M & H. Hampden Coal would split the payment between what was due Kennie-Wayne (the contractor) and what was due M & H.

According to Hall and Hairston, M & H has filed for bankruptcy. Hall testified that for the first quarter of 1994 Kennie-Wayne reported a loss of \$135,460.35 and the company's balance sheet shows total assets of \$1,191,743.12 and total liabilities of \$1,543,786.85. Tr. 50; Exh. R-5. Hall also testified that if Kennie-Wayne is "allowed to mine coal and ship its coal to Hampden Coal their cash flow would improve considerably and they could resume profitable operations."

Hairston testified that, although he purchased Kennie-Wayne, Inc., subject to liabilities and with knowledge that M & H had filed for bankruptcy, he assumed that it was going to be paid by M & H for its production and that Kennie-Wayne was going to be profitable. In addition, he understood that M & H would allow Kennie-Wayne to sell its coal to Hampden if Kennie-Wayne developed payment problems with M & H. From Hairston's testimony, it appears that up until two Fridays before the hearing Kennie-Wayne had been delivering coal to Hampden but that a few days before the hearing, M & H decided not to allow Kennie-Wayne to sell its coal to Hampden.

Hairston testified that he draws an \$8,000 per month salary and that he believes that paying the \$40,454 in proposed penalties would affect Kennie-Wayne's ability to remain in business.

DISCUSSION

In assessing civil penalties under § 110(i) of the Act, a Commission judge is not bound by the penalty proposed by the Secretary. Rather the judge is to assess a penalty de novo based upon the following six statutory criteria: (1) the operator's

history of previous violations, (2) the appropriateness of the penalty to the size of the business, (3) the operator's negligence, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the operator's good faith in abatement of the violation. Secretary of Labor v. Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd Sellersburg Stone Co. v. FMSHRC, 736 f.2d 1147 (7th Cir. 1984).

In evaluating the fourth factor, the Commission has held that, "in the absence of proof that the imposition of authorized penalties would adversely affect (an operator's ability to continue in business), it is presumed that no such adverse effect would occur." Spurlock Mining Company, Inc., 16 FMSHRC 697, 700 (1994), quoting Sellersburg Stone Co., 5 FMSHRC 287. If an adverse effect is demonstrated, a reduction in the penalty may be warranted. Robert G. Lawson Coal Company, (1972). However, "the penalties may not be eliminated . . . , because the Mine Act requires that a penalty be assessed for each violation." Spurlock Mining, supra, 16 FMSHRC at 699, citing 30 U.S.C § 820(a); Tazco, Inc., 3 FMSHRC 1895, 1897 (1981).

Respondent's witnesses seem to portray Kennie-Wayne as being financially viable rather than a business on the brink of financial collapse. Hairston stated that he purchased Kennie-Wayne subject to liabilities with knowledge of M & H's petition for bankruptcy and the amount of MSHA's proposed penalties. He considers himself a good judge of the value of mining operations and obviously assessed Kennie-Wayne as a good investment. The production capacity is about 24,000 clean tons of coal per month, and each ton is worth about \$20.25. Hampden Coal is a very willing buyer of Kennie-Wayne's mined coal and according to Hairston it is in a strong financial condition. Tr. 19, 34. There is no evidence that Kennie-Wayne does not have a legal right to sell coal to Hampden if M & H is unable to buy it.¹ The fact that Kennie-Wayne is capable of paying Hairston a salary of \$96,000 per year is a revealing indication of Kennie-Wayne's financial condition.

Respondent presented balance sheets indicating its profits, losses, assets and liabilities. However, financial statements showing a loss, by themselves, are not sufficient to reduce penalties because they are not indicative of the ability to

¹Hairston testified that part of his agreement with M & H is the understanding that Kennie-Wayne has the right to sell coal to Hampden Coal if M & H defaults in paying for it. In addition, under West Virginia law it appears that Kennie-Wayne would have a mechanic's lien to sell the coal for its work or labor. West Virginia Code § 38-2-31 (1994). Respondent has not submitted any documentation showing that M & H's bankruptcy proceeding would prevent Kennie-Wayne from selling coal to Hampden Coal.

continue in business. Spurlock Mining, Inc., 16 FMSHRC at 700, citing Peggs Run Coal Co., 3 IBMA 404, 413-414 (1974).

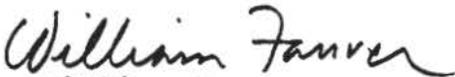
In conclusion, I find that Respondent has failed to prove by a preponderance of the evidence that payment of the proposed civil penalties would adversely affect its ability to continue in business. I also find the proposed civil penalties of \$40,454 to be appropriate for the violations found herein.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Respondent committed the violations as alleged in the citations and orders attached to the Secretary's petitions for civil penalties.
3. Respondent has not proven that payment of the proposed civil penalties would adversely affect its ability to continue in business.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay civil penalties of \$40,454 within 30 days of this decision.


William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 8 1994

WILLIAM T. SINNOTT, II, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. SE 94-358-D
: :
JIM WALTER RESOURCES, INC., : BARB CD 94-09
Respondent :
: No. 5 Mine

ORDER OF DISMISSAL

Before: Judge Maurer

This proceeding concerns a complaint of discrimination filed by the complainant (William T. Sinnott, II) against Jim Walter Resources, Inc. (JWR) pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Mine Act).

On August 23, 1994, JWR filed a Motion for Summary Decision (which I am treating as a Motion to Dismiss), alleging, inter alia, that the instant complaint is barred by the statute of limitations and by laches. Subsequently, on September 26, 1994, the undersigned issued an Order to Show Cause to the complainant to explain why his complaint should not be dismissed because of his failure to timely file his section 105(c) complaint with the Mine Safety and Health Administration (MSHA).

A chronology of the significant events which gave rise to the instant complaint is as follows:

- July 17, 1989 - Complainant is first employed by JWR as an Associate Production Engineer.
- February 12, 1990 - Complainant placed on medical leave for treatment of ulcers and mental illness.
- May 14, 1990 - Complainant returned to duty.
- August 21, 1990 - Complainant terminated from his employment at JWR.
- February 10, 1991 - Complainant files a complaint with the Office of Federal Contract Compliance Programs (OFCCP) under the Rehabilitation Act of 1973, alleging that JWR violated the nondiscriminatory and affirmative action

provisions of its federal contract by terminating him because of his handicap, mental illness.

- February 12, 1992 - OFCCP makes an initial finding of "no violation" in the complaint he filed under section 503 of the Rehabilitation Act of 1973.
- August 5, 1993 - Complainant's request for reconsideration is finally denied by OFCCP.
- November 29, 1993 - Complainant files the instant complaint with MSHA alleging that JWR violated the nondiscriminatory provisions of the Mine Act by terminating him in retaliation for his refusal to follow a direct order that he believed was harmful and would have placed his life in imminent danger.
- March 22, 1994 - MSHA notifies complainant that they have determined "no violation" of section 105(c) of the Mine Act has occurred.
- April 28, 1994 - FMSHRC receives complaint at bar.

The critical two dates for purposes of this motion are August 21, 1990, the date of termination, and November 29, 1993, the date the section 105(c) complaint was filed with MSHA. As the respondent complains of in his motion, the complainant failed to initiate his complaint under the Mine Act until some 3 years and 3 months after the alleged discriminatory activity occurred.

Section 105(c)(1) of the Act prohibits any discrimination against a miner, including discharge, because of the miner's making safety complaints or his justifiable refusal to perform an assigned task which he reasonably believes to be unsafe.

In accordance with section 105(c)(2) of the Mine Act any miner who believes he has been discharged or discriminated against may, within 60 days of the alleged act of discrimination, file a complaint with the Secretary of Labor. The Secretary is then required to conduct an investigation and make a determination as to whether or not a violation of section 105(c) has occurred. If the Secretary determines that the miner's allegations of discrimination are valid and a violation has occurred, he is required to file a complaint on the miner's behalf with the Commission.

Pursuant to section 105(c)(3) of the Act, if the Secretary determines that a violation of section 105(c) has not occurred, he must so inform the miner, and the miner then has a right to file a complaint on his own behalf with the Commission within 30 days of notice of the Secretary's determination.

Ordinarily, when dealing with late-filings of a few days or even a few months, the Commission has determined that the time limits in sections 105(c)(2) and (3) "are not jurisdictional" and that the failure to meet them should not result in dismissal, absent a showing of "material legal prejudice." See, e.g., Secretary on behalf of Hale v. 4-A Coal Co., 8 FMSHRC 905, 908 (June 1986). However, in that same decision, the Commission also stated that "[t]he fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay. . . ." Here, we are dealing with an extraordinarily late filing in excess of 3 years. At some point there has to be an outer limit, if the 60-day rule contained in the statute has any meaning at all.

In David Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (January 9, 1984), aff'd mem., 750 F.2d 1093 (D.C. Cir. 1984) (table), the Commission affirmed a dismissal of a miner's discrimination complaint filed 6 months after his alleged discriminatory discharge. The Commission stated that "timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation," 6 FMSHRC 24.

In that case, the judge below concluded that Hollis knew, or had reason to know, of his section 105(c) remedies within the 60-day period following his discharge; but like Sinnott, elected to seek another avenue of relief (the West Virginia Human Rights Commission, charging discrimination against a racial minority), before filing his section 105(c) complaint over 4 months past the Act's 60-day time limit.

The Commission, reviewing this ALJ finding, stated that: "We do not believe that Congress. . . intended for us to excuse a miner's late-filing where the miner has invoked the aid of other forums while knowingly sleeping on his rights under the Mine Act." 6 FMSHRC 25.

I should also note that in that case, Judge Melick found that the fact that Hollis had completed two years of college reflected positively on his ability to understand his rights under the Mine Act. In the case at bar, the more so. Mr. Sinnott is a college graduate, having received his Mining Engineering degree from the University of Missouri-Rolla in May 1988. While attending the University, he also worked summer jobs for various coal companies and upon graduation went to work for Western Fuels-Utah as an Operations Engineer prior to his relatively short stint of employment with JWR. It is readily

apparent that he is a man of ample intelligence with experience in the coal industry. Moreover, he has demonstrated the ability, with assistance of legal counsel, to pursue another complex complaint concerning this same employment matter with the OFCCP.

It should also be noted that Mr. Sinnott does not claim ignorance of the filing requirements of the Mine Act. Rather, Mr. Sinnott's claim is that his late-filing should be excused because he did not know why he was discharged at the time. He states that at the time of his termination he believed that he was being discharged because of his mental illness and because of "acting strange." It was only later, after the OFCCP case was concluded (and lost) that he came to believe that he was discharged in violation of the Mine Act. The trouble with this theory as an excuse for late-filing is that it is universal. An operator rarely (never) puts a miner on official notice that he is being discharged in violation of the Mine Act or because he made safety complaints or because he justifiably refused to perform an unsafe task. As a matter of practice, it is up to the miner to know that he has engaged in protected activity and to suspect, at least, that the adverse action he has suffered, is somehow connected with that protected activity. One cannot expect the operator to provide official notice to the prospective complainant that they have just violated the Mine Act as a precondition to starting the clock running on the 60-day rule.

Under the circumstances, I conclude that Mr. Sinnott knew or at least should have known of his right to file a complaint with MSHA under section 105(c) of the Mine Act at the time of his August 1990 termination, and that therefore his seriously late-filed complaint herein cannot be excused for "justifiable circumstances." The complaint was filed over 3 years out of time. Since then, another year has passed. After an extraordinary delay of over 4 years since the matters complained of occurred, it is highly questionable whether the other company employees who might have had some knowledge of the events surrounding Mr. Sinnott's termination would have a present recollection of those events. Generally, I find that a 3-plus year delay in charging the respondent with what specifically it did or failed to do in violation of the Mine Act is inherently prejudicial to an operator's ability to defend itself against the allegations contained in the complaint. It can hardly be disputed that JWR would have been in a much better position to investigate and defend against the allegations made in the complaint had the filing deadline been met by Mr. Sinnott. "[E]ven if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitations and. . . the right to be free of stale claims in time comes to prevail over the right to prosecute them." Herman v. IMCO Services, 4 FMSHRC 2135, 2138-39 (Dec. 1982) (emphasis added). In that case, Herman, a senior project engineer, was terminated

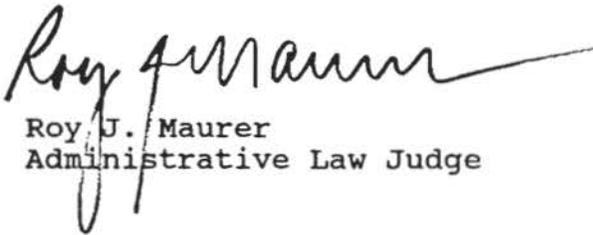
in April of 1979. He delayed filing any complaint until March 1980. When he did file, he filed with the Nevada Department of Occupational Safety and Health, who referred the matter to MSHA. Thus, the discrimination complaint in the case was filed 9 months after the expiration of the time period specified in the statute regarding the filing of such complaints, i.e., 60 days. The Commission affirmed the ALJ's decision, which found no justifiable circumstances to excuse what they termed, "Herman's egregious delay in instituting this proceeding."

Like the miner in Herman, Sinnott's protracted delay in filing a complaint with MSHA cannot be attributed to his being misled as to or a misunderstanding of his rights under the Mine Act. And, like the miner in Hollis, Sinnott pursued an alternative avenue of relief, and not until he lost that claim did he file the subject complaint.

Accordingly, complainant's initial complaint filed with MSHA on November 29, 1993, is found to be excessively stale and will be dismissed herein.

ORDER

In view of the foregoing, the complainant's complaint of discriminatory discharge under the Mine Act is found to have been untimely filed and on this basis, the respondent's motion to dismiss this case is **GRANTED** and the complaint is **DISMISSED**.



Roy J. Maurer
Administrative Law Judge

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DEC 9 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 93-119
Petitioner	:	A. C. No. 36-08136-03511
v.	:	
	:	Natalie Banks
	:	
SUSQUEHANNA-MT. CARMEL, INC.,	:	
Respondent	:	

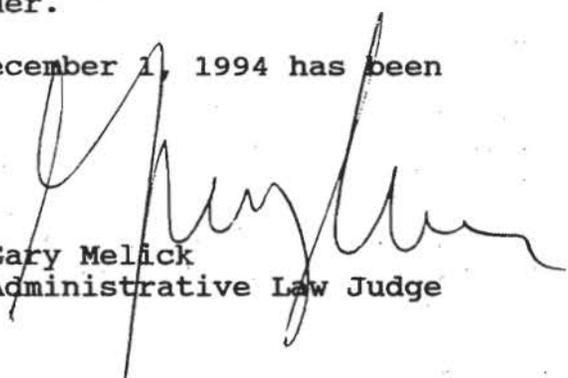
DECISION APPROVING SETTLEMENT

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$4,400 to \$1,000 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable 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 \$1,000 within 30 days of this order.

The hearing scheduled for December 1, 1994 has been cancelled.



Gary Melick
Administrative Law Judge

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DEC 9 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 93-445
Petitioner	:	A.C. No. 36-02374-03875
v.	:	
	:	Docket No. PENN 94-54
	:	A.C. No. 36-02374-03888
	:	
NEW WARWICK MINING COMPANY,	:	Warwick Mine
Respondent	:	
	:	

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor,
U. S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania,
for Respondent.

Before: Judge Amchan:

These cases involve several inspections of Respondent's Warwick mine in southwestern Pennsylvania. In each the primary issue is whether Respondent violated MSHA regulations in failing to clean-up coal and coal dust accumulations in a timely manner, and if it did, whether those violations were significant and substantial. Docket PENN 94-54 contains several allegations charging Respondent with an unwarrantable failure to comply with the Secretary's regulations¹. Docket PENN 94-445 contains two failure to abate orders.

¹At hearing I granted the Secretary's motion to vacate citations 3655711 and 3655712. These citations alleged respirable dust violations based on a single sample.

Docket PENN 94-54

Orders 3655504 and 3655505

On July 26, 1993, MSHA inspector Robert Santee issued Respondent citation 3655279 (Exh. G-4) alleging a violation of the Secretary's regulation at 30 C.F.R. 75.400. That regulation requires that loose coal, coal dust and other combustible materials be cleaned up and not be permitted to accumulate in active workings or on electrical equipment therein. This citation alleged that accumulations ranging up to 1/4 inch deep were permitted on the surfaces of the 3 left (012) longwall section shields, numbers 4 through 22, and behind the shields.

After issuing the citation, inspector Santee discussed the violation with mine management, including mine superintendent, Jon Pavlovich (Tr. 23-24, Exh. G-3, pages 6-8 of entry of July 26, 1994). On July 26, the inspector told management that wash down hoses needed to be installed across the pan line and that the hose attached to the longwall shear was inadequate to prevent coal dust from accumulating (Exh. G-3, pp. 7-8 of 7/26/93 notes).

The next day, July 27, Santee issued another citation for an accumulation of loose fine coal on a pump car at the end of the 012 longwall supply track (Exh. G-5). He also noticed accumulations behind the longwall shields and on the toes of the shield (Tr. 25). Since they were in the process of being cleaned, a citation was not issued for the coal dust in and about the shields (Tr. 25-28). On July 27, Santee discussed with Respondent's safety director, Rod Rodavich, the necessity of continued efforts to prevent repeated violations of section 75.400 at the longwall (Exh. G-3, page 5 of July 27, 1993 notes).

On July 28, 1993, shortly before 5:10 a.m., inspector Santee observed coal dust of up to 1/4 inch in depth on the surfaces of shields 23 through 123, and behind those shields². He found coal dust accumulations on cables and as much as 6 inches of loose coal behind the shields (Exh. G-1)³. He thereupon issued order

²The longwall was not operating at this time and apparently had not operated since 3:30 a.m. (Tr. 21)

³In its brief Respondent argues that inspector Santee's testimony should be discredited because it is inconsistent with the notes he made on July 28, 1993 (Respondent's brief at 13). The first two pages of those notes do in fact state that "small amounts of float dust observed on shield behind support legs which appeared the previous shift did not wash shield off during

3655504 pursuant to section 104(d)(2) of the Act for failure to clean-up the coal and coal dust in a timely fashion. He also issued order 3655505 alleging a violation of section 75.360. This order is predicated on Santee's conclusion that the preshift examination made between 1:00 a.m. and 3:00 a.m. on July 28, was inadequate in that it failed to detect the coal and coal dust accumulations cited in order 3655504 (Tr. 32-33, Exh. G-2).

To the inspector it appeared that the longwall shield area hadn't been cleaned at all recently (Tr. 28). He stated that foreman Paul Wells agreed with him that no cleaning had been done on the prior midnight shift (Tr. 28). Wells denies making such a remark (Tr. 118). Inspector Santee concluded that the coal and coal dust accumulations he observed had accumulated over the course of an entire production shift (Tr. 53-54). He also based his conclusion that the accumulations were the result of Respondent's "unwarrantable failure" on the fact that he had indicated to management, prior to the citation, that the water hose on the longwall shear was insufficient to keep the shields clean and that management had not installed additional hoses (Tr. 78-79).

During his inspection, Santee was accompanied by Barry Radolec, then a inspector-trainee. Radolec concurs with Santee's opinion that the coal and coal dust accumulations were extensive and that they built up over a shift or more (Tr. 92-93). Paul Wells, who was New Warwick's longwall foreman on the day shift of July 28, doesn't dispute that material had accumulated on and behind the shields. However, he contends that much of the material was not coal (Tr. 113, 119).

The longwall had run into a "rock binder" in the middle of the coal seam, which caused a lot of dust to be generated (Tr. 109-114). Wells insists that the dust accumulations cited by Santee were primarily shale and dirt, as opposed to coal (Tr. 113, 119). Inspector Santee, on the other hand, contends that when the dust he saw was mixed with slate, he recognized this and that the accumulations he cited were coal and coal dust (Tr. 157). With respect to this difference of opinion, I credit

the last pass." (Exhibit 3, pp. 1 and 2 of July 28, 1993 notes).

However, I find the conditions related in the order did exist. Santee's notes of the same date at pp. 5-6 are consistent with the allegations of the order. Moreover, Respondent's foreman, Paul Wells, did not deny that such accumulations existed. Rather he argued that the material on the shields was not coal dust and that they could not be kept any cleaner when the longwall shear was not operating (Tr. 117-19).

the testimony of inspector Santee and find a violation of section 75.400 as alleged.

Was this violation due to Respondent's unwarrantable failure to comply with section 75.400?

The Secretary's allegation of "unwarrantable failure" is predicated on the fact that this was the third day in a row that Santee had observed coal and coal dust accumulations on the longwall shields, the fact that the company had not implemented his suggestion that additional washdown hoses be installed, and Wells' "confirmation" that it appeared that no cleaning had been done on the prior shift.

Although Wells denies making such a statement, his testimony is not inconsistent with that of inspector Santee.

Q. In that regard, what did you tell the inspectors?

A. They had cut out at the headgate, which was number one shield. And when they cut out, that makes a greater deal of water mist and dust, and the guys normally cut the water back. If not, they get soaking wet because they've got 36,000 coming down the face and it just blows that water mist back onto you, because that shear uses 75 gallons of water a minute, and it's all blown out there in a mist. They normally cut the water back to 40 shield, which was probably a time of ten to 15 minutes, when they mined from headgate back to 40, I said, okay, that dust probably came from cutting out and it doesn't look like they hosed as they came back to this point.

(Tr. 118)

A few minutes later, however, Wells appeared to contradict himself.

JUDGE: It looked to you like the last pass from one to 40, the hose on [mistranscribed as "and"] the shear had not operated?

A. No. The shear was suppressing the dust, but they did not physically --- a man did not walk and hose down the shields as they mined for that last ten or 15 minutes that they mined. Which you don't do all the time. You're only required to do it the very first pass of the day.

(Tr. 121)

Although it is difficult to determine the precise import of Wells' testimony, I conclude that the coal and coal dust accumulations were in part the result of a reduced amount of water applied on the last pass of the longwall shear on the midnight shift⁴. Respondent knew or should have realized that additional dust would be generated and I conclude that its failure to take sufficient measures to clean up this dust constitutes an unwarrantable failure to comply with section 75.400--particularly in light of the warnings given to them by inspector Santee on the two previous days.

Commission precedent requires consideration of three factors in determining whether a violation of section 75.400 is the result of an operator's unwarrantable failure. They are: 1) the extent of the violation; 2) the length of time the violation has existed; and 3) the efforts of operator to prevent or correct the violation. Peabody Coal Co., 14 FMSHRC 1258 (August 1992); Mullins & Sons, 16 FMSHRC 192 (February 1994).

I conclude that the violation cited in order 3655504 was due to Respondent's unwarrantable failure because the coal and coal dust accumulations were extensive. Although they had not existed for a long time, Respondent should have been on a "heightened alert" that such accumulations could occur--given the reduced water spray in the last pass and the discussions with inspector Santee on the two prior days, see, Drummond Company, Inc., 13 FMSHRC 1362 (September 1991). When inspector Santee came to the longwall no cleaning was in progress, and in light of the circumstances, I conclude that it was incumbent upon New Warwick to clean up these coal and coal dust accumulations immediately.⁵

Civil Penalty

The Secretary proposed a \$4,100 civil penalty for order 3655504. I assess a penalty of \$2,000. Although not a prerequisite to a section 104(d)(2) order, the Secretary characterized this violation as "significant and substantial."

⁴Wells, for example, also stated that did not assume that the dust observed by the inspectors had accumulated in ten minutes (Tr. 119).

⁵Night shift longwall foreman Michael Smith testified as to the additional shoveling of coal and coal dust on July 27-28 (Tr. 128-130). The fact that inspector Santee found nobody engaged in clean-up and no indication that clean-up had commenced prior to his arrival at the longwall section, leads me to conclude that no effort was made to clean this area after the accumulations observed by Santee were created.

The same considerations that are involved in a determination of the "S & S" issue are relevant to a consideration of the gravity of the violation under section 110(i).

Inspector Santee designated the order "S & S" because he detected one to two-tenths methane at the longwall and because the longwall shear was capable of operating (Tr. 33). I conclude that this is insufficient to establish that an ignition or explosion was reasonably likely to occur, or be exacerbated due to the 75.400 violation. Texasgulf, Inc., 10 FMSHRC 498, 500-01 (April 1988). As Respondent points out, the fact that the Warwick mine is a gassy mine does not establish that potential for methane liberation in the longwall section (Tr. 84-85).

Nevertheless, there was certainly some chance of ignition at the longwall section, a situation made much more dangerous by the presence of the cited coal and coal dust accumulations. I deem Respondent's negligence to be very high in failing to take immediate action to clean up these accumulations and conclude a \$2,000 civil penalty to be appropriate given all six penalty assessment factors set forth in section 110(i) of the Act.

Order 3655505 is vacated

Order 3655505 is predicated on the assumption that the accumulations observed by inspector Santee were present when the pre-shift examination for the day shift (4:00 a.m. - 4:00 p.m.) was performed. Santee testified that the pre-shift was made between 1:00 a.m. and 3:00 a.m. (Tr. 21). The longwall section broke down at 3:30 a.m. Michael Smith, the longwall foreman on the night shift testified that when he performed this examination he observed no hazardous conditions in regard to coal and coal dust accumulations (Tr. 132).

I conclude that the accumulations observed by Santee on the day shift may not have been present or may not have been as extensive when Smith did his pre-shift examination. Thus, this examination may not have been inadequate. I therefore vacate order 3655505.

Orders 3655519 and 3655520

At about 10:55 a.m. on August 12, 1993, inspector Santee was traveling in the mocker area of the New Warwick mine (Tr. 37). This is an area where conveyor belts dump coal into a bunker and the bunker dumps the coal of the mainline number 6 conveyor belt (Tr. 37). At this location Santee observed extensive accumulations of loose coal and coal dust by the motor drive structure (Tr. 37-38). He also observed hydraulic oil, up to 1/4-inch deep on the bunker floor, next to a pump car (Tr. 39-40, 71).

The coal and coal dust accumulations were coated with rock dust and there were black footprints in the rock dust leading to a preshift examination board. Some of the accumulated coal and coal dust was soaked with hydraulic oil (Tr. 38). Santee issued order 3655519, which alleged a violation of section 75.400, concluding that the footprints to the preshift board indicated that the examiner had failed to take corrective action and that due to the compaction of the coal and dust, that the accumulations had existed for several shifts (Tr. 38-39).

In addition to the order for the accumulations, Santee issued order 3655520 alleging a violation of section 75.360 in that the preshift examination performed between 5:00 a.m. and 7:40 a.m. was inadequate (Exh. G-7). Mike Voithoffer, the mine examiner who performed the pre-shift inspection at issue, did not consider the accumulations he saw as hazardous (Tr. 138). While Voithoffer also testified that accumulations can build-up in the bunker area very quickly, I conclude from the black footprints in the rock-dusted coal and coal dust that conditions at the time of the pre-shift were pretty much the same as when inspector Santee came by several hours later.

Voithoffer concluded that there were no likely sources of ignition and that these accumulations would be taken care of by the clean-up man on the day shift at about noon (Tr. 138-39, 142-43). Frank Domasky, a New Warwick safety engineer, confirms that Santee observed two areas under the sprockets of the bunker drive where the top of the cone-shaped piles of loose coal and coal dust measured 20 inches (Tr. 149).

Domasky also indicated that the accumulations may have been cleaned up before Santee arrived except that the employee assigned to this duty was busy abating other citations issued by the inspector (Tr. 150-51). The issue thus becomes whether it was an unwarrantable failure for Respondent to fail to note these accumulations in its pre-shift examination and for it to fail to assign additional personnel to clean up this area.

I credit inspector Santee's opinion that the accumulations in this area were such that they warranted immediate attention. I therefore conclude that Respondent's failure to record these accumulations on the pre-shift examination and to assign additional personnel to clean-up this area was sufficiently "aggravated" to warrant the characterization of unwarrantable failure. In so finding I conclude that Mr. Voithoffer's belief that the accumulations need not be recorded, nor cleaned up immediately, was unreasonable, Cyprus Plateau Mining Corporation, 16 FMSHRC 1610 (August 1994). I therefore affirm both section 104(d)(2) orders issued on August 12, 1993.

Significant and Substantial and Penalties

With regard to these orders I am not convinced that the Secretary has established a confluence of factors that would make an ignition or explosion reasonably likely. Texasgulf, supra. There is no showing of potential high methane concentrations in the cited area. Although inspector Santee was concerned about a 7200 volt cable which was 12-15 feet from the coal and coal dust accumulations (Tr. 73), I am not persuaded that the presence of this cable made it reasonably likely that the section 75.400 violation would result in injury. Although there was a puddle of oil by the pump car, which was located 20-25 feet from the bunker, this pump car had its own automatic fire suppression system (Tr. 150)⁶.

Having concluded that the Secretary has not established this violation to be "S & S", I find that the gravity of the violation was significantly lower than for the section 75.400 violation of July 28. Taking into account all six section 110(i) penalty criteria, I conclude that a \$1,000 civil penalty is appropriate for order 3655519 and another \$1,000 penalty is appropriate for Respondent's failure to record the accumulations on the pre-shift examination.

The defective ladder citation

During an August 31, 1993 inspection of the Warwick's mine preparation plant, MSHA inspector Mel Remington observed a 7-foot ladder on the third floor (Tr. 162-63). Upon close inspection of the ladder Remington observed that one of the support legs was broken, just below the lowest rung (Tr. 163). From the lack of dust on the ladder, the inspector concluded that it had been used recently (Tr. 165).

Inspector Remington issued Respondent citation 3667167 alleging a significant and substantial violation of 30 C.F.R. 77.206(a). That regulation requires that ladder be of substantial construction and be maintained in good condition.

⁶The Secretary argues that this violation was "S & S" because "the number 6 mainline conveyor belt was rubbing in loose wet coal just underneath this bunker area" (brief at 7). However, I find inspector Santee's testimony regarding the location of this and other ignition sources to be insufficient to establish that they were directly under the bunker (See, Tr. 103).

New Warwick's defense to this citation is that the defective ladder was a 4-legged step-ladder, not a 7-foot aluminum ladder and that the defect was so obvious nobody would have used it (Tr. 174). However, Respondent's evidence is based on a conversation between safety engineer Frank Domasky and union walkaround representative John Ellis (who did not testify at trial) a week before the hearing. On this basis I credit inspector Remington's testimony over that of Respondent.

On the other hand, I do not find this violation to be significant and substantial. The fourth element in the Commission's test for "S & S" violations is that there is a reasonable likelihood that an injury that is likely to result will be of a reasonably serious nature, Mathies Coal Company, 6 FMSHRC 1 (January 1984). Given the fact that the defect in this ladder was on the bottom rung, it is difficult to envision anyone getting up high enough on it to be injured seriously. The most likely scenario is that as soon as one put their foot on the ladder the support leg would break off. At worst the miner using the ladder would be likely to fall to same level on which he was standing.

As there is not really any evidence regarding the degree of negligence for this violation and as I deem the gravity of the violation to be moderate, I conclude that a \$75 civil penalty is appropriate considering all six of the criteria in section 110(i) of the Act.

Docket PENN 93-445

Coal Dust Accumulations at the overland belt transfer stations

On May 19, 1993, MSHA inspector Frank Terrett examined the overland conveyor belt at the Warwick mine (Tr. 187)⁷. At various points along this belt there are 6 transfer stations, which are two-story buildings housing a drive motor to provide power to the conveyor. In 5 of these transfer stations Terrett observed significant accumulations of coal dust on the surfaces of structures, enclosures and motors. He therefore issued a citation alleging a violation of 30 CFR 77.202 for each one of these belt transfer stations (Exhibits G17-22, Citations 3659083-87).

⁷"Overland" is mistranscribed as "overlying" at Tr. 187 (see Exh. G-17, block 15; G-22, page 1).

These citations were characterized as "significant and substantial". Inspector Terrett found an electrical box open at the transfer station #4 and concluded that a fire was reasonably likely to occur in the continued course of normal mining operations (Tr. 206-07, Exhs. G24-28)⁸.

A termination date of May 21, 1993, was established by Terrett for each of the five violations (See, e.g. box 16 of citation 3659086, Exh G-17, page 2). On May 24, Terrett returned to the mine. He found that transfer houses 1, 2, & 3 had been cleaned up but that the coal dust accumulations in transfer houses 4 and 5 hadn't been touched (Tr. 199-200). The electrical boxes in these two houses were open (Tr. 200-01, Exh. G-27, G-28). Terrett then issued Respondent orders 3659098 and 3659099 alleging a failure to abate the citations issued for houses 4 and 5 on May 19 (Exh. G-17, G-18).

The only evidence as to the reasons for the failure to abate is the inspector's account of his conversation with preparation plant supervisor Tom Cole (Tr. 200, Exh. G-23). Cole told inspector Terrett that the two hourly employees assigned to clean up the transfer houses had reported the task accomplished. Cole thus assumed the citations had been abated (Tr. 200).

Respondent concedes that there were dust accumulations in the areas cited on May 19, 1993, that needed to be cleaned (Tr. 229-30). It also appears to concede that transfer houses 4 and 5 were not cleaned up when inspector Terrett returned on May 24.

New Warwick, however, takes issue with the inspector's characterization of the gravity of the violations, and particularly with his characterizations of the original citations as significant and substantial⁹. Terrett assumed that in the

⁸Terrett testified that the boxes at all the transfer stations were open on May 19 (Tr. 191). However, I find that the Secretary has established only that the box at transfer station #4 was open. Terrett issued a citation for the electrical box at station #4, but not any of the others on that date (Tr. 205-07). Moreover, his field notes of May 19 indicate that the power box at station #4 was open, but does not mention the same condition at the other transfer stations (Exh. G-22).

⁹Respondent's brief also argues that section 77.202 was not violated because the Secretary failed to establish that coal dust existed or accumulated in dangerous amounts. I deem safety director Rodavich's admission that the dust needed to be cleaned up (Tr. 230) as a concession that dust existed in dangerous amounts within the meaning of the standard.

case of a fire resulting from the violations, that employees would have to jump from the second floor of the transfer house to escape (Tr. 192, 203).

Respondent's Safety Director Rod Rodavich contends that there was no likelihood of an employee being trapped in the transfer house. I credit Rodavich's testimony that each transfer house had 2-3 exits on the upper level as well as 3 on the bottom level (Tr. 227-229). Therefore, an employee would not have to jump from the second floor to escape a fire.

I find that the Secretary has not established these violations to be significant and substantial. Step 3 in the Commission's test for a significant and substantial violation is whether there is a reasonable likelihood that the hazard contributed to will result in an injury. Step 4 is whether there is a reasonable likelihood that the injury will be of reasonably serious nature, Mathies Coal Co., 6 FMSHRC 1 (January 1984). Since the Secretary's theory of "S & S" is based largely on the need for an employee to jump from the second story to escape a fire resulting from the coal dust accumulations in the transfer house, I conclude these violations were not "S & S".

Respondent appears to have no argument with which it can legitimately challenge the validity of the section 104(b) orders. To establish the validity of such an order the Secretary need only show that the condition originally cited still existed at the time the 104(b) order was issued, and that the time allowed for termination had passed. Martinka Coal Company, 15 FMSHRC 2452 (December 1993); Mid-Continent Resources, Inc., 11 FMSHRC 505 (April 1989).

The fact that the employees assigned to clean-up the cited transfer houses may not have followed their instructions is not a defense to the orders, or even a mitigating factor in considering the appropriate penalty to be assessed. In Rochester & Pittsburgh Coal Company, 13 FMSHRC 189 (February 1991), the

I decline to address the issue as to whether the elements of a violation of section 77.202, the coal dust accumulation standard for surface coal mines and surface areas of underground coal mines, are different than the elements of a violation of the coal dust accumulation standard for underground coal mines at 75.400, and whether the Secretary's direct case met this additional burden, if any exists.

Commission held that a rank-and-file miner's negligent or willful conduct can be imputed to a mine operator for the purpose of making unwarrantable failure findings. The logic of that decision applies to this case where Respondent delegated its statutory responsibility to timely abate the original citations to rank-and-file miners.

This record is also devoid of any evidence on which I could conclude that Respondent had a reasonable expectation that the employees would clean the transfer houses as instructed. There is no indication, for example, that these employees had a work history demonstrating such reliability that management was justified in assuming that the task had been completed. Indeed, if the employees were told that Respondent was required by MSHA to have the transfer houses cleaned by May 21, it is difficult to believe that they cavalierly ignored their instructions and risked disciplinary action.

Civil Penalties for the Coal and Coal Dust Violations in the Transfer House

The Secretary proposed a \$267 civil penalty for each of the original section 104(a) citations relating to coal and coal dust accumulations in the transfer houses. Given the fact that I find that the gravity of these violations was not as great as believed by MSHA, I assess a \$100 penalty each for citations 3659083, 3659084, and 3659085, taking into account the six criteria in section 110(i) of the Act.

With respect to section 104(b) orders 3659098 and 3659099, and the original citations issued for the accumulations in those transfer houses, I assess civil penalties of \$750 for each transfer house. I find that the gravity of these violations warrants a penalty lower than the \$1,457 proposed by MSHA. However, I believe Respondent's negligence in failing to abate the original citations by the termination date warrants a significantly larger penalty than that assessed for the transfer houses in which the original citations were timely abated.

Battery Charger improperly ventilated

On May 20, 1993, MSHA representative Gerald Krosunger was inspecting a longwall section at the Warwick mine at which production was finished and miners were recovering shields (Tr. 245). He detected the odor of batteries and walked to an area in which he saw a battery-powered scoop being charged in the middle of an entryway (Tr. 233, 235). Krosunger then released a

cloud of chemical smoke which drifted in the direction of the longwall section from which he had just travelled (Tr. 235).

As the result of these observations Krosunger issued Respondent citation 3659432, alleging a significant and substantial violation of 30 CFR 75.340(a)(1). That regulation requires that battery charging stations be ventilated by intake air that is coursed into return air or to the surface. The air may not be used to ventilate working places.

Respondent at page 19 of its brief argues that the standard was not violated because the longwall area was not a working place as defined in 30 C.F.R. 75.2(g)(2). That regulation defines "working place" as "the area of a coal mine inby the last open crosscut." Last open crosscut is defined in section 75.362(c)(1) as "the crosscut in the line of pillars containing the permanent stoppings that separate the intake air courses and the return air courses".

While I agree with Respondent that the Secretary has failed to establish that the longwall area in which Krosunger smelled the battery fumes was a "working place" within the meaning of the above-mentioned definitions, I conclude that these definitions do not apply to the prohibition against ventilating working places with air that has ventilated battery charging stations in section 75.340(a)(1).

Section 75.340(a)(1) is intended to protect miners if a fire originates at a battery charging station, 57 Fed. Reg. 20888 (May 15, 1992). The purpose of this requirement would be seriously undercut if I were to interpret it to allow miners to be exposed to air that had passed over a battery charging station simply because the area in which they were working did not meet the criteria of 75.2(g)(2). The Commission has in the past declined to interpret definitional terms in way that defeats the underlying purposes of a standard, Jim Walter Resources, Inc., 11 FMSHRC 21 (January 1989). I decline to do so in the instant case and conclude that the air that passed over the scoop ventilated a working place within the meaning of 75.340(a)(1).

Michael Smith, Respondent's longwall foreman, appears to concede that the scoop was not being charged in an appropriate location (Tr. 274). However, both Smith and New Warwick safety director Rod Rodavich challenge the inspector's contention that air from the scoop was flowing towards the longwall section (Tr. 263-65, 271-72, Exh R-1). As neither Rodavich nor Smith was with inspector Krosunger when he performed his smoke cloud test, I credit the inspector's testimony that the air from the scoop was moving in the direction of the longwall (Tr. 268-69, 274).

I therefore affirm the violation, concluding that the air from the battery charger was ventilating a working place.

On the other hand I find that the Secretary has not established that this violation was significant and substantial. Inspector Krosunger's opinion that an injury was reasonably likely to occur was based largely on his belief that in the event of a fire, miners at the longwall would have to exit the mine through the entryway in which the scoop was being charged (Tr. 236). However, I credit the testimony of safety director Rod Rodavich that this entryway was neither a primary or alternate escapeway, and that several alternative means of exit were available for the miners at the longwall (Tr. 263).

The Secretary proposed a \$362 civil penalty for this violation. As I conclude that the gravity was considerably less than the Secretary believed, I find that a \$100 penalty is appropriate given the six factors in section 110(i).

ORDER

Docket PENN 94-54

Order 3655504 is affirmed and a \$2,000 civil penalty is assessed.

Order 3655505 is vacated.

Order 3655519 is affirmed and a \$1,000 civil penalty is assessed.

Order 3655520 is affirmed and a \$1,000 civil penalty is assessed.

Citation 3655511 is vacated.

Citation 3655512 is vacated.

Citation 3667167 is affirmed as a non-significant and substantial violation and a \$75 civil penalty is assessed.

Docket PENN 93-445

Citation 3659083 is affirmed as a non-significant and substantial violation and a \$100 civil penalty is assessed.

Citation 3659084 is affirmed as a non-significant and substantial violation and a \$100 civil penalty is assessed.

Citation 3659085 is affirmed as a non-significant and substantial violation and a \$100 civil penalty is assessed.

Citation 3659086 is affirmed as a non-significant and substantial violation. Section 104(b) order 3659098 is affirmed. A civil penalty of \$750 is assessed for these two violations combined.

Citation 3659087 is affirmed as a non-significant and substantial violation. Section 104(b) order 3659099 is affirmed. A civil penalty of \$750 is assessed for these two violations combined.

Citation 3659432 is affirmed as a non-significant and substantial violation. A \$100 civil penalty is assessed.

Respondent shall pay the civil penalties totalling \$5,975 for both dockets within 30 days of this decision.



Arthur J. Amchan
Administrative Law Judge
703-756-6210

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DEC 14 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 94-158-M
Petitioner : A.C. No. 12-00038-05510
v. :
: Mine: Harris City
NEW POINT STONE COMPANY, INC. :
Respondent :

DECISION

Appearances: Lisa A. Gray, Esq., Office of the Solicitor,
U. S. Department of Labor, Chicago, Illinois,
for Petitioner;
Kenneth T. Wanstrath, President, New Point
Stone Company, Inc., Greensburg, Indiana,
Pro Se, for Respondent.

Before: Judge Amchan

On October 13, 1993, MSHA representative Jerry Spruell inspected Respondent's Harris City, Indiana, stone quarry. He observed that on one of the company's Mack dual axle haul trucks a brake chamber was missing (Tr. 14-15). The brake chamber is an air-actuated diaphragm which causes the brake shoes to contact the stopping surface of the wheel drum (Tr. 23).

Respondent's truck has a brake chamber for each of the six wheel assemblies. Two of the wheels are connected by an axle on the front of the truck. There are two axles on the rear of the truck with four tires on each axle. The brake chamber had been removed from the right front tires of the rear dual axles (or the middle tires on the right) (Tr. 26).

Scott Moffitt, a mechanic and truck driver employed by Respondent, had removed the brake chamber in question a month, or month and a half, earlier at the direction of foremen Russ Wanstrath and Rod Borgman (Tr. 40). The chamber was removed because it was leaking air which could have caused the truck to have breaking problems (Tr. 45). After removal, the line to this chamber was plugged to prevent further leaks (Tr. 45).

On the day of the inspection, MSHA representative Spruell observed the truck stop on level ground without difficulty (Tr. 15). Mr. Moffitt had driven the truck approximately once or twice a week since the brake chamber had been removed without experiencing any braking problems (Tr. 41-42). Foreman Rod Borgman had also driven the vehicle with the brake chamber removed and was able to make a sudden stop to avoid hitting a truck that pulled out in front of him (Tr. 55, 58, 60). Additionally, the primary operator of the truck, Richard Van Dyke, apparently experienced no braking problems during this period (Exh. R-3).

Inspector Spruell issued Respondent Citation No. 4308134 pursuant to section 104(d)(1) of the Act. This citation alleged a "significant and substantial" violation of 30 C. F. R. 56.14101(3) due to Respondent's "unwarrantable failure" to comply with the regulation. The cited standard requires that all braking systems on self-propelled mobile equipment "be maintained in functional condition."

Were the brakes on Respondent's Mack Haul Truck maintained in functional condition?

Inspector Spruell opined that the absence of the one brake chamber could cause the truck to swerve when the brakes are applied in a panic situation (Tr. 18) and would increase the distance within which the vehicle would stop (Tr. 20). I decline to credit this testimony as there is nothing in the record that would indicate that the inspector has sufficient expertise to determine the impact of operating the truck without one of six braking chambers. I note that the Secretary apparently did not contact the manufacturer to determine the effect of this alteration.

The Secretary also contends that a braking system with a missing component is per se not in functional condition. He relies in part on a directive in the MSHA Program Policy Manual. The Manual directs that a citation should be issued for violation of section 56.14101 if a component or portion of any braking system is not maintained in functional condition--even if the braking system is capable of stopping and holding the equipment with its typical load on the maximum grade it travels, (Secretary's brief at page 4, citing MSHA Program Policy Manual, Vol. IV, Part 56/57, p. 55a).

Respondent, on the other hand, contends that the braking system worked acceptably and that there is no evidence that the missing brake chamber presented a hazard to its employees. One reason advanced for this contention is that this truck is driven only within the quarry, at speeds of 10 to 15 miles per hour, while it was manufactured to be driven on the open highway (Tr. 43, 63-64).

On balance, I conclude that the Secretary has the better argument and affirm the citation. First of all, the Commission recognizes the MSHA Program Policy Manual as evidence of that agency's policies, practices and interpretations, to which it gives deference in interpreting MSHA regulations, Dolese Brothers Company, 16 FMSHRC 689, 692-93, and n. 4 (April 1994). I find that the Secretary's interpretation is a reasonable one which furthers the safety objectives of the Act. I therefore defer to that interpretation.

Further, it is inconsistent with the objectives of the Act to sanction the prolonged use of equipment on which the braking system has been altered without some reliable evidence that this practice poses no hazard to employees. Although I find Inspector Spruell's conclusions somewhat speculative, I have the same view of the opinions of Respondent's witnesses, who also have not been shown to have sufficient credentials to determine that the removal of a braking chamber posed no hazard.

One can only assume that had it not been for the instant citation the truck in question would have been operated with the missing brake chamber indefinitely. Both Respondent's mechanic, Moffitt, and foreman Borgman recognize that this is not a sound practice (Tr. 44, 60-61). I therefore conclude that there is a presumption that a braking system is not in functional condition when a component has been removed, unless this presumption has been rebutted by reliable evidence from the manufacturer, or equally competent authority, that it is safe to operate the vehicle with the missing component.

Unwarrantable Failure

The Secretary contends that the instant citation was the result of Respondent's unwarrantable failure to comply with the regulation. He argues that "unwarrantable failure" is established by the fact that the brake chamber was intentionally removed at the direction of management and that the truck in question was used with the brake chamber missing for an extended period of time.

The Commission has held that the term "unwarrantable failure" means aggravated conduct amounting to more than ordinary negligence, Emery Mining Corp., 9 FMSHRC 1991, 2001 (December 1987). While it is true that the brake chamber on the cited truck was removed intentionally, I conclude that Respondent's conduct was not sufficiently "aggravated" to constitute an unwarrantable failure for the following reasons.

First, it has not been established that operating the truck with one of six brake chambers missing was in fact dangerous. Secondly, there is no evidence from which I would conclude that Respondent should have suspected that its conduct exposed its

employees to a hazard. Finally, only reference to the MSHA Program Policy Manual would have apprised Respondent of the fact that MSHA regarded operation of the truck under these conditions to violate its regulations.

Significant and Substantial

The Commission's formula for a "significant and substantial" violation was set forth in Mathies Coal Co., 6 FMSHRC 1 (January 1984):

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.

Since I have previously concluded that the inspector's testimony is insufficient to persuade me of the hazards resulting from the violation, I conclude that the Secretary has failed to meet steps 2 - 4 of the Mathies test. I therefore affirm Citation No. 4308134 as a non-significant and substantial violation of section 104(a) of the Act.

Assessment of Civil Penalty

The Secretary proposed a civil penalty of \$2,500 for this citation. While I have vacated the unwarrantable failure characterization of the violation, I conclude that Respondent exhibited considerable negligence in operating the truck in question for a month or month and a half after altering the braking system installed by the manufacturer.

On this record, it is difficult to determine the extent of the gravity of the violation. Respondent quickly abated the violation. In the absence of any evidence to the contrary, I conclude that Respondent is a relatively small operator and that its prior history of violations would not lead me to impose a higher penalty than I would otherwise. Finally, there is nothing in the record to indicate that a penalty of \$2,500 or less would threaten Respondent's financial viability.

After considering these factors pursuant to section 110(i) of the Act, I assess a civil penalty of \$500. I arrive at this figure primarily on the negligence factor. I deem it very important for the safety of miners that operators not alter safety equipment such as brakes and then assume that their

equipment poses no hazard to their employees. I conclude that a \$500 penalty is an appropriate deterrent to such conduct. Assessment of this penalty provides this operator and others an incentive to quickly repair such safety equipment, or at least establish through competent authority that operation of their equipment with the alteration does not compromise the safety of miners.

ORDER

Citation No. 4308134 is affirmed as a non-significant and substantial violation of section 104(a) of the Act. Respondent shall pay the assessed civil penalty of \$500 within 30 days of this decision.


Arthur J. Amchan
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 14 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 94-591
Petitioner : A. C. No. 36-06475-03542
: :
v. : Homer City Coal
HOMER CITY COAL PROCESSING : Processing Plant
CORPORATION, :
Respondent :

ORDER ACCEPTING APPEARANCE
DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Merlin

The penalty petition in the above-captioned case was filed on behalf of the Secretary by a "Conference and Litigation Representative", hereafter referred to as a CLR. In the cover letter to the petition the CLR advises that he is an employee of the Mine Safety and Health Administration who has been trained and designated as a CLR and is authorized to represent the Secretary in accordance with an attached Limited Notice of Appearance. In the notice the CLR states that he is authorized to represent the Secretary in all prehearing matters and that he may appear at a hearing if an attorney from the Solicitor's office is also present.

Subparagraph (4) of section 2700.3(b) of the Commission's regulations, 29 C.F.R. § 2700.3(b)(4), provides that an individual who is not authorized to practice before the Commission as an attorney may practice before the Commission as a representative of a party with the permission of the presiding judge. In reviewing this matter, note is taken of the fact that more than 5,000 new cases were filed with the Commission in Fiscal 1994. Obviously, a caseload of this magnitude imposes strains upon the Secretary's resources as well as those of this Commission. It appears that the Secretary is attempting to allocate his resources in a responsible matter. Therefore, I exercise the discretion given me by the regulations, cited above, and determine that in this case the CLR may represent the Secretary in accordance with the notice he has filed.

The CLR has filed a motion to approve settlement for the one violation in this case. A reduction in the penalty from \$94 to \$63 is proposed. The CLR also requests that the citation be modified to reduce negligence from moderate to low. The violation in this case was issued because fine coal and float

coal dust accumulated below the No. 7 conveyor in the preparation plant. According to the CLR, the operator was aware of the accumulation problem in this area and was prepared to fix it during the first belt conveyor shutdown. In the interim, the operator increased the number of times the area was to be cleaned from one to three times a shift. The CLR further advises that the area had been cleaned three hours before the issuance of the citation and an hour prior to the citation the area was examined and reported to be in good condition.

I have reviewed the documentation and representations made in this case, and 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.

It is **ORDERED** that Citation No. 3960774 be **MODIFIED** to reduce negligence from moderate to low.

It is further **ORDERED** that the operator **PAY** a penalty of \$63 within 30 days of this decision.

A handwritten signature in cursive script that reads "Paul Merlin". The signature is written in dark ink and is positioned above the typed name and title.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Gerald F. Moody, Jr., Conference and Litigation Representative,
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., 6TH FLOOR
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DEC 16 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 95-11
Petitioner	:	A. C. No. 36-07230-03761
	:	
v.	:	Bailey Mine
	:	
CONSOL PENNSYLVANIA COAL	:	
COMPANY,	:	
Respondent	:	

ORDER ACCEPTING APPEARANCE
ORDER OF DISMISSAL

Before: Judge Merlin

The penalty petition in the above-captioned case was filed on behalf of the Secretary by a "Conference and Litigation Representative", hereafter referred to as a CLR. In the cover letter to the petition the CLR advises that he is an employee of the Mine Safety and Health Administration who has been trained and designated as a CLR and is authorized to represent the Secretary in accordance with an attached Limited Notice of Appearance. In the notice the CLR states that he is authorized to represent the Secretary in all prehearing matters and that he may appear at a hearing if an attorney from the Solicitor's office is also present.

Subparagraph (4) of section 2700.3(b) of the Commission's regulations, 29 C.F.R. § 2700.3(b)(4), provides that an individual who is not authorized to practice before the Commission as an attorney may practice before the Commission as a representative of a party with the permission of the presiding judge. In reviewing this matter, note is taken of the fact that more than 5,000 new cases were filed with the Commission in Fiscal 1994. Obviously, a caseload of this magnitude imposes strains upon the Secretary's resources as well as those of this Commission. It appears that the Secretary is attempting to allocate his resources in a responsible matter. Therefore, I exercise the discretion given me by the regulations, cited above, and determine that in this case the CLR may represent the Secretary in accordance with the notice he has filed.

The CLR has filed a motion to dismiss because MSHA has vacated the one violation involved in this matter. The CLR has attached a copy of MSHA's subsequent action vacating the citation.

In light of the foregoing, it is ORDERED that this case be DISMISSED.

A handwritten signature in cursive script that reads "Paul Merlin". The signature is written in dark ink and is positioned above the typed name and title.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Gerald F. Moody, Jr., Conference and Litigation Representative,
U. S. Department of Labor, MSHA, 200 James Place Monroeville, PA
15146

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 20 1994

T. J. McKNIGHT, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. SE 94-51-RM
	:	Citation No. 4094591;
SECRETARY OF LABOR,	:	7/29/93
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 94-52-RM
Respondent	:	Citation No. 4094593;
	:	7/29/94
	:	
	:	Clarks Mine
	:	
	:	Mine ID 31-02009-QFX
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 94-262-M
Petitioner	:	A. C. No. 31-02009-05501 QFX
v.	:	
	:	Clarks Mine
T. J. McKNIGHT, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Leslie John Rodriguez, Esq., Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia, for the Secretary; Michael C. Lord, Esq., Maupin, Taylor, Ellis & Adams, P.A., Raleigh, North Carolina, for Contestant/Respondent.

Before: Judge Maurer

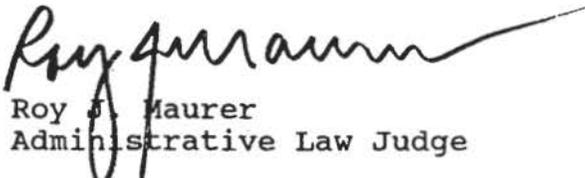
These consolidated proceedings concern two Notices of Contest filed by T. J. McKnight, Inc., pursuant to section 105(d) of the Mine Safety and Health Act of 1977, challenging the legality of two section 104(a) "S&S" citations alleging violations of the mandatory safety standards found at 30 C.F.R. §§ 56.14100(b) and 56.7005, respectively. The civil penalty case concerns a proposed civil penalty assessment of \$7000, for the alleged violations. Pursuant to notice, a hearing was held in Raleigh, North Carolina, on September 15-16, 1994, wherein the parties appeared and presented evidence to support their

respective positions. At the conclusion of the hearing, I scheduled November 15, 1994, as the filing date for the simultaneous submission of proposed findings of fact and conclusions of law. At the request of the Secretary, that filing date subsequently was extended to December 1, 1994.

However, in lieu of filing the requested post-hearing submissions, on December 9, 1994, the parties, pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, filed a joint motion to approve settlement of all matters in issue in these proceedings. The Secretary moves to vacate Citation No. 4094593, contested in Docket No. SE 94-52-RM, and to dismiss so much of the Petition for Assessment of Civil Penalty as is based thereon, on the ground that the evidence now available does not sustain the violation. The Secretary also proposes to reduce the proposed assessment for Citation No. 4094591 from \$2000 to \$500, and to reclassify the negligence factor from "low" to "no" negligence, on the grounds that the Secretary now feels the company did exercise due diligence.

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 \$500 within 30 days of this decision.


Roy J. Maurer
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 21 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	
JIM WALTER RESOURCES, INC., Respondent	:	Docket No. SE 94-74
	:	A.C. No. 01-01401-03987
	:	
	:	Docket No. SE 94-84
	:	A.C. No. 01-01401-03988
	:	
	:	Docket No. SE 94-115
	:	A.C. No. 01-01401-03993
	:	
	:	Mine No. 7

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor,
U.S. Department of Labor, Birmingham, Alabama,
for Petitioner;
R. Stanley Morrow, Esq., Jim Walter Resources,
Inc., Brookwood, Alabama, for Respondent.

Before: Judge Amchan

These cases arise from several MSHA inspections of Jim Walter Resources, Inc.'s (Respondent) No. 7 Mine in Tuscaloosa County, Alabama, in the summer of 1993. The primary issues concern the maintenance of Respondent's conveyor belts and clean-up of coal dust accumulations.

Docket No. SE 94-74

Conveyor Belt Alignment and Damaged Belt System Components

On August 17, 1993, MSHA Inspector Kirby Smith issued Order No. 3015993, pursuant to section 104(d)(2) of the Act. The order alleged a violation of 30 C.F.R. § 75.1725(a) which requires that mobile and stationary machinery be maintained in safe operating condition and that unsafe machinery or equipment be immediately removed from service.

The order was issued due to a number of defects observed by Inspector Smith while inspecting the East A conveyor belt. This belt was out of alignment and was running side to side cutting into the metal supporting structure of the conveyor at several places (Tr. 115-118). A number of the rollers on which the belt moves were dislodged and/or damaged (Tr. 77, 116-17)¹. Some rollers were stuck in mulk (a mud-like mixture of coal dust and water) (Tr. 77, 118-19).

Smith concluded that the friction of the stuck rollers and from the belt rubbing against the metal frame of the conveyor made it highly likely that a fire would occur along the belt line (Tr. 120-21). He therefore concluded that the violation was "significant and substantial (S & S)."

The inspector also concluded that the violation was due to the "unwarrantable failure" of Respondent to comply with the cited regulation. He made this determination because most of the East A conveyor belt was located next to the main track which carried Respondent's miners to their work stations and because the area was subject to preshift examinations required by MSHA (Tr. 115, 122-24).

Inspector Smith does not know how long the damaged rollers he observed had been defective, nor how long the East A belt had been out of alignment and cutting into the supporting structure (Tr. 169-74, also see Tr. 87). He concedes that the conveyor belt could sever a piece of the supporting structure in a very short period of time and that belt rollers are damaged or become stuck on a recurring basis (Tr. 171-74). On the other hand, the record establishes that the conditions cited by Smith were persistent at Respondent's mine.

Two days prior to the issuance of Smith's order, Keith Plylar, Chairman of UMWA Local 2397's Safety and Health Committee, discussed these conditions with mine management. He complained to Larry Morgan, the dayshift mine foreman, about small smoldering fires that were occurring where the East A belt was rubbing against the belt structure (Tr. 41-45, 63). The belt had been improperly aligned for a least a week prior to the issuance of Order No. 3015093 (Tr. 49-50, 63). However, it is possible that the alignment was corrected during that week and that it then recurred (Tr. 68-70).

Respondent concedes that section 75.1725(a) was violated, but takes issue with the "S & S" and "unwarrantable failure" characterizations contained in Order No. 3015093 (Respondent's

¹When abating this order, Respondent replaced approximately 200 rollers on the cited conveyor, as well as "training" or aligning the belt (Tr. 124-25, Order No. 3015093, Block 17).

brief in Docket No. SE 94-74 pages 3-5, 7-8). An "unwarrantable failure" is aggravated conduct by a mine operator constituting more than ordinary negligence, Emery Mining Corp., 9 FMSHRC 2007 (December 1987).

The Commission formula for a "S & S" violation was set forth in Mathies Coal Co., 6 FMSHRC 1 (January 1984):

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

In challenging the "unwarrantable failure" characterization, the company first points out that the East A conveyor was approximately 5,000 feet long (Tr. 170). Each section of the belt has three top rollers spaced five feet apart and one bottom roller (Tr. 169). Bottom rollers are spaced 10 feet apart (Tr. 169).

Respondent calculates that the 200 defective rollers found when the instant order was abated indicates that 95 of the rollers on the East A belt were operating properly (Respondent's brief at 4). Respondent contends that the dimensions of the belt and the propensity of belt components to malfunction makes it impossible to judge their conduct "aggravated" on this record.

MSHA and the union witnesses contend that the Respondent's conduct is "unwarrantable" because it has no set procedure for maintaining and repairing the East A belt (See e.g. Tr. 51). The Secretary suggests that Respondent is hesitant to repair defective rollers because it would have to shut down this conveyor, which otherwise runs 24 hours a day (Tr. 52, 200, 223-24). By letting the belt fall into the state of disrepair that existed on August 17, 1993, the Secretary argues that Respondent failed to maintain the belt as would a prudent mine operator.

Respondent contends that the Secretary has simply failed to meet its burden of proving "unwarrantable failure." Respondent put on no witnesses regarding this order but submits that there is simply no evidence that this violation was due to more than ordinary negligence. I agree with Respondent.

To establish aggravated conduct, the Secretary must establish the standard of care from which the cited mine operator departed. The record in this case is completely amorphous in this regard. There is no question that there were many defective rollers and that the belt was misaligned, posing some degree of a fire hazard. However, I am left to guess at the reasonableness of the steps taken or not taken to correct these defects (See e.g., Tr. 54-55).

It may have been preferable for Respondent to introduce evidence establishing that it was acting prudently in maintaining the East A beltline, but the lack of evidence as to what constitutes prudent behavior inures to the detriment of the Secretary. Inspector Smith conceded that Respondent might not be acting imprudently if it failed to shut down the East A belt every time a single roller gets stuck--even though a single defective roller can cause a fire (Tr. 170-74). I am therefore left in the dark as to the circumstances under which a reasonably prudent employer would shut down the belt line, and how far beyond such circumstances were the conditions cited on August 17, 1993. I therefore vacate the characterization of "unwarrantable failure" contained in Order No. 3015093.

On the other hand, I conclude that the Secretary has established this violation to be "S & S." Given the number of defective rollers, the recurring nature of misalignments of the East A belt, and that Respondent's No. 7 Mine is a gassy mine, I conclude that it is reasonably likely that in the continued course of normal mining operations a fire would occur and such fire could result in serious injury.

I therefore affirm a "S & S" violation of section 104(a) of the Act, and assess a \$2,000 civil penalty². This figure is derived primarily on the basis of the gravity of the violation, which I consider quite high given the number of defective rollers on the date of violation and the methane liberation of the No. 7 Mine. Respondent is a medium-large operator (Tr. 13) and a \$2,000 penalty will not affect its ability to stay in business. The record indicates the violation was timely abated in good faith.

The two remaining criteria that must be considered in assessing a civil penalty under section 110(i) are the operator's history of previous violations and negligence. I find nothing in the record regarding these factors that influences this penalty assessment.

² A \$7,000 civil penalty was proposed by the Secretary.

Order 3015094, Float Coal Dust in East A Belt
Conveyor Entry

On August 17, 1993, Inspector Smith also found accumulations of float coal dust throughout the 4900 feet of the East A conveyor belt entry (Tr. 78-79, 126-28)³. Some of this dust was covering rock dust and some of it was floating in puddles of water on the mine floor (Tr. 125-26). The extent of the accumulation is indicated by the fact that Respondent used six pods of rock dust to abate the condition. One pod contains several tons of rock dust (Tr. 137).

As the result of his observations, Inspector Smith issued Order No. 3015094, alleging a violation of 30 C.F.R. § 75.400 and section 104(d)(2) of the Act. The regulation requires float coal dust and other combustible materials to be cleaned up and that they not be permitted to accumulate on active workings or electrical equipment.

The order was characterized as "S & S." Inspector Smith concluded that an ignition of the float coal dust was reasonably likely (Tr. 130-35). He opined that frayed chords and fibers of the conveyor belt which were being heated by friction could fall to the mine floor and ignite the coal dust. The belt fibers were being heated in places where they were caught in rollers and where the belt was rubbing against the conveyor structure (Tr. 133-35).

The determination of "unwarrantable failure" for this order was predicated on the fact that two-thirds of the East A belt was next to the track entry and therefore readily visible to everyone, including management officials (Tr. 136-37). Further, the accumulation of float coal dust was noted in Respondent's pre-shift examination book and no effort to abate the condition was underway when Smith observed the violation (Tr. 138).

I conclude that the violation herein was "S & S" as alleged. I find that the likelihood of the coal dust being ignited by heated belt fibers and the fact that this is a gassy mine is a sufficient "confluence of factors" to establish a reasonable likelihood of an accident and serious injury, Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988).

A "S & S" finding is not precluded by the fact that the East A belt had both a carbon monoxide detection system and point-type heat sensors (Tr. 67-68). The record establishes that miners may be exposed to smoke from such fire before being warned by either detection system (Tr. 70-71). Similarly, the

³ Float coal dust is defined as coal dust particles that can pass through a No. 200 sieve, 30 C.F.R. § 75.400-1.

fact that a miner has yet to be injured by a belt line fire at the No. 7 Mine does not mean that such injury is not reasonably likely to occur in the future. To hold otherwise would suggest that it is unimportant for operators to comply with sections 75.1725(a) and 75.400.

Similarly, I find that the Secretary has established an "unwarrantable failure" to comply with section 75.400 on the East A belt line. Commission precedent requires consideration of three factors in determining whether a violation of section 75.400 is the result of an operator's unwarrantable failure. They are: (1) the extent of the violation; (2) the length of time the violation has existed; and (3) the efforts of the operator to prevent or correct the violation. Peabody Coal Co., 14 FMSHRC 1258 (August 1992); Mullins & Sons, 16 FMSHRC 192 (February 1994).

The extensive nature of the float coal dust accumulations along the East A beltline, the location of this beltline next to the track entry where it was readily visible to management, and the fact that inspector Smith found nobody engaged in cleaning up the accumulations, lead me to conclude that "unwarrantable failure" has been established in this case. While it is true that coal dust accumulations can occur in a relatively short period of time, the testimony of Inspector Smith and miner Troy Henson that the dust had accumulated throughout the belt entryway, make it very unlikely that this violation had just occurred when Smith observed it.

I find Respondent's exhibit JWR-1 to be insufficiently specific to be given any weight in determining whether this violation was due to unwarrantable failure⁴. This document indicates that two people were shoveling and sweeping loose coal and coal dust on the East A belt on the day shift of August 17, 1993. The exhibit does not indicate how long this shoveling was done and in any event, I conclude from the extent of the accumulations found by Inspector Smith that whatever shoveling was performed was woefully inadequate to comply with the regulation.

The Secretary proposed a \$7,000 civil penalty for Order No. 3015094, I assess a penalty of \$3,500. I conclude that the gravity of the violation and Respondent's negligence as reflected by the extensiveness of the accumulations warrant such a penalty in conjunction with consideration of the other four penalty criteria.

⁴ This exhibit was admitted over the Secretary's objection that it was not sufficiently authenticated (Tr. 161-68).

Order No. 3015095: Coal and Coal Dust Accumulations
at the section 4 belt feeder

When Inspector Smith arrived at the section 4 belt feeder on August 17, 1993, he found accumulations of loose coal and coal dust six to 42 inches in depth, 20 feet wide, and 15 feet long (Tr. 139-40). The belt feeder transfers the freshly mined coal from the ram cars coming from the working face to a belt conveyor (Tr. 139, 142-43). The section 4 belt feeder had been improperly positioned so that some of the coal from the ram cars was being dumped on the ground (Tr. 83-86, 139).

Smith issued Order No. 3015095 alleging a violation of section 75.400 and section 104(d)(2) of the Act. I find that the evidence falls short of that necessary to establish an "unwarrantable failure" to comply with the regulation. Although the condition was noted in the preshift examination book (Tr. 140) there is nothing in this record that would indicate Respondent's failure to correct this condition was anything more than ordinary negligence. This condition was not nearly as extensive, nor as persistent as that cited in Order No. 3015094.

On the other hand, I conclude that the Secretary has established this violation to be "S & S." The tail rollers on the conveyor were turning in loose material thus making ignition reasonably likely (Tr. 140). Considering also that this is a gassy mine, I find that the Mathies criteria have been satisfied.

I therefore affirm Order No. 3015095 as an "S & S" violation of section 104(a) of the Act. I assess a civil penalty of \$500, rather than \$5,000 as proposed by the Secretary. Respondent's negligence was not nearly as great as that assumed by the proposed assessment. However, the accumulation was recorded in the preshift book and there was no evidence of abatement measures when Smith observed the violation (Tr. 141). This degree of negligence and the gravity as reflected in the "S & S" determination warrant a penalty of \$500, in conjunction with the other penalty criteria.

Citation No. 2807230: Improperly Secured Cover Guard

On September 22, 1993, MSHA representative Terry Gaither inspected the No. 1 longwall section at Respondent's No. 7 Mine. He observed that the cover guard for the main sprocket drive of the face conveyor was held in place by only one bolt (Tr. 20-21). Five other bolts for the guard had been sheared off (Tr. 20). The guard is approximately 30 inches by 30 inches and 1 and 1/2 - 2 inches thick (Tr. 20-21). It weighs approximately 200 pounds and is situated about four feet above ground level (Tr. 22, 25-26).

When Gaither observed the cover guard it was jumping up and down from vibration and rocks were coming out from under it and falling into a passageway (Tr. 20-23). Miners who passed by the cover guard could have been struck by a rock, or been hit on the foot by the guard if the last bolt sheared off and the guard became dislodged (Tr. 23-33).

Gaither issued Respondent Citation No. 2807230 alleging a "S & S" violation of 30 C.F.R. § 75.1725(a). I affirm the citation as issued and assess a \$362 civil penalty, the same as that proposed by the Secretary. I conclude that a conveyor on which a heavy metal plate is secured by one of the six bolts that are supposed to hold it in place is not "in safe operating condition" as that term is used in the standard.

I conclude further that if the cited condition persisted in the course of continued normal mining operations it is reasonably likely that a miner will be struck by a rock or by the metal plate itself and be seriously injured. A penalty of \$362 is appropriate given the gravity of the violation and Respondent's negligence in not replacing the bolts when five of the six had sheared off.

Docket SE 94-84

This docket involves Order No. 3015087 issued on July 29, 1993, by MSHA Inspector Kirby Smith. The allegations in this order are very similar to those in Order No. 3015993 in Docket No. SE 94-74, which was issued approximately three weeks later. This order involves the condition of the "isolated" portion of the East A conveyor belt at Respondent's No. 7 Mine, rather than that portion of the belt which is adjacent to the track entry.

Smith observed a number of places where the top rollers of the conveyor belt had slid together, leaving portions of the belt inadequately supported (Tr. 215). The inspector also observed a number of the bottom rollers of the conveyor which had been taken out of service by detaching one side from the supporting structure (Tr. 215-16).

The belt was also improperly aligned so that it was rubbing against its supporting structure (Tr. 195-96, 215). This caused the belt to fray, with the fibers from the belt becoming entangled in the rollers and creating friction. Since the chords and fibers of the belt are flammable, Inspector Smith concluded that a fire was highly likely. This and the fact that the air from the beltline was ventilated to the working face caused the inspector to characterize the violation as "S & S" (Tr. 221).

The inspector characterized the violation as an "unwarrantable failure" to comply with section 75.1725(a) for several reasons: (1) the belt line was subject to preshift and onshift examinations; (2) a large number of rollers were defective, and (3) his belief that the rollers taken out-of-service indicated management awareness of the cited conditions (Tr. 219-20).

The conditions observed by inspector Smith on July 29, 1993, were persistent and recurring problems on the isolated portion of the East A beltline. Union representative Keith Plylar had discussed them with management officials on numerous occasions, including just three days prior to the issuance of the instant order (Tr. 197-98). Plylar was told that the East A belt was prone to misalignment because it was constructed out of three different types of belting material (Tr. 202).

I conclude that Respondent committed a "S & S" violation of section 75.1725(a) as alleged, but that the Secretary has failed to show that the violation is the result of Respondent's "unwarrantable failure" to comply. As with Order (now citation) No. 3015993, the number of defective rollers and the persistence of this problem in a gassy mine lead me to conclude that there was a reasonable likelihood that this violation would contribute to a serious injury.

Similarly, I find the Secretary has failed to establish Respondent's "aggravated" conduct in the absence of any evidence indicating the measures that a reasonably prudent employer would have taken with regard to the East A belt. Given the fact that one of the defective rollers could have started a fire, I believe that the gravity of the violation, as well as the negligence of Respondent, warrants a civil penalty of \$2,000, rather than the \$7,000 proposed by the Secretary.

I conclude that the violation was the result of at least ordinary negligence on the basis of Mr. Plylar's testimony. Despite the fact that maintaining this beltline may be a Herculean task, it is readily apparent that in the three days between Mr. Plylar's complaint to management and the inspection, the condition of the isolated portion of the East A belt did not improve significantly (Tr. 197-209). Although this evidence is insufficient to find aggravated conduct, it is sufficient for the undersigned to conclude that Respondent should have done more in the way of maintaining the beltline than it did.

Docket No. SE 94-115

This docket pertains to two orders issued by MSHA Inspector Oneth L. Jones at Jim Walter's No. 7 mine. They allege excessive coal and coal dust accumulations in violation of section 75.400. The first was issued on August 16, 1993, and the second on September 2, 1993.

On August 16, at about 8:05 a.m., Jones was inspecting the West B conveyor belt and observed an accumulation of coal dust. It was wet on the bottom, damp in the middle and dry from the friction of the conveyor on top (Tr. 237, 241). This accumulation was about 19 inches deep, 20 feet in length and the width of the belt. The coal dust touched the bottom of the belt (Tr. 237-38).

Several conveyor rollers were stuck at the site of the accumulation and one was hot to the touch (Tr. 237-38). Jones characterized the violation as "S & S" because he believed that the heat generated by the rollers made an ignition of the coal dust reasonably likely (Tr. 244). I credit his opinion.

The "unwarrantable failure" characterization was predicated on the fact the violation was in an entry adjacent to the manbus stop (Tr. 239). Therefore, both the dayshift and the nightshift would have passed the cited area within an hour of Jones' arrival (Tr. 240). This area would have been subject to a preshift examination between 4 a.m. and 7 a.m. and Jones concluded that the accumulation was too extensive to have occurred after this examination (Tr. 242). Union walkaround representative Keith Plylar also believes that the accumulation occurred before 4 a.m. due to the amount of dust and the degree to which it was compacted (Tr. 274-75).

Respondent counters that coal dust accumulations of this magnitude have occurred in periods of less than an hour. It cites, in particular, an accumulation for which it was cited in August 1994 (Tr. 279-283). Given the lack of evidence on whether this accumulation existed when the preshift examination was done, I cannot credit the assumptions made regarding the duration of the violation by the Secretary's witnesses. I therefore find that it is unclear how long the condition cited had existed prior to Inspector Jones' arrival at the scene.

Applying the criteria set forth by the Commission in Peabody Coal Co., 14 FMSHRC 1258 (August 1992), I do not find that this violation rises to the level of "unwarrantable failure." The accumulation was not sufficiently extensive to lead to such a finding, and as stated above, I find the evidence regarding the duration of the violation similarly insufficient. The Secretary

also argues that 192 violations of this regulation by Respondent in the two years prior to the instant order mandate a finding of unwarrantable failure (Secretary's brief at 7-9).

This number of prior violations of the standard does not, standing alone, persuade the undersigned that the instant violation was due to an "unwarrantable failure." The record is clear that coal spills in coal mines and that it accumulates. It is also clear that this may happen rather quickly. I find nothing in this record to persuade me that Respondent's failure to start clean-up of the instant accumulation by the time of Inspector Jones' arrival constituted aggravated conduct.

In conclusion, I affirm Citation No. 3183062 as a "S & S" violation of section 104(a) of the Act. I assess a civil penalty of \$1,000--giving greatest weight to the gravity of the violation when considering the six penalty criteria.

Order No. 3183157

On September 2, 1993, at 7:50 a.m., Inspector Jones observed the East A belt tailpiece turning in an accumulation of fine dry pulverized coal dust (Tr. 252). The suspended dust was highly visible (Tr. 252). Jones issued Respondent 104(d)(2) Order No. 3183157.

His characterization of "unwarrantable failure" was based on the fact that he had cited an almost identical problem at the same location less than two weeks earlier on August 24, 1993 (Tr. 254-56), and that miners, including management personnel, passed right by the cited location getting on and off the manbus at the beginning and end of their shifts (Tr. 263). Jones also concluded that the accumulation must have been created prior to the preshift examination for the dayshift (Tr. 258-60).

I am not sufficiently persuaded by Inspector Jones' opinion as to the duration of the violation to accord it great weight. Thus, for the same reasons that I stated with regard to the previous violation I find that the record fails to establish conduct sufficiently worse than ordinary negligence.

Citation No. 3183157 is affirmed as a "S & S" violation of section 104(a) of the Act and section 75.400 of the regulations. I assess a civil penalty of \$1,000, primarily because the gravity of the violation in conjunction with the other penalty criteria warrant such an amount.

ORDER

Docket No. SE 94-74

Citation No. 3015993 is affirmed as a "S & S" violation of section 104(a) and a \$2,000 civil penalty is assessed.

Order No. 3015994 is affirmed as a violation of section 104(d)(2) of the Act and a \$3,500 penalty is assessed.

Citation No. 30150995 is affirmed as a "S & S" violation of section 104(a) and a \$500 penalty is assessed.

Citation No. 2807230 is affirmed as a "S & S" violation of section 104(a) and a \$362 penalty is assessed.

Docket No. SE 94-84

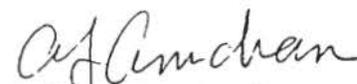
Citation No. 3015087 is affirmed as a "S & S" violation of section 104(a) and a \$2,000 penalty is assessed.

Docket No. SE 94-115

Citation No. 3182957 is affirmed as a "S & S" violation of section 104(a) and a \$1,000 penalty is assessed.

Citation No. 3183157 is affirmed as a "S & S" violation of section 104(a) and a \$1,000 penalty is assessed.

The penalties assessed above shall be paid within 30 days of this decision. Thereupon these cases are DISMISSED.



Arthur J. Amchan
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DEC 22 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-289
Petitioner	:	A. C. No. 48-00732-03523
v.	:	
	:	Belle Ayr Mine
AMAX COAL WEST INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Ann M. Noble, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania for Respondent.

Before: Judge Hodgdon

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Amax Coal West Incorporated, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petition alleges two violations of the Secretary's mandatory health and safety standards and seeks a penalty of \$100.00. For the reasons set forth below, I vacate the citations and dismiss the petition.

This case was heard on August 30, 1994, in Gillette, Wyoming. MSHA Inspector Lewis H. Klay Ko testified for the Secretary. Randall L. Rahm, Clyde W. Witcher, James L. Phipps, Jr., and Terry R. Bosecker testified on behalf of Amax. The parties also filed post-hearing briefs which I have considered in my disposition of this case.

BACKGROUND

Amax operates the Belle Ayr Mine in Campbell County, Wyoming. The mine consists of a strip coal mine, preparation and loading facilities. Among Amax's customers are two utilities, Northern Indiana Power and Service Company (NIPSCO) and Southwest Electric Power Company (SWEPCO).

NIPSCO and SWEPCO contracted with NALCO, a chemical company, to spray a dust suppressant on their coal after it had been loaded into railroad cars. NALCO, in turn, hired Commercial Building Systems (CBS) to perform the spraying at the Belle Ayr Mine. In addition, NALCO entered into a verbal agreement with Amax to be allowed to install two large tanks on mine property and to use Amax's power and water in order to carry out the spraying operation. NALCO leased the tanks from Jim's Water Service, which installed them on the site.

One of the tanks held water, and the other tank held a surfactant.¹ The water and the surfactant were mixed together for spraying on the coal. NALCO was experimenting with the most effective mixture of the two for suppressing dust.

Both NALCO and CBS have MSHA identification numbers issued under Section 45.3 of the Secretary's Regulations, 30 C.F.R. § 45.3. The CBS employee responsible for carrying out the spraying of the coal came to the mine only when a train with coal for one of the utilities needed spraying or when it was necessary to perform maintenance on the spraying equipment.

On November 10, 1993, Inspector Klay Ko issued two citations to Amax for violations found on the two tanks. The citations were subsequently modified on November 24, 1993. Citation No. 3588795 alleges a violation of Section 77.206(c), 30 C.F.R. § 77.206(c), and states that: "The green 20' (feet) tall water tank and the 20' (feet) tall surfactant [sic] tank, vertical ladder on each one was not provided a backguard. The surfactant [sic] tank is tan in color." (Pet. Ex. 2.) Citation No. 3588796 sets out a violation of Section 77.206(f), 30 C.F.R. § 77.206(f), and asserts that: "The green 20' (feet) tall water tank and the 20' (feet) tall tan surfactant [sic] tank.[sic] The vertical ladder on each one did not project at least 3' (feet) above the landing." (Pet. Ex. 3.)

Inspector Klay Ko was accompanied on the inspection by his supervisor, Larry Keller. Both were aware that the tanks were leased and used by CBS and NALCO. The inspector testified that he issued the citations to Amax, rather than to CBS or NALCO, because "the contractor was not on the mine property that I could issue the citation to. The production operator was." (Tr. 18.)

¹ A "surfactant" is a "[s]urface active agent, a substance that affects the properties of the surface of a liquid or solid by concentrating in the surface layer." Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 1107 (1968).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

It seems obvious from these facts that either CBS or NALCO should have been the recipient of the citations. The question in this case is whether Amax could be issued the citations. Amax argues that the inspector abused his discretion in issuing it the citations and that they should, therefore, be vacated and the civil penalty petition dismissed. I conclude that Amax is correct.

Prior Commission Decisions

While it is clear that the Secretary has wide enforcement discretion, there is little guidance on if, when or how he can abuse this discretion. In *Phillips Uranium Corp.*, 4 FMSHRC 549 (April 1982), the Commission vacated citations and orders issued to an operator, holding that they should have been issued to an independent contractor. In that case, Phillips owned mining rights and was conducting mining activities at a proposed uranium mine. It retained independent contractors to construct shafts and related underground construction. None of the contractors had MSHA identification numbers.

The Commission found that:

The citations and orders alleging violations of the Act described activities or omissions of the contractors' employees or conditions of the contractors' equipment or facilities relating to the work the contractors were engaged to perform. Phillips' employees, equipment or activities did not cause or contribute to the alleged violations. Phillips' employees did not perform any work for the contractors, but they did inspect and observe the progress of the work to assure compliance with quality control and contract specifications. The alleged violations were abated by employees of the contractors.

Id. at 549-550.

In holding that the contractors should have been cited, the Commission said:

The Secretary's insistence on proceeding against Phillips appears to be a litigation decision resting solely on considerations of the Secretary's administrative convenience, rather than on a concern for the health and safety of miners. In choosing the course that is administratively convenient, the Secretary has ignored Congressional intent, the

Commission's clear statements in *Old Ben* [1 FMSHRC 1480 (October 1979)], and the intent of his own regulations, and has subjected the wrong party to the continuing sanctions of the Act. The Secretary's decisions to continue against Phillips were not consistent with the purposes of the Act and must fail.

Id. at 553.

The Commission next took up the issue in *Cathedral Bluffs Shale Oil Co.*, 6 FMSHRC 1871 (August 1984). In that case, which also involved an independent contractor performing shaft construction, both the operator and the contractor had been cited. The contractor did not contest the citation, but the operator did. The Commission held that the fact that both the operator and the contractor had been cited, and the fact that the Secretary had formally adopted a policy concerning the issuance of citations for violations of the Act committed by independent contractors,² distinguished the case from *Phillips*.

However, the Commission went on to find that the Secretary had failed to properly follow his own policy in citing the operator. It stated:

We emphasize that in this case an independent contractor with a continuing presence at the mine site was cited for a violation it committed in the course of its specialized work; the contractor did not contest the citation; and the hazardous condition was abated promptly. Given these facts and the lack of any demonstrated exposure of Occidental employees or control by the production-operator other than routine verification of work performed, we believe that harm, rather than good, would be done to the goal of achieving maximum mine safety and health if such a strained interpretation and application of the Secretary's enforcement policy were upheld. Therefore, we decline to interpret the Secretary's regulations and guidelines to require precisely what their adoption was intended to avoid.

6 FMSHRC at 1876.

The same day the Commission issued its decision in *Cathedral Bluffs*, it issued a decision in *Old Dominion Power Co.*, 6 FMSHRC

² 44 Fed. Reg. 44497 (July 1980). Except for the introductory language, the criteria considered by the Commission in these guidelines was identical to the criteria presently contained in MSHA's *Program Policy Manual*, the text of which is found on p. 9, *infra*.

1886 (August 1984). In that case, Old Dominion Power Company was cited for a violation which resulted in a fatal accident to one of its employees at an electrical substation located on property leased by Westmoreland Coal Company from Penn-Virginia Resources. Although there were a number of issues in the case, the Commission found with respect to whether Old Dominion was properly cited with the violation, that it was an independent contractor and, consequently, properly cited. It held:

We emphasize that by citing Old Dominion for the violation committed by its employees, the Secretary has acted in accordance with the Commission's longstanding view that the purpose of the Act is best effectuated by citing the party with immediate control over the working conditions and the workers involved when an unsafe condition arising from those work activities is observed. *Old Ben, supra; Phillips Uranium, supra.* By citing the operator with direct control over the working conditions at issue, effective abatement often can be achieved most expeditiously. *Id.*

Id. at 1892.

Both *Cathedral Bluffs* and *Old Dominion Power* were reversed by federal courts of appeal. The Fourth Circuit in *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985), held that Old Dominion had such minimal contacts with the mine that it was not an "operator" under the Mine Act. *Id.* at 97. As a result, the court did not address the issue of whether the "independent contractor" was the appropriate entity to cite.

In *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986), the court reversed the Commission because "the Commission improperly regarded the Secretary's general statement of his enforcement policy as a binding regulation which the Secretary was required to strictly observe" Consequently, no opinion was offered on whether the citation could have been issued to the operator, but the case was remanded to the Commission for further action consistent with the opinion.³ *Id.*

The next occasion that the Commission had to address this issue was in *Consolidation Coal Co.*, 11 FMSHRC 1439 (August 1989). As in *Phillips Uranium* and *Cathedral Bluffs*, this case

³ The Commission remanded the case to the Administrative Law Judge "to determine the liability of Occidental for the violation of its independent contractor in light of the court's opinion." *Cathedral Bluffs Shale Oil Co.*, 8 FMSHRC 1621, 1622 (November 1986). There is no further, published record of the case.

involved shaft construction by an independent contractor. As in *Cathedral Bluffs* both the operator and the independent contractor had been cited for the violations and the independent contractor did not contest the citations. Relying on *Phillips Uranium*, the operator had argued at trial that the Secretary had not properly exercised its enforcement discretion in citing the operator.

The judge had concluded that *Phillips Uranium* was not applicable in a case where both the operator and the independent contractor had been cited. *Id.* at 1442. The Commission affirmed the judge, stating:

In this instance, the Secretary pursued enforcement action against both a production operator and its contractor for electrical violations occurring in an underground mine setting wherein the employees of both the production operator and the independent contractor were exposed to potential hazards occasioned by the violations. We have carefully reviewed the record, the judge's decision, and the parties' arguments. We hold that the judge's conclusion that the Secretary's discretion was not abused in citing Consol in addition to Frontier for these particular violations is supported by the record, summarized above, relating to the violations and the inspectors' reasons for citing both parties,^[4] and is also supported by applicable precedent. See, e.g., *Old Ben*, *supra*, 1 FMSHRC at 1481-86; *Intl. U., UMWA v. FMSHRC*, *supra*, 840 F.2d at 83; *Brock v. Cathedral Bluffs Shale Oil Co.*, *supra*, 796 F.2d at 537-38; *BCOA v. Secretary*, *supra*, 547 F.2d at 246.

Id. at 1443.

In *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354 (September 1991), the Commission affirmed a judge's decision which held that the Secretary did not abuse her discretion in citing Bulk, an independent contractor of Bethlehem Steel, rather than James Krumenaker, a subcontractor leasing a truck and driver to Bulk. Stating that "[w]e believe that it is unreasonable to require the Secretary to pursue each of Bulk's 70 to 100 subcontractors," the Commission held that the judge's decision was "supported by applicable precedent, which clearly establishes that the Secretary has wide enforcement discretion. See, e.g.

⁴ The reasons given for citing both parties were that the violations occurred in Consol's mine, Consol's employees worked in the area where the contractor's employees were working part of the time, the cited conditions could affect other employees and areas of the mine and Consol's work relationship with Frontier. *Id.* at 1442.

Consolidation Coal Company, 11 FMSHRC 1439, 1443 (August 1989); *Cathedral Bluffs*, 796 F.2d at 537-38; *Old Ben*, 1 FMSHRC at 1481-86." *Id.* at 1361.

Most recently, the Commission decided *W-P Coal Co.*, 16 FMSHRC 1407 (July 1994). That case involved a decision to cite W-P, the company that held the mining rights to a mine, in addition to Top Kat, the company W-P had contracted with to perform the mining. The judge had relied on *Phillips Uranium* in concluding that the Secretary had impermissibly cited W-P based on "administrative convenience" rather than the protective purposes of the Act.

In reversing the judge, the Commission said:

We agree with the Secretary that the judge erred in relying solely on *Phillips Uranium*. That case, decided in 1982, was directed to the Secretary's earlier policy of pursuing only owner-operators for their contractors's violations. Subsequently, the Secretary's policy has been broadened to include pursuit of independent contractor-operators in some instances. It is now well established that, in instances of multiple operators, the Secretary may, in general, proceed against either an owner operator, his contractor, or both. *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1360 (September 1991); *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (August 1989). The Commission and the courts have recognized that the Secretary has wide enforcement discretion. See, e.g., *Bulk Transportation*, 13 FMSHRC at 1360-61; *Consolidation Coal*, 11 FMSHRC at 1443; *Brock v. Cathedral Bluffs Shale Oil Co.*, 790 F.2d 533, 538 (D.C. Cir. 1986). Nevertheless, the Commission has recognized that its review of the Secretary's action in citing an operator is appropriate to guard against abuse of discretion. E.g., *Bulk Transportation*, 13 FMSHRC at 1360-61; *Consolidation Coal*, 11 FMSHRC at 1443.

Id. at 1411. The Commission went on to examine W-P's involvement in the mining operation and concluded that "the record reveals that W-P was sufficiently involved with the mine to support the Secretary's decision to proceed against W-P." *Id.*

Analysis and Conclusions

Applying this precedent to the case at hand, it appears that this case is most like *Phillips Uranium*. However, although the Commission has not expressly overruled *Phillips Uranium*, it severely limited its applicability in *W-P Coal*. Consequently, since this case does not involve "the Secretary's earlier policy

of pursuing only owner-operators for their contractors' violations," I conclude that *Phillips Uranium* is not pertinent.

Old Dominion and *Cathedral Bluffs* would also seem to support a finding that the Secretary abused his discretion in citing Amax. Although both cases were subsequently overruled by the courts, neither was overruled on the issue of whether the operator, in *Cathedral Bluffs*, or the independent contractor, in *Old Dominion*, should or should not have been cited for the violation. Therefore, it would seem that the reasons given by the Commission for concluding that the operator should not have been cited, with the exception of its holding that the Secretary's guidelines were binding, and that the independent contractor was correctly cited would still provide guidance today.

On the other hand, it may also be significant that since *Cathedral Bluffs*, there have been no Commission decisions finding an abuse of the Secretary's discretion in citing either the operator or the independent contractor or both. The later cases, *Consolidation Coal*, *Bulk Transportation* and *W-P Coal*, seem to have been decided on the degree of involvement between the operator and the independent contractor. Therefore, I conclude that while *Cathedral Bluffs* and *Old Dominion* may be instructive in this case, they are not dispositive.

Were it not for the Commission's statement in *W-P Coal* that Commission review guards against an abuse of discretion by the Secretary in issuing a citation, one might conclude from the most recent cases that the Secretary is free to cite the operator, the independent contractor, or both, as he sees fit. However, by stating that it will guard against an abuse of discretion the Commission has clearly implied that there is some limit to the Secretary's enforcement decisions. While the Commission has never set out what that limit is, and the term "discretion" indicates the absence of a hard and fast rule, it does mean that the Secretary cannot act arbitrarily or capriciously. *Langnes v. Green*, 282 U.S. 531, 541 (1931).

While acknowledging that the Secretary has wide enforcement discretion, it appears that if ever there was a case where the Secretary abused this discretion in citing an operator instead of an independent contractor, this is it. Amax has virtually no involvement with NALCO or CBS. The independent contractor was not hired to perform services for Amax, but for two of Amax's customers. The contractor was not retained by Amax, but by the customers. Conversely, in all of the cases discussed above, there was a contractual relationship between the operator and the independent contractor.

Although the violations occurred within Amax's property area, they occurred on property leased to NALCO.⁵ The location of the tanks was not in the same area that Amax's miners were working. Nor did any of Amax's employees have any duties that would require them to go into the NALCO area. The cited conditions could only affect Amax employees if an employee deliberately went out of his way to go to the tanks and then decided to climb the tanks. The violations could have no effect on any of Amax's mining operations or employees performing those operations anywhere in the mine.

While failing to follow his own guidelines concerning enforcement against independent contractors is not binding on the Secretary, not following them may well be an indication of an abuse of discretion. Volume III, Part 45, of MSHA's *Program Policy Manual* 6 (07/01/88 Release III-1) states that "[i]nspectors should cite independent contractors for violations committed by the contractor or by its employees. Whether particular provisions apply to independent contractors or to the work they are performing will be apparent in most instances." (Pet. Ex. 4.) Clearly, under this standard NALCO should have been cited.

The manual also advises that:

Enforcement action against a production-operator for a violation(s) involving an independent contractor is normally appropriate in any of the following situations: (1) when the production-operator has contributed by either an act or by an omission to the occurrence of a violation in the course of an independent contractor's work; (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor; (3) when the production-operator's miners are exposed to the hazard; or (4) when the production-operator has control over the condition that needs abatement. In addition, the production-operator may be required to assure continued compliance with standards and regulations applicable to an independent contractor at the mine.

Id.

None of these situations are present in this case. Amax did not contribute to the violations in any way. It did not

⁵ Originally, this was a verbal agreement. Subsequent to the violations, the NALCO's operation moved to a different site on Amax property and the lease was reduced to writing. (Tr. 44-45.)

construct the tanks, make arrangements for their use and placement or use the tanks for any of its mining operations. Nor were the tanks used by the contractor in connection with any of Amax's mining operations.

To argue that permitting the tanks on the property and failing to inspect them for possible violations are acts or omissions contributing to the occurrence of a violation, as the Secretary does, is to argue that there can never be a situation when the contractor rather than the operator should be cited. By that standard, Amax would always be responsible for every violation occurring on its property. Under that standard Amax had an obligation to inspect another contractor's pickup truck, which was cited the same day, for a defective parking brake. (Tr. 25.) Yet even the inspector agreed that the contractor was the proper entity to cite in that case.

Amax did not contribute by act or omission to the continued existence of a violation committed by an independent contractor for the same reasons it did not contribute to the occurrence of the violation. Interestingly, the Secretary argues that (1) applies in this case, but (2) does not. Yet it would seem that the reasons he gives for (1) being applicable, that Amax permitted the tanks on the property and did not inspect them, would also apply to (2).

Amax's miners were not exposed to the hazards. None of them had duties that required them to work around the tanks or to climb the ladders on the tanks. None of Amax's employees had any reason to be in the vicinity of the tanks, as tanks were not in an area normally travelled by those employees, and the ladders were on the opposite side of the tanks. (Tr. 89.) To argue that this guideline applies in this case because an Amax employee was not prevented from climbing the ladders would stretch the guideline beyond relevance.

Finally, it is obvious that Amax had no control over the condition needing abatement. It had no authority to put a backguard on the ladders, put handholds at the top of the ladders, remove the ladders from the tanks or in any meaningful way correct the situation. The fact that, having been issued a citation, Amax directed CBS to remove the tanks from its property does not demonstrate that Amax had control over the condition needing abatement. Clearly, the entity having control over the violative conditions was CBS or NALCO.

The manual's guidelines all indicate that the contractor, rather than Amax, should have received the citations. To argue, as the Secretary does, that solely by permitting NALCO to be on its property Amax's conduct satisfies the guidelines would render the guidelines superfluous and unnecessary.

In this case, the only reason given for citing Amax instead of CBS or NALCO is that no one from either of those companies was present at the time the inspector wanted to issue the citation. This reason does not even rise to the level of administrative convenience since that term is generally used in connection with convenience in prosecuting the case. See, e.g., *W-P Coal* at 1409. Here, only convenience in serving the citation was involved. Even if a representative of the contractor was not immediately present to accept the citations, the citations could have been served by mail.⁶ Consequently, there was no reason not to cite the independent contractor.

ORDER

In view of the above, I conclude that the Secretary abused his discretion in citing the production-operator rather than the independent contractor for the violations in this case. Accordingly, Citation Nos. 3588795 and 3588796 are **VACATED** and the Petition for Civil Penalty is **DISMISSED**.



T. Todd Hodgdon
Administrative Law Judge

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⁶ Section 45.5, 30 C.F.R. § 45.5, provides that "[s]ervice of citations, orders and other documents upon independent contractors shall be completed upon delivery to the independent contractor or mailing to the independent contractor's address of record."

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 27 1994

BLUESTONE COAL CORPORATION, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 93-165-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 2723399; 1/13/93
	:	Keystone No. 6 Strip
	:	Mine ID 46-03404
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. WEVA 94-117
BLUESTONE COAL CORPORATION, Respondent	:	A. C. No. 46-03404 03509
	:	Keystone No. 6 Strip

DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for the Secretary;
David J. Hardy, Esq., Jackson & Kelly, Charleston,
West Virginia, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

In this consolidated contest and civil penalty proceeding Bluestone Coal Corporation (Bluestone) contested the validity of an imminent danger order of withdrawal issued at its Keystone No. 6 Strip Mine pursuant to section 107(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C. § 817(a) and the Secretary of Labor (Secretary) sought the assessment of civil penalties for alleged violations of 30 C.F.R. §§ 77.1600(b), 77.1607(c) and 77.1600(a). The violations were charged in citations issued pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), and in association with the order of withdrawal. The Secretary further alleged that the violations were significant and substantial contributions to mine safety hazard (S&S violations).

Pursuant to notice, the cases were heard in Beckley, West Virginia. Subsequently, the Secretary's Mine Safety and Health Administration (MSHA) vacated the withdrawal order. Counsel for the Secretary stated, "[After] considering all of the evidence of record, the Secretary determined that [the] [o]rder ... could not be sustained" (Sec. Br. 3, Apex. A). For the same reason MSHA vacated the citation alleging a violation of section 77.1600(a) (failure of Bluestone to restrict haulage roads to authorized persons) (Sec. Br. 3, Apex. B).

Issues left for resolution are whether the alleged violations of sections 77.1600(b) and 77.1607(c) occurred, if so, whether they were S&S, and the appropriate penalties to be assessed. I will discuss evidence relating to the vacated order and citation only to the extent it bears upon these issues.

STIPULATIONS

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

1. Bluestone is subject to the jurisdiction of the Act.
2. The Administrative Law Judge has jurisdiction to hear and decide the case.
3. The orders of withdrawal and citations were issued by authorized representatives of the Secretary of Labor and were properly served upon Bluestone.
4. Penalties proposed for the alleged violations if assessed will not affect Bluestone's ability to continue in business.
5. Bluestone is a small operator with an excellent history of compliance.
6. The alleged violations were abated in a timely fashion.

(Tr. 11 for all six stipulations.)

THE EVIDENCE

THE SECRETARY'S WITNESSES

LARRY K. MURDOCK

Larry K. Murdock, is a federal mine inspector for surface coal mines. His duties require him to inspect all aspects of a mine, including haulage roads. Murdock has inspected Bluestone's

Keystone No. 6 Strip Mine since March 30, 1990 (Tr. 17). Prior to January 1993, he inspected it approximately five times (Tr. 18, 58).

The Bluestone operation consisted of a large land tract, portions of which are leased to various independent contractors. The contractors develop and operate underground coal mines. The number of mines on the Bluestone property varies between 8 and 13 (Tr. 19.) A mix of county, state, and private roads are used on the operation - they include two main haulage roads. The haulage roads lead to Bluestone's preparation plant where coal from the contractors' mines is processed (Tr. 20).

On January 11, 1993, Murdock traveled to the Bluestone property to inspect the preparation plant. Between 1:50 p.m. and 2:00 p.m., while in the central control room of the plant, he heard that a coal truck had overturned on the property and that an ambulance was needed (Tr. 21-22). He went immediately to the mine foreman's office. While the foreman called the ambulance, Murdock left the office, got in his automobile, and drove to the accident scene (Tr.22).

The coal truck was lying on its side. Fuel had leaked from the truck and the fire department had been called to wash down the gasoline (Tr. 28). The truck driver, Theodore Payne, was dead. His body was lying in the haulage road some distance from the truck (Tr. 24).

Murdock began to gather information about the accident (Tr. 25.) Murdock also called his supervisor (*id.*). Murdock then issued to the mine foreman an order of withdrawal pursuant to section 103(k) of the Act, 30 U.S.C. § 813(k). The order sought to preserve the accident scene by closing to coal trucks the road Payne had traveled (Tr. 26).

MSHA personnel -- including Jerry Sumpter, an accident investigator and John Cheetham, an electrical inspector -- soon arrived. They were joined by personnel from the State of West Virginia, Bluestone officials and Thomas Mullins, the owner of Mullins Trucking Company, Payne's employer (Tr. 29-30).

According to Murdock, the accident occurred when the truck failed to negotiate one of the last turns in the road. At the turn two parallel roads of different elevations -- an upper road and a lower road -- entered the haulage road. After failing to make the turn, the truck left the haulage road and traveled onto the upper road. It hit the berm on the right side of the upper road, fell on its side, and slid onto the lower road ("T" on Joint Exh. 1; Tr. 33-34).

Payne started the fatal trip at the No. 39 Mine, a mine operated by Blackstone Coal Company (Blackstone), a contractor of Bluestone (Joint Exh. 1, upper left had corner; Tr. 36, 85.)

Murdock described Payne's route. From No. 39 Mine, Payne traveled along County Road 52/6 until he reached County Route 6. Payne turned right onto Route 6 and proceeded until shortly before the Bluestone Shop where he bore left onto County Route 6/2. After traveling a short distance Payne crossed onto the Bluestone's property ("X" on Joint Exh. 1). At this point, the road's name changed from County Route 6/2 to Company Road D-11-82 (Tr. 36-37; Joint Exh. 1).

Payne proceeded along D-11-82, past a box cut (a "Y" intersection) where D-11-82 was joined by another road. Further along, Payne passed an impoundment on the left. To this point the road contained only slight grades (Tr. 38). However, just past the impoundment the grade increased greatly and the road entered an area where it turned several times (Tr. 37).

Near the bottom of the steep grade the road came to another "Y" where a vehicle had to bear left to go the plant. Here the road contained some final sharp turns (Tr. 38). Payne failed to complete a turn and the truck went straight ahead onto one of the access roads where it overturned (Tr. 39).

Murdock stated that the investigation team surveyed the scene and because of early darkness, left the mine shortly afterward.

Murdock had last inspected the mine in October 1992. At that time he had not noted any imminent danger that involved the haulage road. Murdock also agreed that in October he had written no citation for the lack of, or the inadequacy of, traffic signs (Tr. 68).

When he traveled the road during prior inspections he never observed trucks going in excess of five to seven miles per hour (Tr. 75, 97). He agreed that a truck driver was best equipped to control the speed of a truck and when asked whom he would cite if he observed a truck using excessive speed on a haulage road, Murdock stated that he would cite the operator of the truck -- i.e., the person or company who owned or controlled the truck. However, he added that he might cite the operator responsible for the haulage road also since a speeding truck would endanger others using the road (Tr. 77). Murdock acknowledged that portions of the haulage road near the accident site were traveled by the general public going to or from their homes (Tr. 74-75).

With respect to the cause of the accident, the truck appeared to have gone out of gear during its descent of the road. Murdock agreed that Bluestone had no ability to control the loss

of gear and that "[t]he only possibility to help... [Payne] not lose control of the truck is if there is any other means that they could have provided that would keep him from getting into excessive speed and not [be] able to control [the truck]" (Tr. 79).

JERRY SUMPTER

Jerry Sumpter, an accident investigator for MSHA, was the leader of the MSHA investigation team. Sumpter stated that he was informed of the accident and arrived at the mine late in the afternoon on January 11. Payne's body had been removed but his overturned truck was blocking the access road. The MSHA team photographed the scene. Because people had to use the road to get to and from their homes, Sumpter permitted the truck to be pulled out of the way (Tr. 146). It was growing dark and the team decided to continue the investigation the next day.

On January 12, Sumpter assisted in inspecting the truck's brakes. The brakes were out of adjustment. Also, there was not enough air pressure in the system to apply the brakes to the brake drums. As a result, the brakes were ineffective (Tr. 148). Sumpter stated that if he had found the brakes in this condition during a regular inspection, he would have removed the truck from service (*Id.*). As a result of the investigation Mullins Trucking was issued a citation for inadequate brakes (Tr. 228, 231; Bluestone Exh. 5). Sumpter speculated that with good brakes Payne might have been able to control the truck (Tr. 264).

On January 12, Sumpter walked the haulage road. He was accompanied by Skip Castanon, his supervisor. Sumpter tried to determine if the roughness of the road had caused the truck's transmission to slip out of gear. The only thing Sumpter noticed was a "washboard area," near the impoundment. Sumpter described the area as "very rough" (Tr. 151). Gravel that had been used to fill some of the washboard-like ruts had been worn away by traffic (Tr. 151-152).

As a result of the investigation, Sumpter issued an imminent danger order of withdrawal (Gov. Exh. 3). Sumpter stated:

I issued it because of the steepness, number one, of the grade, and the payload that the truckers were using to come off of this steep grade. And also ... there was no means available in case of a runaway with this truck. Also, I didn't observe very many signs. I observed two that particular day (Tr. 159).

With regard to the signs Sumpter stated that there was a 20 miles per hour sign at the top of the steep grade. Also, there was a sign stating that all visitors were required to

report to the preparation plant (Tr. 160). With regard to the payloads, Sumpter believed a coal truck should haul 28 tons of coal. MSHA's investigators reviewed Bluestone's records and found that loads at Keystone No. 6 Strip Mine averaged 34 to 36 tons. These heavy loads put inordinate stress on the brakes.

Another problem was that as the trucks came down the hill the drivers changed gears to control the speed of their descent. Sumpter stated that during upshifting or downshifting it was not unusual to miss a gear. When this happened a truck could run away (Tr. 163). He added, "[T]hat is basically what we thought may have happened, that the truck either jumped out of gear or the brakes was overheated. Then the victim has ... two choices. If he jumps, he may die; if he stays with the truck, he may die... . When he ran away toward the last curve ...he rode the truck out. Then he decided to jump and the end result was fatal" (Tr. 163-164).

Sumpter was shown a copy of a memorandum from Castanon to MSHA District Manager L.D. Phillips (MSHA District 4) regarding the results of a survey of road grades in the district. The December 28, 1992 memorandum indicated that in District 4 there were 41 haulage roads with grades of 15 percent or greater (Bluestone Exh. 6). Sumpter understood that if a grade was over 12 percent he could require the operator to install a vehicle escape ramp or some other kind of safety device (Tr. 282). Sumpter noted that following the accident the company installed both escape ramps and "Australian barriers" along the road (Tr. II 15-16). ("Australian barriers" are dirt mounds that are approximately three feet high and that are placed at intervals along a road. A truck can stop if it runs on top of the mounds and "bottoms out" (Tr. II 16).)

In addition to the imminent danger order, Sumpter issued the subject citations. Citation No. 2723400 was issued because Bluestone did not properly post the haulage road with rules, signals or warning signs (Gov. Exh. 4). Sumpter was asked what signs he believed should have been posted in order to comply with section 77.1600(b). He stated that a sign was needed prior to the start of the steep grade to warn truckers to use a lower gear and a stop sign was needed on the flat, before reaching the steep part of the grade. The signs should have required drivers to stop and select a lower gear to descend the grade (Tr. 168-169). He suggested the signs should have been located "in a conspicuous place" (Tr. 169). In addition, signs should have pointed out the particular hazards of the road -- for example, the washboard area or the curves. They should also should have indicated the speed at which it was safe to descend (Tr. 170).

The area involved in the violation was from the impoundment to the preparation plant, a distance of nearly one mile (Tr. 170-171). In addition to the previously mentioned signs, he believed

yield signs or stop signs should have been installed where roads crossed or entered the haulage road, and in the flat areas signs should have limited speeds to 15 miles per hour (Tr. 171). Finally, signs should have advised drivers of vehicles traveling the road to use their C.B.s to monitor conditions on the roads (Tr. 172).

Sumpter explained that Citation No. 2723400 was abated when various signs were posted. Specifically, at the start of the steep grade a sign was posted instructing truck drivers to use a lower gear. Also, signs were installed at the top of the hill instructing truckers to stop, to shift to a lower gear and to reduce speed to 15 miles per hour (Tr. 180-181). In addition, a sign was posted instructing truck drivers to monitor their C.B.'s.

Section 77.1600(b) states in part that "traffic rules, signals and warning signs" shall be "standardized." When asked to state what the word "standardized" meant to him, Sumpter replied that it "meant a uniform system throughout the property that each and every employee ... could understand" and that signs should be repeated every so often (Tr. 183).

Sumpter believed the lack of signs was an S&S violation in that it was going to result in a serious or fatal accident "sooner or later". He also believed the violation contributed to Payne's death (Tr.172-174).

Sumpter was asked about Bluestone's negligence in allowing the alleged violation to exist. He had indicated on the citation form that the company exhibited a "moderate" degree of negligence. However, he stated that if he were to cite the company again for the same violation, he would consider the company's negligence "low" (Tr. 269).

Sumpter also observed that many of the company's rules and regulations were vague and that Bluestone should have included in the rules a specific instruction for truckers to use low gears on steep grades rather than provide that the speed limit on haulage roads was 20 miles an hour (Tr. 178, 179). The rules also should have specified the tonnage that was safe to haul. The company should have known that there would be a temptation to overload the trucks since the drivers were paid on the basis of the weight of the coal they hauled (Tr. 179).

After being cited for the alleged violation Bluestone updated the rules and regulations (Bluestone Exh. 1) and retrained "everybody on their property" to make sure they understood the rules (Tr. II 30). Although Sumpter had not seen the undated rules, he understood they specified which gears

should be used in descending the roadway, indicated where to stop before proceeding down the grade and required trucks to maintain a speed limit of ten miles per hour (Tr. II 31-32).

Sumpter testified he also issued Citation No. 2723974, which alleged a violation of section 77.1607(c), a mandatory standard requiring that "[e]quipment operating speeds ... be prudent and consistent with conditions of roadway, grades and the type of equipment used" (Gov. Exh. 5). When asked to explain why he believed the standard had been violated, Sumpter stated that he had spoken with several truck drivers and that there was no consistency regarding the gear they used to descend the grade. This resulted in trucks traveling the grade at different speeds. He also noted the condition at the road near the impoundment and stated that the washboard area might have caused Payne's truck to go out of gear. However, he did not know for certain why Payne lost control of the truck and did not know the speed of the truck or the exact spot at which Payne lost control. (Tr. 185-186, 187, 271). Although there were no eyewitnesses, Payne had been heard over the truck's C.B. to say that he had lost control of the truck and it was believed the truck was moving "pretty fast" (Tr. 189, 240).

In Sumpter's opinion the alleged violation lead to Payne's death. It was logical that if the truck was not kept under control a serious or fatal injury was reasonably likely to result. 188-189).

While in Sumpter's view Bluestone management was negligent in allowing the violation to exist, its negligence was mitigated by the fact it kept the haulage road relatively well surfaced, except for the washboard area (189-190).

Finally, Sumpter stated that in his opinion 30 trucks daily traveled the haulage road to the plant. He described the road as having been used for "years" (Tr. 224). He knew of no other reportable accident on the road, and there was no evidence Payne was an unsafe driver. In fact, some of those interviewed by the investigation team stated that he was a good and well-respected driver (Tr. 225, 243-244).

AUBREY T. CASTANON

Aubrey T. "Skip" Castanon, is an MSHA supervisor and specialist in accident investigation. In his capacity as an accident investigator Castanon researched the hazards associated with haulage roads. In July 1992, a fatal accident involving a coal haulage truck lead MSHA to survey haulage road grades at all coal mines in District 4. The survey resulted in Castanon's memorandum of December 28, 1992, to District Manager Phillips (Tr. II 40-41; Bluestone Exh. 6). Castanon testified that MSHA discovered that when a coal truck is loaded at or above its

maximum recommended capacity, and is descending a steep grade, the load shifts toward the front of the truck and the front brakes and drive train come under a strain that can cause them to fail (Tr. II 43). MSHA advised mine operators of this and other hazards associated with steep grades. MSHA also sent to operators a 1977 Bureau of Mines Informational Circular titled "Design of Surface Haulage Roads" (Tr. II 50).

Despite these initiatives, Castanon did not believe that MSHA's response to haulage road accidents had been adequate. He stated, "[W]e probably recognize some of the problems with haulage road design.... And I just don't think we have taken the data that we're supposed to be taking ... and disseminate[ed] that information to the mining industry the way we should, or develop[ed] regulations based on that information" (Tr. II 53).

Castanon was at the Mine on January 12. In addition, on January 13 he participated in interviews conducted by MSHA concerning the accident. Castanon believed that Citation No. 2723400 correctly cited a violation of section 77.1600(b) because the only sign he saw along the haulage road was one stating "All first-time visitors report to the preparation plant" (Tr. II 62). He observed no signs concerning speed or grades.

In Castanon's opinion a speed limit sign should have been posted at the top of the grade. In addition, signs were needed about not passing on the haulage road, and about truckers monitoring their C.B. channels (Tr. II 63). Had such signs been in place they would have reminded Payne to descend the hill in a safe manner. The failure to remind Payne of the dangers presented by the grade played a part in his death (Tr. II 81). In addition, Bluestone only gave a 20 miles per hour speed limit for the roadway in its rules and regulations, this was adequate for the top of the road where the grades were less, but where the grade became steeper, the limit should have been eight or ten miles an hour (Tr. II 68-69).

With respect to an interpretation by MSHA of section 77.1600(b), Castanon stated that as far as he knew, there was no official interpretation. (Tr. II 142-143).

Castanon also believed Citation No. 2723974 properly cited a violation of section 77.1607(c). In his opinion, Payne downshifted and the truck went out of gear; or, the truck hit the washboard area of the road and went out of gear. Failure to subsequently control the truck's speed contributed to Payne's death (Tr. II 82, 144). (However, there was no indication that Payne was traveling at an excessive speed when he lost control of the truck (Tr. II 115). Nor was there any evidence Payne was driving recklessly prior to the accident (Tr. II 132).) In his view, Mullins Trucking also should have been cited for Payne's failure to control the truck (Tr. II 126-127).

Castanon believed the Bluestone was moderately negligence in allowing the violation to exist (Tr. II 84).

BLUESTONE'S WITNESSES

JOHN G. CHEETHAM, JR.

John G. Cheetham, Jr., an MSHA inspector who investigates accidents involving heavy equipment, appeared under subpoena and as an adverse witness. He estimated that during the proceeding 16 or 17 years he had investigated approximately 65 accidents involving coal haulage trucks (Tr. 107). As part of the investigation of the January 11 accident Cheetham examined the truck's braking system. There were six wheels on the truck -- four in back and two in front. Consequently, there were six brake drums (Tr. 108, 115). The brake drums were "worn excessively, with grooves and heat cracks" (Tr. 108, see also Tr. 116-117). In addition three of four back brakes were out of adjustment (Tr. 118-120). Cheetham estimated that 60 to 70 percent of the truck's breaking capacity had been lost (Tr. 121). The truck was dangerous to operate; so much so that he would have removed it from service (Tr.122).

Cheetam was asked about the cause of the accident. In his opinion Payne had attempted to change gears -- to downshift. When he could not get the lower gear, the truck ran away (Tr. 122). With the braking capacity essentially gone, it was not possible to stop the truck on the steep grade (Tr. 122-123).

BYRD E. WHITE, III

Byrd E. White, III, is vice president and secretary of Bluestone. White has been affiliated with the company for more than 17 years. White testified that at the time of the accident Bluestone employed 13 miners. There was a superintendent (Dale Wright), an assistant superintendent, a chief engineer, seven hourly employees and three other employees who did general engineering work (Tr. II 150-151).

White described the mining arrangements at the Keystone No. 6 Strip Mine. According to White, Bluestone leased the land, portions of which it subleased to independent contractors. The contractors mined coal and delivered it to Bluestone's preparation plant. Bluestone's standard contract required the contractors to mine in accordance with federal and state law, to hire their own employees and buy their own equipment. Bluestone prepared the leased sites for mining, but the contractors developed their own mines. Bluestone paid the contractors a specified sum per ton for coal brought to the preparation plant. After mining was finished, Bluestone reclaimed the land (Tr. II 152-153).

Bluestone maintained the roads on its property, whether they were haulage roads or county roads (Tr. II 153, 158-159). Bluestone's contract did not specify how coal was to be transported to the plant, nor did it specify how the contractor was to hire truckers (Id.).

In total, Bluestone leased approximately 26,000 acres of land. In January 1993, there were between 12 and 15 mines on the property. As White explained, "The number changes; somebody quits, somebody else comes in. Sometimes a mine is vacant for 2 or 3 months before we get somebody to replace them" (Tr. II 154).

Blackstone was one of the companies operating a mine in January 1993. As with other contractors, Blackstone contracted to mine the coal, bring it to the plant and be paid on a per-ton-delivered basis (Tr. II 155). Blackstone hired Mullins Tucking.

DALE WRIGHT

Dale Wright is Bluestone's superintendent. He testified in detail about the Bluestone property and the roads thereon. Wright stated that the grade of the haulage road traveled by Payne varied. From the box cut to the impoundment the grade was 5.9 percent. From the impoundment to the spot where the truck overturned the grade was 12 percent (Tr. II 185).

Wright also testified that he had been involved in writing Bluestone's rules and regulations for haulage roads. In fact, he was the author of those in effect at the time of the accident (Tr. II 189; Bluestone Exh. 1). Bluestone gave the rules and regulations to its contractors, along with a cover letter instructing the contractors to make certain they and their subcontractors complied. In addition, some copies were handed out to individual truckers (Tr. II 189-190). The purpose was to make sure mining contractors understood the truckers they hired were the contractors' responsibility and that it was the contractors' duty to make sure the truckers understood the rules and regulations (Tr. II 190). The rules were also posted at the mine (Id.).

On an average day approximately 20 different trucks traveled to the preparation plant. The trucks made approximately 60 trips downhill from the box cut to the plant (Tr. II 191). This portion of the road had been used since 1987. Approximately 300 trips per week were made by coal trucks from the box cut to the plant. Wright estimated that since 1987 there were approximately 46,000 trips down this portion of the road (Tr. II 192). Aside from the accident involving Payne, Wright knew of no other reportable accident on the road (Tr. II 193).

Using photographs and the mine map, Wright identified signs posted on the property. There were three signs notifying first time visitors to report to a mine office, there were nine "no-trespassing" signs, there was a sign stating "Danger, watch out for coal trucks" and one stating "Proceed with caution. Coal truck traffic.", there were two environmental permit signs and there was a sign warning that the property was patrolled by security police (Tr. II 197-206; Bluestone Exh. 8; Joint Exh. 1). After the citation was issued Bluestone added yield and speed limit signs that were virtually identical to those used on public roads (Nos. 3 and 6 on Bluestone Exh. 8; Tr. II 230, 232).

Wright stated that he was surprised to be served with a citation alleging a violation of section 77.1600(b). He explained that many inspectors had traveled the roads -- inspectors who were inspecting Bluestone's facilities and those who were traveling to the contractors' mines -- and he had no knowledge of any previous citation for a such violation nor of comments about the signs and rules (Tr. II 207).

THE MERITS

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
2723400	1/13/93	77.1600(b)	\$ 6000

The citation states in part:

Management did not have traffic rules, signals or warning signs standardize [sic] on the steep mountain incline to provide the coal haulage equipment a warning of the steep incline on [B]urke [M]ountain road to the preparation plant. This was revealed after a fatal truck haulage accident (Gov. Exh. 4).

Section 77.1600(b) states that, "Traffic rules, signals, and warning signs shall be standardized at each mine and posted."

THE ARGUMENTS

The Secretary argues that "The failure to have any signs indicating the safe manner for travelling on the road clearly is a failure to comply with the regulation, which requires that rules, signals and warning signs be posted[T]o adequately ensure the safety of those driving on the hill, signs warning of hazardous conditions, steep grades, speed limits, and curves, are necessary. Likewise, to insure that drivers were consistent in how they travelled on the hill, Bluestone should have had a sign reminding drivers to stay in a low gear and to avoid shifting as they descended the hill" (Sec. Br. 8-9 (citations omitted)).

The Secretary also argues that Bluestone's haulage rules and regulations were not enforced by Bluestone and that "rules not consistently enforced or followed cannot be considered 'standardized' as the regulation requires" (Sec. Br. 10). Further, the Secretary attacks the rules because they were inadequate in that they indicated a speed limit -- 20 miles per hour -- that was too fast for the road where the accident occurred and because they did not address steep grades, sharp curves, or remind drivers to stay in low gear.

Bluestone argues that section 77.1600(b), as applied in this case, is void for vagueness. Bluestone points to the conflicting testimony among MSHA witnesses as to the meaning of the standard and the absence of any MSHA interpretive policy (Bluestone Br. 11-15).

THE VIOLATION

When the Secretary alleges the violation of a mandatory safety standard, it is essential first to determine what the standard requires. The wording of section 77.1600 (b) is simple. At each mine, traffic rules, signals, and warning signs are to be standardized and posted. The word "standardized" conveys the act of bringing the rules, signals and warning signs into conformity with a standard in order to make them uniform. See Webster's Third New International Dictionary (1986) at 2223. The word "posted" conveys the act of displaying the standardized rules, signals and warning signs where they may be observed and read. Id. at 1771.

The standard is broadly worded, and, as Bluestone notes, the Commission has enunciated a "reasonably prudent person" test for such a standard -- "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." See e.g., Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990).

Uniformity of signals and warning signs would, I believe, be understood by a reasonable person to refer to both the physical nature of the signal or sign and to its wording (See Tr. II 141-142). The uniformity of written rules would be likewise understood. Uniformity would also be understood to refer to the location of the rules, signals, and warning signs. That is to say, at substantially similar areas requiring the invocation of a rule, signal or warning sign, the same rule, signal or warning sign would be required to be placed in substantially the same location. As Sumpter stated, if a warning sign was required at the top of a certain grade, a similar sign should be placed at the top of each similar grade (Tr. 183). Given the simple language of the standard, this is hardly a revolutionary or convoluted interpretation and because such an understanding is, in my

opinion, well within the keen of a reasonably prudent person familiar with the industry, I decline Bluestone's invitation to find section 77.1600(b) void for vagueness.

However, the question remains whether Bluestone violated the standard as charged. In this regard, it is important to keep in mind that the standard does not specify which rules, signals or warning signs are required to be exhibited at certain places. Rather, it mandates that if they are exhibited they be uniform in appearance and location and they be posted, that is, placed where they may be observed and read.

It is clear from the testimony that Bluestone was not cited because its rules, signals and signs lacked uniformity or were exhibited improperly. Rather, it was cited because it did not have certain specific signs in the places MSHA believed they should have been and because it did not include among its rules and regulations those MSHA thought necessary.

The testimony of Sumpter, who issued the citation, is telling:

Counsel for the Secretary: You only saw two signs on the haul road. Is that correct?

Sumpter: Yes that is all I saw.

Counsel for the Secretary: Now, what signs would be necessary to comply with the regulation, in your opinion?

Sumpter: By looking at that particular property and the haul roads, you need [a sign], where you descend the steep grades ... [to] warn the truckers to use a lower gear, or maybe even a stop sign if they want to stop on the flat before going over the steep ... if you select a lower gear, it keeps your miles per hour down, under say a ten-mile-an hour; not what management had posted, which was twenty (Tr. 168-169).

* * *

Counsel for the Secretary: Are there any other signs you feel are necessary on the haul road?

Sumpter: I would try to take control ... saying how many miles an hour to descend that haul road in a safe manner and ... let them know that the hazards are all up and down the haul road. It would be various signs is what I'm saying (Tr. 170).

* * *

The signs should be posted all over the haul road ... Just take control of the area and say certain things. If you need to yield -- there are several roads there that cross each other; a yield signs or a stop (Tr. 171).

Counsel for the Secretary: Should there be any signs regarding communication?

Sumpter: There should be for your C.B. It should tell you what channel and no monkey play....You need to take control of that, also (Id.).

What troubled Sumpter was the fact that Bluestone had not installed the type and number of signs he believed were required where he believed they should be. Lacking a standard mandating operators install warning signs at hazardous areas and install signs advising those entering the property of the reporting and communication rules to be followed, Sumpter sought to enforce such requirements through section 77.1600(b), a standard designed for another purpose. (In this regard it is instructive to compare the Traffic Safety regulations in Subpart H of the standards for surface metal and nonmetal mines. 30 C.F.R. § 56.9100(b) requires "signs or signals that warn of hazardous conditions ... [to be] placed at appropriate locations at each mine.")

In like manner, Sumpter was troubled by the content of Bluestone's rules, not whether they were uniform and exhibited where they could be read.

Counsel for the Secretary: Did you consider these rules and regulations [Bluestone Exh. 1] adequate?

Sumpter: No, I do not (Tr. 177).

* * *

They should have put in here the steepness of the grades or, "Truckers Use Lower Gears," for example It's just saying speed limit on haul roads is twenty miles an hour. To me, that is vague. It mentions trucks in here, but it doesn't get into the actual haulage, what the truckers are really supposed to do (Tr. 178).

* * *

Take control of the coal trucks as far as telling them how much coal....I feel that should be in part of this policy (Tr. 179-180).

Lacking a standard specifying what the rules should contain, Sumpter tried to dictate their content through section 77.1600(b). (Again, it is instructive to reference the Traffic Safety standards in Subpart H of the mandatory standards for surface metal and nonmetal mines. 30 C.F.R. §9100(a) requires, "Rules governing speed, right-of-way, direction of movement, and the use of headlights to assure appropriate visibility, ... shall be established and followed at each mine.")

Because I find that Bluestone was not cited for a violation of section 77.1600(b), but rather for failing to conform to requirements that are outside the purview of the standard, I conclude that Citation No. 2723400 is invalid. I will order its vacation at the close of this decision.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
2723974	1/13/93	77.1607(c)	\$ 6,000

The citation states in pertinent part:

Based on evidence obtained during a fatal accident investigation it was determined that the 1979 DM 600 Mac coal haulage truck was being operated at a speed that was not consistent with the conditions of the roadway, grades, visibility and traffic while descending the Burk Mountain coal haulage road with a full load of coal. An accident occurred on 01/11/93 about 1:55 P.M. when the truck ran away and turned over at the switchback (Gov. Exh. 5).

Section 77.1607(c) states:

Equipment operating speeds shall be prudent and consistent with conditions of roadway, grades, clearance, visibility, traffic, and the type of equipment used.

THE ARGUMENTS

The Secretary's position is that "for whatever reason the victim lost control of the truck ... [and] that once he lost control he was not operating at a speed consistent with the conditions [of the roadway]" (Sec. Br. 15).

Bluestone focuses on the requirements of abatement imposed by MSHA -- the construction of Australian barriers and escape ramps and the limitation of haulage truck payload weights -- and asserts the Secretary is trying to impose requirements that can only be established through rulemaking (Bluestone Br. 17-22).

Bluestone also argues that MSHA should not be permitted to hold it responsible for an accident that resulted because the subcontractor (Mullins Trucking) of the independent contractor (Blackstone) failed to properly maintain or assure the safe operation of the subcontractor's truck (Bluestone Br. 9).

THE VIOLATION

The first question is whether a violation of the cited standard existed. If not, the issue of who should be held responsible is immaterial. As the Secretary notes, section 77.1607(c) is subject to the same "reasonably prudent person" test as section 77.1600(b). In the context of the alleged violation, this means whether a reasonably prudent person familiar with the mining industry, including the factual circumstances surrounding the January 11, 1993 accident, would have recognized the speed of Payne's truck as imprudent and inconsistent with the conditions of the road and truck.

All of the witnesses agreed that the accident occurred near the bottom of the grade when the truck failed to negotiate one of the last turns in the road. Cheetham thought the grade at its steepest point was between 13 percent and 16 percent (Tr. 126). Wright believed that the grade from the box cut to the accident site averaged 12 percent (Tr. II 185). Sumpter described the grade as "steep" (Tr. 159). All three witnesses agreed the grade was significant, and it is certain that unless the speed of a truck was fully controlled, the grade was hazardous.

Cheetam's testimony establishes that the brakes on the truck were substantially impaired. However, whether or not brakes that were fully functional would have allowed Payne to retain control of the truck, as Sumpter believed might have been possible, is not significant (Tr. 264). The fact remains that Payne did not retain control, as Payne himself exclaimed over his C.B. moments before his death (Tr. 189).

The record does not support a finding as to why Payne lost control. As the company points out, although MSHA's witnesses had their theories -- that the truck had gone out of gear or that the brakes had locked or that a combination of both had occurred (see for example Tr. 187)-- they were candid in stating they did not know for certain what had happened (see for example Tr. 79).

Further, none of the witnesses knew exactly where Payne lost control. Nor could they cite to any evidence that Payne was speeding or driving recklessly prior to losing control (Tr. 271, Tr. II 132).

Nonetheless, the inescapable fact is that at some point and for some reason, the loaded coal truck went out of control while descending the steep and potentially hazardous grade and that

near the bottom of the grade Payne failed to maneuver around one of the road's final curves. It is reasonable to infer that given the fact the accident occurred near the bottom of the grade and given the condition of the truck, the truck was traveling too fast to negotiate the curve. It is equally reasonable to conclude the truck's speed was neither prudent nor consistent with the grade, curve, and condition of the brakes and that this constituted a violation of section 77.1607(c).

In finding the violation existed I am not unmindful that MSHA might have chosen to cite a violation of section 77.1607(b), a standard that requires mobile equipment operators to have full control of moving equipment, and that such a citation might have been as appropriate, perhaps even more appropriate, than the citation of section 77.1607(c). see Island Creek Coal Co., 3 FMSHRC 1265 (ALJ Koutras). However, the fact that one set of circumstances can engender violations of more than one standard does not render invalid MSHA's choice of a standard or standards to cite. The fundamental question is whether the standard chosen has been violated.

The violation was terminated on February 2, 1993. The termination notice states in part:

As an additional safeguard four speed berms [i.e., Australian barriers] and three escape ramps have been provided on the haulroad in the event another truck should become a runaway (Gov. Exh. 5).

MSHA's rationale for requiring the barriers and ramps as a condition for abatement was explained by Murdock. When he was asked about Bluestone's ability to influence a driver's control over a truck Murdock responded, "The only possibility to help... [a driver] not lose control of the truck is if there is any other means that ... [Bluestone] could have provided that would keep ... [the driver] from getting into excessive speed and not being able to control it and lose it" (Tr.79). The barriers and ramps were part of the "other means" upon which MSHA insisted. In fact, Sumpter stated that he and other MSHA inspectors were told that if they found a grade over 12 percent, escape ramps or some other kind of safety device should be required (Tr. 282).

There are two reasons why Bluestone's argument that the citation is invalid because it is based upon a failure to fulfill requirements not contemplated by the standard can not prevail. First, and most important, there was a violation of the cited standard. The truck was not operated at a speed consistent with the conditions, grade and type of equipment used. Second, if Bluestone objected to the requirements for abatement of the citation, the Act provided a specific means to challenge those requirements. Bluestone could have refused to comply and could have sought review of any resulting section 104(b) withdrawal.

order, 30 U.S.C. § 814(b), by bringing a contest proceeding under section 105(d) of the Act, 30 U.S.C. §815(d). Bluestone could have argued the withdrawal order was invalid because it was unreasonable to require measures beyond the requirements of the cited regulation. As Judge Melick observed, "The Secretary is without authority under [s]ection 104(b) to compel performance of additional mining activities or to create new regulations beyond what is necessary to abate the precise violation charged." Drummond Company, Inc., 14 FMSHRC 2039,2042 n. 3 (December 1992). However, Bluestone did not chose to avail itself of this option and it is much too late for it to "end run" the statutory enforcement scheme.

BLUESTONE'S LIABILITY

Finally, I also reject Bluestone's view that the imposition of liability for the violation is contrary to existing decisional law (Bluestone Br. 8-9). The relationship of Bluestone, Blackstone, Mullins Trucking, and Payne is clear. Bluestone was the operator in overall charge of the mine. Bluestone contracted the mining of the No. 39 Mine to Blackstone. Blackstone subcontracted with Mullins Trucking to haul the coal. Payne was employed by Mullins Trucking.

In the past, MSHA has issued citations to independent contractors when the independent contractors have actual control over the violative conditions. The theory behind citing the contractor in such situations is that responsibility should lie with the party in the best position to alleviate the hazard. The theory recognizes that although under the Act a mine operator may be held liable for the violative conduct of another on the basis of the Act's imposition of liability without fault, the Secretary has wide discretion in citing the contractor or the mine operator or both and that he does not abuse his discretion when he chooses to cite the party in the best position to prevent the violation in the first instance. See Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1359-1361 (and cases cited therein.)

The Secretary has made clear that there are four instances in which he will exercise his discretion to cite mine operators for the violations of independent contractors: the mine operator contributed to the violation; the mine operator contributed to continued existence of the violation; the mine operator's employees were subjected to the hazard created by the violation; or the mine operator had control over the condition requiring abatement (III Program Policy Manual Part 45 at 6). However, the Secretary's discretion is not limited to these four instances, Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537-539, and, indeed, one commentator recently (and rather gratuitously) has suggested the law is such that the Commission will "rubber

stamp" any and all MSHA decisions to cite mine operators for independent contractor violations. C. Gregory Ruffennach, Independent Contractors: How Things Have changed, Mine Safety and Health News, November 18, 1994, at 585-589.

While I suspect that no one would be more surprised than the Secretary if this were indeed true, I believe in this case there are traditional and compelling reasons to find that the Secretary's citation of Bluestone was well within his authority. First, the hazard created by the violation was not limited to Payne. Operation of the truck at a speed that was inconsistent with the grade and curve of the road and the condition of the truck created a hazard that not only resulted in Payne's death but that also potentially endangered the public, truckers employed by contractors and employees of Bluestone -- all of whom, the record establishes, used the road on occasion.

Second, Bluestone recognized a bottom line responsibility to make sure the speed of coal haulage trucks was consistent with the condition of the road. Bluestone's haulage rules and regulations specifically limited trucks to 20 miles per hour and cautioned the speed limit was to be "strictly adhered to" (Bluestone Exh. 1 at 2). Bluestone added that it would not accept coal from truckers who did not comply with its rules (*Id.* at 3). The citation of Bluestone was an incentive for Bluestone to find a more effective means to better ensure truckers traveled at safe speeds on the mine's roads.

For these reasons I cannot find the Secretary abused his discretion in citing Bluestone. Moreover, the fact that the Secretary might have cited Mullins Trucking, as Castanon recognized, and that this also might have had a deterrent effect, equal or even greater, to citing Bluestone, does not invalidate the Secretary's choice (Tr. II 126-127).

S&S

The four-part test enunciated by the Commission in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984) for determining whether a violation is S&S is well known and need not be repeated here. I have concluded a violation of section 77.1607(c) existed. Moreover, I find the evidence easily establishes a discrete safety hazard in that failure to operate the coal haulage truck at a speed consistent with the grade and curve of the road and the condition of the truck endangered not only the truck driver but others who traveled the road. Unfortunately, the worst occurred and the hazard came to a fatal fruition. There is no doubt that the speed at which the truck was operating was a significant and substantial contribution to that fatality. The violation was S&S.

GRAVITY

The concept of gravity involves analysis of both the potential hazard to miners and the probability of the hazard occurring. The potential hazard was of an accident caused by excessive speed and resulting in the death or injury of the truck driver, other miners, and/or the public. It is difficult to imagine anything more hazardous than a truck with inadequate brakes speeding out of control down a frequently used, steep, and multi-curved road.

NEGLIGENCE

Negligence is the failure to exercise the care required by the circumstances. Given the volume of traffic over the road and the lack of any previous reportable accidents or citations, the lack of any conclusive evidence as to what caused Payne to lose control of the truck or where he lost control, as well as the lack of any citation with regard to the washboard area, there is no basis to find that Bluestone's design and/or maintenance of the road contributed to the violation. Nor is there any basis to find that Bluestone was in some way responsible for training Payne and that its failure to properly train him lead to Payne speeding out of control. Although at trial the Secretary's counsel seemed especially enamored of this theory, speculation is not equivalent to proof.

However, Bluestone required trucks on its property to be maintained in safe operating condition (Sec. Br. 17; Bluestone Exh. 1). It seems certain the virtually useless condition of the brakes played a role in causing the violation. While initial responsibility for the condition of the brakes lay with Mullins Trucking and Blackstone, the presence of the unsafe truck on Bluestone's property evidenced Bluestone's negligent failure to effectively enforce its rules. I conclude therefore, the Secretary has established that Bluestone failed to exhibit the care that was necessary and that Bluestone's negligence contributed to the violation.

OTHER CIVIL PENALTY CRITERIA

The parties stipulated that Bluestone is a small operator with an excellent history of compliance (Stipulation 5). They further stipulated that the proposed penalties would not affect Bluestone's ability to continue in business (Stipulation 4).

CIVIL PENALTY

The Secretary has proposed a civil penalty of \$6,000 for the violation of section 77.1607(c). The violation was instrumental in Payne's death and I have recognized its very serious nature.

In addition, I have found Bluestone negligent. However, I conclude that the company's small size and excellent compliance record, as well as the primary parts played by Payne, Mullins Trucking and Blackstone in the violation, warrant a significantly lower penalty than that proposed by the Secretary. I will assess a civil penalty of \$500.

ORDER

The Secretary has vacated Order No. 2723399. Therefore, Docket No. WEVA 93-165-R is DISMISSED.

In Docket No. WEVA 94-117, the Secretary's vacation of Citation No. 2723275 is **AFFIRMED**. Citation No. 2723400 is **VACATED**. Citation No. 2723974 is **AFFIRMED** and a civil penalty of \$500 is assessed for the violation of section 77.1607(c). Bluestone is **ORDERED** to pay the civil penalty within 30 days of the date of this decision. Upon payment of the civil penalty Docket No. WEVA 94-117 is **DISMISSED**.



David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 27 1994

CONSOLIDATION COAL COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEVA 94-260-R
: Citation No. 3318787; 5/5/94
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Blacksville No. 2 Mine
ADMINISTRATION (MSHA), : Mine ID 46-01968
Respondent :

DECISION

Appearances: Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Contestant;
Elizabeth Lopes, Esq., and Robert S. Wilson, Esq., U.S. Department of Labor, Arlington, Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a Notice of Contest filed by the contestant pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, challenging the legality of a section 104(d)(1) "S&S" citation alleging a violation of mandatory safety standard 30 C.F.R. § 75.1725(a). A hearing was held in Morgantown, West Virginia and the parties filed posthearing briefs which I have considered in the course of my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute a violation of the cited mandatory safety standard, (2) whether the alleged violation was "Significant and Substantial" (S&S), and (3) whether the alleged violation was the result of an unwarrantable failure by the contestant to comply with the cited standard.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; 30 U.S.C. § 801 et seq.
2. Commission Rules, 29 C.F.R. § 2700.1, et seq.
3. Mandatory safety standards 30 C.F.R. § 75.1725(a).

Stipulations

The parties stipulated to the following (Tr. 12):

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this contest proceeding pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977.
2. The contestant is the owner and operator of the Blacksville No. 2 Mine.
3. Operations of the Blacksville No. 2 Mine are subject to the jurisdiction of the Act.
4. The contestant may be considered a large mine operator for purposes of 30 U.S.C. § 820(i).
5. The maximum penalty which could be assessed for this violation pursuant to 30 U.S.C. § 820(a) will not affect the ability of the contestant to remain in business.
6. MSHA Inspector Lynn A. Workley was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Citation No. 3318787.
7. A true copy of Citation No. 3318787 was served on the contestant or its agent as required by the Act.
8. Citation No. 3318787, marked as Government Exhibit No. 1, is authentic and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

The contestant's counsel would not stipulate to the accuracy of MSHA's proposed civil penalty assessment "Data Sheet" and MSHA's computerized mine compliance history print-out (Exhibits G-5 and G-6). However the objections were overruled and the documents were admitted and made a part of the record (Tr. 13).

Discussion

Section 104(d)(1) "S&S" Citation No. 3318787, May 5, 1994, cites an alleged violation of 30 C.F.R. § 75.1725(a), and the cited condition or practice states as follows:

The 6 South No. 2 belt conveyor was not being operated in safe condition. The tailpiece was plugged with fine coal and coal dust. Several roller sections were missing and the belt was riding on the steel roller mounting brackets. Most of the remaining roller sections were stuck with fines and worn flat from belt friction. The side frame and floor adjacent to the tailpiece was covered with thick dry black float coal dust. A cloud of black float coal dust was present in the air above and behind the tailpiece. The belt was removed from service immediately when cited.

MSHA's Testimony and Evidence

MSHA Inspector Lynn A. Workley testified as to his experience and background, including 8 years of work for the contestant at an underground mine. He has served as an inspector for 12 years and is a certified mine foreman and underground electrical worker. He confirmed that he was familiar with the Blacksville No. 2 mine and has inspected it for 10 years (Tr. 14-16).

Mr. Workley confirmed that he inspected the mine on May 5, 1994, and was accompanied by Ron Thomas, a company escort, and Philip Nine, the miner's representative. Mr. Workley identified a copy of the citation that he issued and he explained what he observed and why he cited a violation of section 75.1725(a), requiring the cited conveyor to be removed from service. He stated that the belt was in operation and he observed "a cloud of float coal dust" in the air above and behind the tailpiece. He concluded that the tailpiece was clogged with fine coal and coal dust and that the belt was rubbing coal and generating float dust. He stated that it was difficult to see inside the tailpiece with the belt running, but that he could see in from the side view and observed that "the area between the top and bottom belt was packed with fine coal". He also observed coal dust accumulations a quarter of an inch in thickness on the right side of the tailpiece facing it inby (Tr. 16-21).

Mr. Workley stated that after the hinged tailpiece side guards were opened, he observed that the area under the top belt and around the impact rollers was completely plugged and full of dry coal and coal dust accumulations and part of the impact rollers were stuck and were "worn completely flat clear down to the shaft". He stated that a couple of rollers were missing under the tailpiece, and believed that only 2 out of 12 roller sections

were turning. He also stated that the belt was not aligned on the rollers and that it was running over to the right side and was contacting the metal brackets that the missing rollers had been mounted on. Approximately one inch of the top of two brackets had been worn away by frictional contact with the moving belt (Tr. 21-23).

Mr. Workley stated that heat was being generated at the area where the brackets were worn and where the thick float coal dust was on the tailpiece frame and on the floor beside it, and he could feel warm air coming out of that side of the tailpiece (Tr. 23). Mr. Workley explained why he believed that the conditions he observed constituted a violation of section 75.1725(a), as follows at (Tr. 24-25):

A. As I said previously, that standard requires that mobile and stationary equipment be maintained in safe operating condition. This tailpiece was not maintained in safe operating condition. The belt was running. It was in contact with fine coal and coal dust accumulations inside the tailpiece. It was also in contact with metal brackets, producing frictional heat.

Q. Was there evidence that any maintenance had taken place on this belt?

A. No.

Q. Why didn't you write a separate citation under section 75.400 for coal dust accumulation?

A. I considered a violation of 75.400 initially, before the protective hinged sides were turned back and I could see that the belt was definitely wearing against the metal stand. Then I decided that .1725(a) -- That standard requires that it be removed from service -- It was adequate just to issue a citation under that standard. I didn't need to write both of them, in my opinion.

Q. Mr. Workley, how was the violation abated?

A. All of the combustible material was cleaned from inside the tailpiece, removed and put on the belt. The brackets that the belt had been contacting were bent back to prevent further contact if the belt ran out of alignment.

Q. Would the operator have been able to completely abate this violation without stopping the belt?

A. Not safely, no.

Mr. Workley confirmed that he designated the violation as significant and substantial and stated that the cited conditions created a fire hazard in the mine. He was aware of at least two belt fires, and he explained what was needed for a belt fire to occur as follows at (Tr. 26-27):

A. Three things are necessary for a fire; adequate air, adequate fuel and an ignition source. There was adequate air in that area, with twenty-one percent oxygen in it. There was ample amount of dry coal and coal dust inside the tailpiece and on the frame, beside the tailpiece and on the mine floor, and in the air above and behind the tailpiece. And there was a frictional heat source from the belt rubbing the accumulations and from the belt rubbing against the metal stands where the rollers were missing. And, occasionally, at intervals of four hundred feet or less, there are metal splices that hold the belt together that come through and you have metal to metal friction against those metal stands that are being worn.

Mr. Workley stated that metal to metal friction would create sparks and the float coal dust or dry coal dust, which he described as "dry and black", could be ignited by the generated heat. He believed it was reasonably likely that a fire would occur if the belt continued to run without the cited conditions being corrected. He believed it was reasonably likely for an injury to occur if there was a fire because the heat and smoke area was confined and the heat and smoke would likely not be carried away, and someone there to fight the fire would be injured by smoke inhalation or burns (Tr. 28). He confirmed that two fire detection systems were installed on the No. 2 belt, one in the general tailpiece area, and the other some distance away.

Mr. Workley explained his high negligence and unwarrantable failure findings as follows at (Tr. 29-31):

A. * * * Looking at the wear I saw to the impact rollers, it occurred while coal was being loaded onto this tailpiece and that had ceased happening months before this violation was cited. The rollers had been worn out for months.

The amount of coal that had accumulated inside the tailpiece had been there shifts, days, weeks. I can't tell you how long for sure. It took a prolonged period of time for it to accumulate.

The thickness of the float coal dust on the side of the structure and on the mine floor indicated that it had been like this for a long period of time.

A pool of water behind and under the end of the tailpiece which was black with coal dust, and the presence of a wash down hose, indicated to me that float dust had been present previously and had been washed off of this area repeatedly.

Q. When you observed the condition at the six south number two belt, was it obvious that it was in an unsafe condition?

A. Yes, it was.

Q. And would a reasonably competent preshift examiner have noticed this condition?

A. He should have, yes.

Q. In your opinion, the condition you just described, did it exist prior to the previous preshift exam?

A. There is no question in my mind that it did, Yes.

* * * * *

Q. How long do you believe it took for the brackets to be worn down?

A. Several days, weeks. They wear slowly. It's a rubber belt. I think the belt travels somewhere around three hundred and fifty feet per minute. It's enough to create a great deal of friction, but a steel bracket a quarter to three-eighths of an inch thick wears rather slowly, so this took a long period of time.

Q. You described coal dust accumulations inside the tailpiece. How long do you think it took for that accumulation to build up?

A. Weeks.

Mr. Workley stated that as he approached the tail piece area to better evaluate the problem, safety escort Thomas picked up a washdown hose and started washing the left side of the tailpiece and the floor. When he informed Mr. Thomas that he was issuing a citation, Mr. Thomas became excited and left the area. When he returned he washed down the other side of the tailpiece after the belt was shut down and stated "I want to apologize to you for yelling. I didn't realize it was this bad" (Tr. 32). Several mine officials then appeared at the scene, and one referred to the condition of the tailpiece and commented that "he did not want this kind of junk -- only he used stronger language -- in his mine" (Tr. 34).

Mr. Workley explained why the belt was not aligned and why he believed that the worn impact roller conditions took place over multiple shifts and that no maintenance had been done for a long time. He also explained why he believed the float coal dust had accumulated over a period of multiple shifts (Tr. 35-37), and stated as follows at (Tr. 38):

A. I'm not positive, but based on twenty years of experience as a miner and as an inspector, what I saw in the air, the amount of float dust that was in the air current there, it would have taken a long period of time for that thickness of float dust to settle on that structure and on the walkway beside it.

On cross-examination, Mr. Workley confirmed that his belief that the belt rollers had been dumping while coal was being dumped on the tailpiece was an inference on his part and that he had no other explanation for the roller wear that had occurred. He also confirmed that a belt alignment problem can be unexpected and occur at any time while the belt is in operation. If this occurs, coal spillage can be expected and it can get caught up in the bottom belt. Although the coal on the belt is normally wet to damp, the coal he observed around the impact rollers and plugging the tailpiece was fine and extremely dry, and the float coal dust was black and suspended in the air (Tr. 39-42).

Mr. Workley confirmed that he had not previously inspected the six south tailpiece and that he had no way of knowing how long it took for the float coal dust to be generated (Tr. 39, 43). He patted the accumulations on the belt frame and floor and it dispersed into a black cloud in the air. The float coal was "finely ground, the consistency of face powder", and he collected no samples (Tr. 44).

Mr. Workley stated that he did not speak to the fire boss about his examination, but he did speak to others in mine management who told him that no foreman had come to look at the six south tailpiece after the fire that occurred on sixth north (Tr. 45).

Mr. Workley stated that he found no problem with the tail roller on the cited tailpiece and detected no hot rollers or smell of combustion. He confirmed that it was possible that warm air would be generated from a continuously running piece of equipment. He confirmed that operating a tailpiece with missing impact rollers is not a violation as long as the belt is not contacting the frame. He confirmed that he observed the belt contacting the frame, and when the belt was not running "it was resting on portions of the frame when it stopped and portions of the frame were worn away by friction of the belt rubbing it" (Tr. 49).

Mr. Workley believed that the fire boss should have observed the cloud of float coal dust generated in the air above and behind the tailpiece and should have looked inside to determine what was generating the dust (Tr. 51). He did not know when the last preshift was conducted prior to his inspection, but indicated that at a minimum, it would have been close to four hours. He conceded that he was speculating that the fire boss encountered the same conditions that he observed, and confirmed that he did not issue a violation for an improper preshift examination (Tr. 52-54).

Mr. Workley stated that the two missing rollers were rubber impact rollers, and that no metal rollers away from the tail piece were missing, and he explained the worn bracket conditions that he observed (Tr. 55-58).

In response to further questions, Mr. Workley stated that "judging by the wear on those two brackets" he concluded that the belt had been out of alignment for "several shifts" (Tr. 58). He described the condition of the brackets as "worn down approximately one inch at the top and they were both bright and shiny" and he believed it took "shifts weeks" for this to occur (Tr. 59). He believed it unlikely that the coal dust accumulations he observed occurred over a short period of time because he found float coal dust "a quarter to more than a quarter of an inch thick" deposited adjacent to the tailpiece belt and he has inspected belt lines that had not been dragged or rock dusted for several shifts and found little or no accumulations of float coal dust (Tr. 59).

Mr. Workley stated that the float coal dust was washed down to terminate the citation and the clogged coal fines were removed with a bar, roof bolts, or a pointed instrument (Tr. 60). He explained that no coal had been transported over the tailpiece in question for three or five months before his inspection when it was operated as part of a working section. The tailpiece belt was running during his inspection because it was a continuation of the "mother belt", and it performed no useful function. However, the mother belt would not operate if the tailpiece were shut down (Tr. 62).

Mr. Workley confirmed that he reviewed the prior fire boss preshift and onshift reports and saw no indication of the cited conditions. The tailpiece area was part of the normal fire boss run and he saw no examination entries mentioning the brackets, the belt out of alignment, or the presence of any float coal dust (Tr. 63). He did not speak with the fire boss who worked the midnight shift and who was not present when the citation was issued (Tr. 64). He explained his concerns as follows at (Tr. 64-65):

Q. So missing rollers, per se, is not a violation.

A. No, sir, it's not.

Q. And the belt running out of alignment is not a violation.

A. No, your honor, it's not.

Q. I guess the bottom line is that it was in general disrepair, in that these two brackets were touching and caused the belt to run out of alignment, caused some friction. And there was float coal dust there and you were concerned it was a fire hazard. Is that it?

A. Yes, your honor.

Robert P. Nine, testified that he has worked for the contestant for 21 years, and that he currently works as a block mason. He confirmed that he accompanied Mr. Workley as the miner's representative during his inspection on May 5, 1994, at the tailpiece. He confirmed that he observed "heavy" float coal dust accumulations on the belt structure and tailpiece and estimated that it was "under a half inch, or quarter inch" thick. He estimated that it would take "two to three days, maybe" for the coal dust to accumulate. He looked into the side of the tailpiece and observed a roller that was worn flat with fine coal dust and pieces of coal or fines around it where it had frozen the roller. The belt was running, but the frozen roller was not turning (Tr. 66-69). He further described his observations as follows at (Tr. 70-71):

Q. Were the side guards ever removed so you could get a better look inside the tailpiece?

A. Yes. The beltman came later and the belt was shut off. And they pulled the skirts or the guard. The top of it come up and fell back.

Q. What did you see?

A. It was a mess. Rollers wore down, froze; accumulation of coal in the tailpiece.

Q. Can you estimate how long it would have taken for the coal to accumulate inside the tailpiece in the manner that you saw it?

A. I would say weeks.

Q. Did you see the belt rubbing on the steel bracket or on two steel brackets?

A. Yeah. That was on the other side of the belt. There wasn't any roller there. There was a bracket, and you could see where the belt had rubbed into the bracket.

* * * * *

A. Yeah, it was worn down. It was worn down past where the other belt -- I don't know how far. It was shorter than the others by an inch or so.

Q. Do you have an estimate as to how long that took?

A. On that, I don't know. I would say a day, couple days. I don't know how long it would take a belt to go through steel like that. I would say a day or two, maybe a week.

Mr. Nine stated that Mr. Thomas was initially angry with Mr. Workley for issuing the citation but later apologized to him after looking at the tailpiece. He stated that Mr. Thomas said it was bad but "didn't think it was that bad till he looked in it" (Tr. 72). He also confirmed that there have been three or four belt fires at the mine during the past year.

On cross-examination, Mr. Nine estimated that he had visited the cited tailpiece five to ten times prior to Mr. Workley's inspection. He confirmed that someone would be assigned to clean up coal accumulations and take care of problems on belt lines as they occurred. He confirmed that he did not know how long the belt was running off to one side of the tailpiece, and since the tailpiece is enclosed, one could not see that it running off of the brackets unless the enclosure was opened up. He confirmed that a casual observer could not see the belt running off unless they opened up the hinged guards and looked under the cover (Tr. 77-78).

Ray L. Ash, MSHA Inspector Supervisor, testified that he has 46 years of mining experience, 21 of which was in private industry as a mine superintendent, section boss, and mine foreman. He confirmed that he was with Mr. Workley during his inspection of May 5, 1994, and that he was there to conduct a quality control review and evaluation as to how inspections are conducted (Tr. 79-82).

Mr. Ash stated that he personally observed the conditions cited by Mr. Workley and he described them as follows at (Tr. 84-86):

A. We came off of the -- I believe it was the five-s belt. We came down it. Five-s belt, from one end to the other, is several hundred, maybe a thousand feet

long, a very good looking belt, very well maintained, everything in good shape, you know.

We came down to the corner there and I looked around the corner. I couldn't believe the contrast of what I saw up this little -- Up the entry where this tailpiece was setting, the contrast to the rest of the belt line. You know, it just indicated there was lot of trouble there from somewhere. I don't know where. But something was bad wrong.

Q. Why do you say that?

A. Well most of the rock dust had been washed off the ribs, float dust in the air. I could see float dust on part of the structures and thing up three, that had settled, and just -- I've been to many of them. And when you see that, you know, you've got trouble, when you see it look like that.

* * * * *

A. When I saw it up there, I stepped back and I let Mr. Workley go first, because I knew there was trouble. Then I walked along after he went up in there. And I saw -- tried to see in the tailpiece.

There wasn't too many places you could see in. I couldn't see any rollers in there as it's been testified to before. Everywhere I looked in there, it was packed with some kind of coal. Some of it was caked hard. Some of it was loose. I just couldn't see anything in there that much.

I could see a lot of float dust collected on the ribs and some float dust in the air. I could see it in the beam of my light.

Q. When the side guard was lifted, afterward, what did you see then?

A. I walked -- After the side guards were lifted, which was a good while later, I walked back up far enough to look, just to look in there. The reason I didn't go clear to the end, there must have been eight or ten people in this little confined place, trying to work and do things. So I tried to stay out of the way as much as I could.

But I did see the brackets. I wasn't close enough to tell how much they were wore down, a quarter inch, a half inch, inch, or what. But the brackets did show

signs they had been worn on. And the rollers and the other stuff was just a mess in there. Everything had been bound up with coal.

Mr. Ash believed that the danger of fire was very real, and based on his experience, he was of the opinion that it was highly likely that a belt fire would have occurred if the belt continued to run without correcting the cited conditions. He agreed with Mr. Workley's finding that an injury was reasonably likely to occur to people fighting the fire. He also believed that methane, which is released freely in the mine, could be present in the area, adding to the hazard (Tr. 87).

Mr. Ash expressed his "one hundred percent" agreement with Mr. Workley's high negligence and unwarrantable failure findings and he believed that the accumulations occurred over a long period of time. He saw no evidence of any coal spillage along the belt live and did not believe that the accumulations had occurred recently. He also believed that it took a long time for the worn bracket condition to occur and he stated that this would be a very slow process taking place over "several months". Based on his experience, he believed that a reasonably competent preshift examiner would have noticed the float coal accumulations in question. He confirmed that an examiner would not be able to see the belt rubbing on the steel bracket while walking by the belt. However, he believed that a competent examiner would have looked for the source of the float coal dust and reported it to his foreman (Tr. 88-91). Mr. Ash denied that he ever commented to Mr. Thomas that the conditions he observed "was not that bad" and he heard no comments from Mr. Thomas about the condition of the tailpiece (Tr. 94).

On cross-examination, Mr. Ash stated that he was impressed with management's quick reaction to the citation (Tr. 96). He confirmed that no one would open the tailpiece covers unless the belt were shut off and that it was difficult to open the covers "because it was hinged and I think it hadn't been opened for so long" (Tr. 97). He believed that the worn bracket condition would have occurred from the belt running off center on more than one occasion (Tr. 98-100). He had no reason to believe that the belt fire detection or fire suppression systems were not functioning and he found nothing wrong with them (Tr. 100).

Mr. Ash believed that the preshift examiner should have observed the absence of rock dust, and the presence of float dust in the area and on the ribs, and this should have alerted him to look in the tailpiece. He confirmed that the floor around the tailpiece "was wet, sloppy, muddy". Although it was possible that the float dust in the air was not there when the preshift was conducted he believed that this possibility is "very, very low", and that at least part, if not all, of the conditions were present (Tr. 102).

Mr. Ash confirmed that he found no methane problem at the tailpiece area, and no hot rollers or electrical problems. He found no problems on any of the other belts in the area. He confirmed that the problem was confined to the cited tailpiece area 45-feet from the transfer point and stated that "it looked like another world" (Tr. 105).

In response to further questions, Mr. Ash stated that the friction between the belt, the brackets, the frozen rollers, and the belt rubbing the coal in the tailpiece were all sources of ignition (Tr. 106). He stated that some of the coal he observed near the brackets was dry, indicating that heat was being generated, while the coal in other areas was damp (Tr. 107).

Mr. Ash stated that the float coal dust and packed coal conditions were observable from the side of the tailpiece but that the brackets underneath were not readily observable until the belt was shut down and the covers were opened up (Tr. 114). He summarized his agreement with the unwarrantable failure finding by Mr. Workley as follows at (Tr. 116):

[S]o I guess the nuts and bolts of this citation is the fact that you found float coal dust accumulated on the belts. You came to the conclusion it had been there for a while. And after you opened the hinges, you found all these other conditions. You found, like you said, it was a marked contrast between another part of the mine. And you agreed it was unwarrantable, because the mine management should have been alerted to that or at least the fire boss should have been alerted to it and gone one step further than what he did.

A. Yes, Sir.

Q. Or what you believe he did or didn't do. Is that correct?

A. Yes, sir.

Q. So that is the aggravated conduct.

A. Yes.

Q. That supports the unwarrantable.

A. Yes

The Contestant's Testimony and Evidence

John Straface, mine superintendent, testified that he holds a 1987 degree in mining engineering from West Virginia university, and has been employed by the contestant since that

time. Referring to a mine map, he stated that the cited tailpiece was a couple of miles away from the fire that occurred on the six north belt (Tr. 121). He explained the direction of the airflow over the tailpiece area and confirmed that there was a stopping 12 to 15 feet behind the tailpiece and that there was a dead end down the entry. The stopping was 12 to 15 feet from the tailpiece. He confirmed that fire sensors and suppression systems were installed in the area, including a water pump, bags of rock dust, and a fire extinguisher (Tr. 117-127). He also explained how the impact rollers functioned and how they are distinguished from the metal rollers found along the beltline. He confirmed that there are six similar tailpieces in operation in the mine and he has experienced no significant problems with them (Tr. 131-133).

Mr. Straface explained how the tail pieces are serviced and maintained, and he believed that adequate examinations are made and he could recall no prior citations for a violation of section 75.1725(a) (Tr. 134).

Mr. Straface explained the duties of a fire boss, and he stated that any hazardous conditions found by the examiner are taken care of immediately. He stated that hot impact rollers are not common and that he has never observed or known of any such rollers getting hot (Tr. 135). He examined and explained several preshift examination reports covering the area cited by Mr. Workley (Tr. 136-139).

Mr. Straface stated that he arrived at the cited tailpiece area fifteen minutes or one half an hour after the belt was shut down. He described the area as damp and wet, and stated that the ribs were moist and adequately rock dusted. He observed no cloud of float coal dust and confirmed that some work had already been done in the areas and the belt was not running. He also confirmed that he did not observe the conditions observed by Mr. Workley with the belt running. He did not consider the tailpiece to be in an unsafe operating condition (Tr. 140-143).

Mr. Straface stated that he observed wet muck material that had built up around some of the impact rollers and some wet buildup on part of the belt structure. The tail roller and belt rollers "were running free" and he did not consider missing impact rollers to be an unsafe condition. He did not believe that the impact roller bracket was causing a problem. He stated that "there were impact rollers that were not turning" and that they were "frozen" (Tr. 144). However, he did not consider this condition to be necessarily a hazard (Tr. 145).

Mr. Straface confirmed that a belt fire had occurred at approximately 1:00 a.m. on the six north belt on May 5, 1994, the shift before Mr. Workley's inspection of the sixth south tailpiece. He explained that a tail roller similar to the cited

one had failed and the hot bearing was against a piece of the rubber belt conveyor that had lodged in the area and it caused some smoldering of the belt line. The foreman at the scene had to cool it off with a fire extinguisher and water, and as a result of this incident, crews were dispatched to examine the other mine tailpieces (Tr. 146-148).

Mr. Straface confirmed that the cited tailpiece was checked for any problem similar to the one that caused the fire on the earlier shift but that the tailpiece guards were not opened to examine the area under the guards (Tr. 149). He reiterated that he did not observe the conditions observed by Mr. Workley before the citation was issued shutting down the belt (Tr. 153).

On cross-examination, Mr. Straface stated that some amount of float coal dust is unavoidable on belts, but it is a hazard and should be recorded in the preshift report. However, he explained that the foremen are instructed to correct float coal dust conditions immediately, and if this is done, the condition is not reported during the preshift, but it should be recorded on the on-shift side of the examination book (Tr. 158-159). He agreed that some of the wet and "sloppy" conditions be observed at the tailpiece could have occurred by washing off the tailpiece to take care of accumulations of spillage and float coal dust (Tr. 160).

Mr. Straface stated that it would take more than a shift, and possibly more than a day, for the impact rollers to be worn down to the shaft. He could not recall that any metal was showing on the worn rollers and stated that "they were worn to a flat place" (Tr. 162). He further stated that no coal was being dumped on the cited tailpiece and the section ceased developing in December, 1992. The tailpiece was used at that time as a section tailpiece when it was in production (Tr. 162). He stated that the tailpiece is examined regularly no more than every 2 weeks, and usually every week. He did not believe that a flat impact roller necessarily demands immediate maintenance, and he stated that the belt line was not in operation for 5 or 6 months during a strike (Tr. 163).

In response to further questions, Mr. Straface stated as follows at (Tr. 167-170):

Q. Do you think all these conditions that inspector Workley described on the face of this citation could have occurred within a week; struck rollers, bent bracket, all the stuff that the found in there? That could have happened between inspections?

A. All of those conditions?

Q. Yes.

A. It probably -- It probably could have grown in magnitude.

Q. What?

A. It probably could have grown in magnitude. All of those conditions that he noted would not have required the belt to be shut down to repair them on their own.

* * * * *

Q. Human nature being what it is -- this tail roller is kind of isolated. It hasn't been used on a regular basis. It is altogether possible that somebody just forgot to look at this thing, open it up and look at it?

A. I'm sure that is possible.

JUDGE KOUTRAS: Nobody is going to admit that to you, are they? You're the mine superintendent. That is true, isn't it? Nobody is going to admit that to you, are they?

A. (No Response.)

Ray Campbell testified that he has an associate degree in mining from Belmont Technical College, and has worked in the mines since 1977. He has worked for the contestant since 1984, as a section foreman and fire boss, and "sometimes, whenever they need me to fill in, I do preshift examinations" (Tr. 173). He confirmed that he was familiar with the violation in this case and he stated that he conducted the preshift examination on the May 5, 1994, midnight shift. He stated that he looks for float dust, spillage, bad rollers, roof and rib conditions, and methane (Tr. 174).

Mr. Campbell stated that he was at the cited tailpiece on two occasions during the May 5, midnight shift, and he went there the second time after an alarm sounded on the six north tailpiece because of a hot bearing. He found no unusual conditions or circumstances at the cited tailpiece when he arrived there at 1:30 a.m. He stated that he looked around the tailpiece, checked the pillar block bearings, and found nothing unusual other than some water and slop which he pumped out. He found no accumulations of float dust on the tailpiece but did not pull the covers off to look inside because "I seen nothing out of the ordinary, I didn't feel it was necessary, and you cannot do that with the belt running" (Tr. 176).

Mr. Campbell stated that he considered hot rollers, coal spillage, the belt or roller rubbing in coal spillage, and float

dust to be hazardous conditions. He stated that he observed no evidence of the belt running in coal around the tailpiece, and saw no damage to the edge of the belt or the belt running out of train or off to one side at the tailpiece (Tr. 178). He returned to the tailpiece area at 6:00 a.m. to preshift it and it took him 5 to 10 minutes to do this. He checked for float dust, spillage, methane, and roof or rib conditions. He saw no float dust in the air, saw no quarter inch accumulations on the tailpiece structure and observed nothing that would have led him to pull the tailpiece covers open and look inside. The examination of the tailpiece interior is not a normal part of his examination and this job is assigned to the belt foreman. He stated that he would have taken care of any hazardous conditions if he had found any (Tr. 179-181).

Mr. Campbell stated that he would look at both sides of the tailpiece during his examination and could not recall ever having to use the washdown hose to wash float dust off the tailpiece. He described the area on the day he was there as "very wet and muddy", and the only explanation he had for any float dust observed by the inspectors was that someone turned the belt water off. He stated that the coal dust would come off the other belt lines, and believed it was possible that spillage and muck caught in the bottom belt may have been the source of the coal dust (Tr. 183-186).

Mr. Campbell stated that he looks for ignition sources such as bad rollers, sparks, or signs of combustion, but observed none of these during his examination, and he smelled nothing unusual (Tr. 188). He explained the absence of any float dust entries on his preshift reports and stated that "we do whatever is necessary to take care of the situation" and that this is standard mine procedure (Tr. 189).

On cross-examination, Mr. Campbell stated that he could examine the tailpiece tail roller bearings by looking at them from each side, and he had no reason to believe there were any bad or missing rollers inside the tailpiece and had no reason to look inside (Tr. 191). He stated that there is no reason to record a hazardous condition that is taken care of during the preshift examination because "its no longer a violation or hazardous condition" and "you have already cleared it" (Tr. 193). It is, however, noted on the on-shift book that the condition was there and that it was taken care of. Any float coal conditions detected are taken care of immediately (Tr. 197).

Don Chernok, belt foreman, stated that he has worked for the contestant for 22 years and holds fire boss and foreman's papers. He is responsible for the large rollers and bearings at the back of the tailpiece, the guarding and skirting, and the inside rollers. He stated that he examines the tailpieces "as often as

I can. I try to get them once a week. Sometimes it's a little more than a week that I finally get around to all of them "(Tr. 209). He examines for conditions that cannot be detected when the belts are running and he opens the tailpiece lids to look inside (Tr. 209).

Mr. Chernok stated that a flat or frozen roller does not render a tailpiece unsafe to operate and it simply indicates that "there is a potential of maintenance for me, something that I do need to make corrections on as time warrants" (Tr. 210). He does not consider a missing impact roller to be an unsafe operating condition, and he removes lumped coal around a roller to avoid any damage. Fine coal around rollers, and accumulations of muddy materials are hosed out. He could not recall any float coal dust situations at the cited tailpiece (Tr. 212).

Mr. Chernok could not recall the exact day he examined the tailpiece prior to May 5, and stated that "it never goes more than a week and a half that I don't see every tailpiece" and that he never fails to examine the tailpiece in question (Tr. 212).

On cross-examination, Mr. Chernok stated that he does not routinely stop the belt during his examinations of the tailpiece unless he observes something out of the ordinary. He does not keep maintenance records for the tailpiece. He stated that he checks the tailpiece "at least every other week, maybe not weekly. And I do try to examine weekly" (Tr. 215). He explained how the cited conditions could have occurred at the tailpiece since his last examination, and he stated that no belt problems, such as tears, worn edges, or abrasions, ever came to his attention at any time when the citation was issued (Tr. 220).

In response to further questions, Mr. Chernok stated that he considers rollers turning in fine, black, dry float coal dust to be an unsafe condition because of the possibility of heat and combustion. He also believed that a belt riding on, and rubbing the brackets, could generate heat. He confirmed that the conditions found by the inspectors could have occurred a week or a week and a half prior to his last inspection (Tr. 222).

Mr. Chernok stated that he arrived at the tailpiece no more than 30 minutes after the citation was issued and that he was in no position to observe the float coal that the inspector testified about (Tr. 226).

Ronald E. Thomas, safety inspector, testified that he has 24 years of mining experience as a section foreman and safety escort, all at the Blacksville No. 2 mine (Tr. 227). He confirmed that he accompanied Inspectors Workley and Ash during the May 5, 1994, inspection, and he identified copies of his inspection notes (Exhibit C-6; Tr. 229). Mr. Thomas stated that he arrived at the tailpiece ahead of the inspectors and saw no

cloud of float coal dust. He did see some float dust which consisted of some dust generated off the belt line that had been deposited on the frame of the tailpiece. He stated that he began to wash the material off "because sometimes I get into trouble violations wise of somebody calling a float dust violation, and I just try to handle it. It was just a very light dusting from deposits from the belt line" (Tr. 232).

Mr. Thomas disagreed that there was a violation of section 75.1725(a), and he was of the opinion that there was no hazard. He described the dust as wet and damp, and stated that it had been rock dusted and that he tried to use a sump pump to remove the water out of the area, but it wouldn't work. The dust suppression sprays on the belt were operating and the belt was damp (Tr. 234). After the belt was shut down, the tailpiece covers were opened and "we seen that we needed some areas cleaned inside there" and he described the material as "belting, scrapes from old belt, looked like rope or string, mud, muck, some dried mud and muck" and he believed that it was material knocked down inside when he hosed off the tailpiece (Tr. 236).

Mr. Thomas stated that when he initially observed the tailpiece he saw no condition that would have caused him to open the covers and look inside and he saw no evidence that the belt was being cut by any part of the structure (Tr. 236). He described the material he saw around the impact rollers and belt structure as "muck, damp water that has dried out and then redampened again and dried out, and just water", and he saw no fine coal dust or float coal dust (Tr. 237). He believed there was sufficient rock dust in the area, and that the ribs were damp or wet (Tr. 238).

Mr. Thomas stated that when the citation was abated, the missing and flat rollers were not required to be replaced, and all of the rollers that were frozen were not free to turn and four of them were still frozen. The bare metal piece was bent back so that it did not touch the belt and the tailpiece was hosed down and "we continued to run after we cleaned it out a little bit more" (Tr. 238).

On cross-examination, Mr. Thomas stated that he initially picked up the water hose because he thought that Inspector Workley was going to issue a section 75.400 float dust citation. Mr. Thomas confirmed that float dust was on the tailpiece frame, and he stated that "I'm not calling it float dust" (Tr. 241). He stated that he did make the statement "I didn't realize the condition was that bad" after the tailpiece lids were opened (Tr. 242). He stated that three or four people, including himself, worked to abate the citation, and that it took approximately one-half hour.

Mr. Thomas stated that after he was informed that a section 75.1725(a), citation was issued, he left the area to tell his supervisors that the belt needed to be shut down. When he returned, Inspector Workley informed them that he was going to issue a section 104(d)(1) citation because of the fire at the number six north belt. He stated that he told Mr. Workley that the cited area had been preshifted and that no hazard was observed by the midnight preshift examiner (Tr. 245).

Inspector Workley was called in rebuttal by MSHA, and he stated that he decided to cite a violation of section 75.1725(a), after walking to the back and right side of the tailpiece and observing how much float coal dust was there. He informed Mr. Thomas that he was citing a violation of section 75.1725(a), and that he was required to remove the tailpiece from service immediately (Tr. 246). Mr. Workley stated that after Mr. Thomas left the area he informed the miner's representative Philip Nine that he was considering issuing a section 104(d)(1) citation because of the conditions he found. Mr. Nine then informed him about the fire at the six north belt on the previous shift, and Mr. Workley believed that this added to the operator's negligence and that the violation was unwarrantable (Tr. 247-248). He further explained his opinion that the dust he observed was not recent spillage as follows at (Tr. 248-249):

A. In order for spillage to occur and cause the float dust condition at the tailpiece, the spillage would have to occur at the five-s or four-s transfer. And if the coal fell from there, onto the bottom belt, and was carried back to the two south -- or six south number two tailpiece, the scraper would have knocked a lot of the spillage off onto the mine floor and there would have been spillage all over the place at the tailpiece. There was none.

Also, there would have been an entry in the preshift examination book from the shift before or two shifts before or three shift before, noting the spillage and the action taken to clean it up.

Q. The belt foreman testified that he examines the belt approximately once a week, every seven to eight days. Is it possible this condition could have occurred over a one-week period?

A. Parts of the condition may have occurred over less than a one week period, but part of the condition, as I described previously, occurred over months. The wear of the impact rollers did not occur in the last week or two before the violation was cited.

On cross-examination, Mr. Workley confirmed that he did not require the replacement of the worn impact rollers as part of the abatement. He stated that it was possible that a bad roller wiper could have pulled the material up into the tailpiece (Tr. 250).

Mr. Workley further explained the effect of the prior fire on his unwarrantable failure finding as follows at (Tr. 251-253):

Q. Why would the fire on this other tailpiece cause you to decide to issue a (d)(1)?

A. Your honor, a reasonably prudent person, if you were responsible for the operation of a coal mine and you have two mother belt tailpieces and you have an emergency, a fire, occur on one of them, wouldn't a reasonably prudent person send somebody or even go himself to the other one to make sure that the same condition didn't exist there, immediately or as soon as possible?

Q. It's my understanding that is what they did. There was testimony here that the fire on the six north belt was caused by some defective bearing or something in the main tail roller. As a result of that, the preshift examiner went and checked the tailpiece that you cited and checked the bearings on the tail roller visually. Were you aware of that?

A. One one ever offered that information to me, your honor. And I did question people if that had happen.

Q. Had you had that information available to you, would you still have issued the (d)(1) order -- I mean, citation?

A. Given the other conditions, your honor, I'm not positive, but probably not.

* * * * *

Q. Mr. Workley, to your knowledge, was the situation on the six north belt a reportable incident?

A. You mean did it require reporting under federal guidelines? No, it didn't.

* * * * *

Q. You said you might not have issued a (d)(1) citation if you had known that the operator had sent someone to check the six south tailpiece. Is that correct?

A. That is correct.

Q. Would it make a difference, in your opinion, if you knew that the only thing that the, I believe it was a fire boss checked, when he went to examine the six south tailpiece was the bearing on the back tail roller. He didn't check the rest of the tailpiece. He only examined that part.

A. No. Then it wouldn't have changed my opinion.

Findings and Conclusions

Fact of Violation

The contestant is charged with a violation of mandatory safety standard 30 C.F.R. § 75.1725(a), which provides as follows: "(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Inspector Workley based his citation for a violation of section 75.1725(a), on several factors, which taken as a whole, led him to conclude that the cited conveyor belt tailpiece was not maintained in a safe operating condition. Mr. Workley testified credibly that he observed float coal dust accumulations on the tailpiece frame, belt rollers that were plugged with dry coal dust, partially stuck rollers, rollers impacted with coal dust that were not turning, and a portion of the belt that was running to one side and rubbing or contacting some worn metal roller brackets and generating frictional heat. Mr. Workley believed that these conditions presented a belt fire hazard and rendered the cited tailpiece unsafe for continued operation.

Supervisory Inspector Ash, who was with Mr. Workley, personally observed the conditions cited by Mr. Workley and he testified credibly that he observed float coal dust in the air and the worn brackets. Mr. Ash saw the worn brackets after the tailpiece lids were opened, and he described the conditions as "just a mess" and that "everything had been bound up with the coal" Mr. Ash agreed with Mr. Workley that the cited conditions presented a fire hazard.

Miner's representative Nine, who was also present during the inspection, and who has worked for the contestant for 21 years, also testified credibly that he observed float coal dust accumulations on the tailpiece and belt structure, and a frozen roller that was not turning and impacted with coal and coal fines. Mr. Nine also observed the conditions inside the tailpiece after the lids were opened, and he saw that the belt had rubbed the metal roller bracket and worn it down, coal

accumulations, and a frozen roller. Mr. Nine also heard Mr. Thomas' comment that he (Thomas) did not believe the conditions were "that bad" until he looked inside the tailpiece.

Mine superintendent Straface, who arrived at the tailpiece area 15 to 30 minutes after the belt was shut down, and after some abatement work had been done, did not observe the cited conditions as they existed and were observed by Inspector Workley at the time he issued the citation. Under the circumstances, I have given little weight to Mr. Straface's opinion that the tailpiece was not in an unsafe operating condition because the area was wet, there was no float coal dust present, and the tail and belt rollers "were running free" of coal. It seems obvious to me that by the time Mr. Straface arrived at the scene, corrective action had been initiated to wash down the area and to free the belt rollers of impacted coal, and to bend back the rubbing brackets.

Belt foreman Chernok also arrived at the tailpiece 30 minutes after the citation was issued and after the abatement was well on its way, and he did not view the conditions that prompted Mr. Workley to issue the citation. Even though he did not view the conditions as observed by Mr. Workley, Mr. Chernok agreed that belt rollers turning in fine, black, dry float coal dust was an unsafe condition because of the possibility of heat and combustion, and that a belt riding on, and rubbing a bracket could generate heat.

Although safety escort Thomas testified that he arrived at the tailpiece ahead of Inspector Workley and Ash and saw no "cloud" of float coal dust, he confirmed that he observed float coal dust deposited on the tailpiece frame. He admitted that he immediately began washing down this material because he did not want to get into trouble with any float coal dust violations, and that after the tailpiece guarding lids were opened up exposing the inside area of the tailpiece he stated to Inspector Workley that he did not realize that the condition of the cited tailpiece "was that bad." Mr. Thomas also agreed that after the lids were opened the areas inside the tailpiece needed cleaning. Although Mr. Thomas believed that the coal dust he observed was rockdusted and light in color and was not float coal dust, I find the testimony of Inspector Workley, Inspector Ash, and miners' representative Nine to the contrary to be more credible.

Preshift examiner Campbell testified that when he last inspected the tailpiece area at 6:00 a.m. on May 5, he found "no unusual" conditions, observed no float coal dust accumulations, and found no evidence of the belt running in coal or out of train. However, Mr. Campbell did not inspect the inside of the tailpiece where the inspectors found the cited conditions because it was not his job. Under the circumstances, I have given little weight to Mr. Campbell's testimony and find that it does not

rebut the credible testimony of the inspectors with respect to the cited conditions which they personally observed at the time the violation was issued.

After careful consideration of all of the testimony and evidence in this case, I conclude and find that the credible testimony of the inspectors, as corroborated by Mr. Nine, clearly establishes the existence of the cited conditions and reasonably supports Inspector Workley's conclusion that the cited belt tailpiece was not maintained in a safe operating condition as required by the cited section 75.1725(a). Accordingly, the cited violation IS AFFIRMED.

Significant and Substantial Violations

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

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

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

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

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it

is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, 3 FMSHRC 327, 329 (March). Halfway, Incorporated, 8 FMSHRC 8, (January 1986).

Citing Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 501 (April 1988), the contestant asserts that in order to determine the reasonable likelihood of a combustion hazard resulting in an ignition or explosion there must be a "confluence of factors" to create a likelihood of ignition. In the instant case, the contestant argues that the violation was not significant and substantial because an ignition was unlikely. In support of this conclusion the contestant asserts that (1) an adequate fire suppression and fire detection system was installed and in working order, (2) the area was wet, (3) there was no smell of combustion, and no electrical hazards or hot rollers, (4) any float dust in the area was minimal and did not represent a hazardous accumulation and (5) the lack of damage to the belt represents clear and convincing evidence that the belt was not in contact with the bracket while it was in operation.

In support of the inspector's "S&S" finding, the respondent argues that a violation of section 75.1725(a) has been established and that the failure to maintain the cited tailpiece in a safe operating condition and free of hazards presented a discreet fire hazard that exposed miner's to serious injuries.

The respondent further argues that the failure of the contestant to maintain the tailpiece would have resulted in a fire, and miners would have been injured had normal mining operations continued. Citing the testimony of Inspectors Ash and Workley that the float dust accumulations on the tailpiece frame existed for 10 to 12 hours and that the accumulations inside the tailpiece existed for a prolonged period of shifts, days or weeks and were not documented in the last preshift or onshift exams, the respondent concludes that it was highly unlikely that the accumulations would have been removed any time soon.

The respondent also relies on the fact that a preshift examiner would not normally look inside the tailpiece to examine the belt or rollers, and he cites the admission of the belt

foreman that he keeps no record of when he has last examined the tailpiece and has no set examination schedule, and the mine superintendent's testimony that given the remote location of the tailpiece, it could have been missed during a beltline examination. The respondent concludes that given the failure of preshift examiners to discover the unsafe condition of the tailpiece and the lack of a set plan for examining the tailpiece, it is not likely that the conditions would have been corrected before an accident occurred.

The respondent further argues that the coal dust accumulations inside the tailpiece and on the frame were dry and combustible and that there was sufficient air to accommodate a fire. The respondent cites the testimony of the inspectors that the belt has running in coal dust accumulations, causing friction that could likely result in a fire, and that the belt was not aligned and was wearing away at steel brackets on the right side of the tailpiece where Inspector Workley noted the greater amount of float coal dust. The respondent points out that both inspectors were of the opinion that given the conditions which they observed, it was reasonably likely that a fire would occur.

Finally, the respondent asserts that Inspector Workley's belief that if a fire occurred, it was reasonably likely that there would be an injury of a reasonably serious nature, specifically smoke inhalation or smoke, stands uncontradicted.

I have considered the fact that the workable fire detection and suppression systems were installed along the belt line. However, Inspector Workley testified that the sensor was in the "general area" of the tailpiece and that a C.O. monitor was located "some distance" from the tailpiece (Tr. 28). Mr. Straface testified that the fire suppression system was located at the Five-S transfer area (Tr. 125). Further, even though these systems were provided, they did not prevent the prior two belt fires that occurred at belt tailpieces (Tr. 46-47). Indeed, the tailpiece fire that occurred on the immediate shift prior to the inspection by Mr. Workley was not put out by any suppression system. A foreman was dispatched to the area, and he used a fire extinguisher to wet down the smoldering roller bearing that had overheated.

Although the inspector conceded that there was no smell of combustion, he nonetheless testified credibly that the three ingredients necessary for a fire were present, namely, adequate air, fuel, and an ignition source (Tr. 26). He found that the belt was running and was in contact with the metal brackets, producing frictional heat, and that the belt was in contact with the fine coal accumulations inside the tailpiece (Tr. 24). He also indicated that had he smelled combustion, he would have concluded that the belt was actually on fire and would have issued an imminent danger withdrawal order (Tr. 59-60). Under

all of these circumstances, the fact that there was no actual smell of combustion does not detract from the inspector's "S&S" finding.

While it may be true that there were no electrical hazards or hot rollers, Inspector Ash testified credibly that heat was being generated around the tailpiece area where the belt was rubbing the metal roller bracket because there was dry coal in that area and the rest of the coal was damp (Tr. 101). Mr. Ash also testified credibly that there were frictional ignition sources present at the tailpiece, namely the belt rubbing on the metal bracket and the rollers that were impacted and frozen in the coal accumulations. He also indicated from his long experience that belts rubbing belt stands and metal brackets produce heat quickly (Tr. 106).

Belt foreman Chernok admitted that a roller turning in fine, black dry coal dust is an unsafe condition because of the possibility of heat and combustion (Tr. 221). He also agreed that a belt riding on steel bracket could generate heat (Tr. 221). Safety escort Thomas confirmed that after the belt was shut down, he bent the bare metal bracket back "so it wouldn't touch the belt" (Tr. 238).

The contestant's conclusion that the lack of belt damage represents clear and convincing evidence that the belt was not in contact with the bracket while it was in operation is rejected. Although the brackets in question were not visible while the belt was in operation with the tailpiece guards in the closed position, there is ample credible evidence that lead me conclude that the brackets were contacting the belt while it was running.

Inspector Workley testified that after the belt was stopped he observed that it was resting on portions of the belt frame and that the frame was worn away by friction caused by the belt rubbing the frame (Tr. 49). He also saw that the belt was wearing away at the missing brackets which had worn down approximately an inch from the top, and that this wear was on the right side of the tailpiece where there was a greater concentration of float coal dust (Tr. 22).

Mr. Nine confirmed that the belt had rubbed the roller brackets, and that it was worn down and running off to one side (Tr. 70-71). He also confirmed that there were two prior tailpiece belt fires during the past year (Tr. 71). Inspector Ash believed that the wear on the brackets was ongoing (Tr. 99).

The contestant's suggestion that the tailpiece area was so wet as to render it harmless is rejected. As noted earlier, contestant's witnesses Straface, Campbell, and Chernok did not observe the tailpiece conditions at the time the inspectors observed them and ordered the belt shut down. Although safety

escort Thomas arrived just ahead of the inspectors, he picked up a water hose and began washing the area down. As indicated earlier, I have found the testimony of the inspectors and Mr. Nine with respect to the existence of the dry float coal dust and coal accumulations inside the tailpiece to be more credible than the testimony of Mr. Thomas.

After careful consideration of all of the evidence and arguments presented in this case, I conclude and find that the respondent has the better part of the argument and has established by a preponderance of the credible evidence that the violation was significant and substantial (S&S).

I have concluded that a violation of section 75.1725(a), has been established. I further conclude and find that the cited tailpiece conditions presented a discrete hazard of a potential belt fire and that in the normal course of continued mining at the time the inspector observed the cited conditions it was reasonably likely that an ignition would have occurred as the dry, black, combustible coal dust and float coal dust continued to accumulate and turn in the tailpiece that was plugged with fine coal and coal dust, and as the belt continued to run out of alignment and rub on the missing roller brackets in question. I further conclude and find that a tailpiece belt fire was reasonably likely to occur as a result of the ignition, and that it was reasonably likely that the miners on the working sections would suffer smoke inhalation, and possibly other fire related injuries of a reasonably serious nature. Accordingly, I conclude and find that the violation was significant and substantial (S&S), and the inspector's finding in this regard **IS AFFIRMED**.

Unwarrantable Failure Violation

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it

means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

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

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

The contestant asserts that Inspector Workley's unwarrantable failure finding is materially flawed because mine examiner Campbell had made a special examination of the 6 South tailpiece within one-half hour of the alarm sounding because of the hot roller at the 6 North tailpiece and the inspector conceded that if he had known about this examination he probably would not have found an unwarrantable violation.

The contestant further argues that designating the violation as unwarrantable was also inappropriate in light of: (1) the fact that the inspector did not require many of the conditions addressed in the violation (i.e., missing and stuck impact rollers) to be corrected prior to putting the tailpiece back into service, (2) the credible evidence that the other conditions cited by the Inspector could have occurred after the last examination of the tailpiece and (3) the credible testimony that

the mine had a maintenance program that, as a rule, kept the six tailpieces installed at the mine in safe operating condition. Examined as a whole, the contestant concludes that these factors clearly establish that it was not indifferent to the hazards associated with the operation of the tailpiece.

The respondent asserts that the evidence fully supports the inspector's unwarrantable failure finding. The respondent argues that given the existence of the cloud of float coal dust over the tailpiece, the amount of float dust accumulations on the tailpiece frame, and the lack of any evidence of a spill, it was clear that there was an obvious problem with the tailpiece that should have been explored by the preshift examiner.

The respondent further argues that the coal dust accumulations inside the tailpiece and the wearing down of the bracket by the belt support Inspector Workley's belief that the accumulations and belt wearing conditions existed over a prolonged period of shifts, days, weeks, or months.

The respondent points out that Inspector Workley found that no maintenance had been done on the tailpiece for a long time, and the belt examiner could not state when he last examined the tailpiece, and admitted that he kept no tailpiece maintenance records. He also admitted that there was no set schedule for examining belts, and the mine superintendent testified that the isolated location of the tailpiece made it possible that it was missed during maintenance checks.

Finally, the respondent argues that while there is testimony that the cited tailpiece roller was checked following the fire at the 6 North belt prior to the inspection of May 5, 1994, it is unclear whether Inspector Workley would have concluded that the violation was unwarrantable if he knew that the cited tailpiece was checked to determine the condition of the tail roller. Although the respondent asserts that Mr. Workley testified that he "was informed that no one checked the tailpiece," the transcript record reflects that Mr. Workley testified that no one told him that anyone had checked the cited tailpiece after the prior incident at the 6 North tailpiece (Tr. 252). In any event, the respondent concludes that the remaining evidence supports a finding that the failure by the contestant to maintain the tailpiece rises to a level of aggravated conduct.

Inspector Workley, whose 20 years of experience included 8 years of underground mining and work as a mine foreman, testified credibly that the coal accumulations that he found inside the tailpiece, and the float coal dust in the area, had accumulated over a prolonged period of time. He also testified credibly that the worn tailpiece roller and bracket conditions and the lack of maintenance that he observed occurred over a period of multiple shifts and weeks.

Supervising Inspector Ash, who had 46 years of mining experience, including 21 years as a mine superintendent and foreman, was in total agreement with Mr. Workley's unwarrantable failure finding, and he testified credibly that the coal accumulation inside the tailpiece and the worm roller bracket conditions were very slow processes that would have taken place over several months.

The contestant's argument that Inspector Workley's unwarrantable failure finding is materially flawed because he conceded that if he had known that Mr. Campbell had preshifted the tailpiece on May 5, he probably would not have made that finding is rejected. Mr. Workley's testimony must be taken in context. Mr. Workley further testified that had he also known that Mr. Campbell only looked at the rear tailpiece roller and did not examine the rest of the tailpiece, it would not have changed his unwarrantable failure opinion.

Preshift examiner Campbell, who confirmed that he sometimes conducts preshift examinations as a "fill-in," as needed, in my view performed a rather cursory examination of the cited tailpiece. Mr. Campbell confirmed that he did not examine the inside of the tailpiece because the belt was running and he observed no hazardous conditions, and had no reason to examine the inside of the tailpiece. However, he further stated that the examination of the inside of the tailpiece was not his job and that this task was assigned to the belt foreman. Under the circumstances, it would appear to me that even if Mr. Campbell had some reason to examine the inside of the tailpiece, by his own admission he would not have done so because it was not his job. Given the fact that there was a hot roller and belt fire problem with another tailpiece on the shift prior to Inspector Workley's inspection, I would expect a reasonably prudent preshift examiner to ensure that the cited tailpiece was thoroughly examined, inside and outside, even if he had to shut the belt down to do so. If Mr. Campbell had done so, he would have found the conditions that company safety inspector Thomas characterized as "bad."

Belt foreman Chernok, who was responsible for the large rollers and bearings at the back of the tailpiece, and the guarding and inside rollers, testified that "I try to get them once a week. Sometimes it's a little more than a week that I finally get to all of them." Mr. Chernok could not recall when he last examined the tailpiece prior to Mr. Workley's inspection, and he kept no tailpiece maintenance records. He also testified that he examines the tailpiece "at least every other week, maybe not weekly." He agreed that the cited tailpiece conditions could have occurred a week or a week and a half prior to his last examination. Since Mr. Chernok could not recall when he last examined the tailpiece, and maintained no records, this testimony

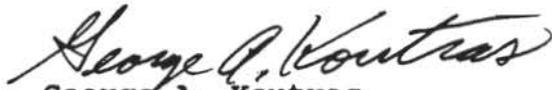
gives little support to the contestant's unwarrantable failure position. As a matter of fact, it lends support to the respondent's position that little or no attention was given to this particular tailpiece.

Mine superintendent Straface confirmed that the cited tailpiece had not been used as an active section coal production tailpiece since December, 1992, and that the belt line had not been in operation for 5 or 6 months during a strike. Given the fact that the tailpiece was in a rather isolated mine area and had not been used on a regular basis as part of the active coal production cycle, I believe one can reasonably conclude from the condition of the tailpiece, as testified to credibly by Inspectors Workley and Ash, and miners representative Nine, that the cited tailpiece was not given much if any attention, and that no one ever took the initiative to open the guarding lids to examine the inside of the tailpiece, particularly during the time immediately after the tailpiece fire incident on the 5 North belt, and immediately before the inspection by Mr. Workley. Indeed, Mr. Straface agreed that it was possible that someone forgot to open up the tailpiece and examine the inside before the inspector cited it. When asked from the bench if anyone would likely admit that they failed to examine the tailpiece thoroughly, Mr. Straface did not respond.

After careful review and consideration of all of the testimony and evidence adduced in this case, I conclude and find that the credible testimony of the respondent's witnesses supports the unwarrantable failure finding made by the inspector. I conclude and find that the failure of the contestant, over a protracted period of time, to clean up and remove the float coal dust on the outside of the cited tailpiece and the coal accumulations inside the tailpiece, and to thoroughly inspect the inside of the tailpiece and take corrective action to remedy the frozen rollers and the metal roller bracket that was rubbing the belt, particularly in view of a fire on a similar tailpiece on the shift immediately prior to the inspection of May 5, 1994, constituted sufficient "aggravated conduct" to support the inspector's unwarrantable failure finding. Accordingly, the inspector's finding **IS AFFIRMED**.

ORDER

Based on the foregoing findings and conclusions, the contested section 104(d)(1) "S&S" Citation No. 3318787, May 5, 1994, citing a violation of 30 C.F.R. § 75.1725(a), **IS AFFIRMED** as issued, and the Notice of Contest filed by the contestant **IS DENIED** and **DISMISSED**.



George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DEC 28 1994

LION MINING COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. PENN 93-420-R
: Order No. 3706548; 7/2/93
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Grove No. 1
ADMINISTRATION (MSHA), :
Respondent : Mine ID 36-02398

DECISION

Appearances: Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania,
for Contestant;
Richard T. Buchanan, Esq., Office of the
Solicitor, U.S. Department of Labor, Philadelphia,
Pennsylvania, for Respondent.

Before: Judge Fauver

Lion Mining Company seeks to vacate a § 107(a) withdrawal order under the contest provisions 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, probative, and reliable evidence establishes the Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. Lion Mining Company owns and operates Grove No. 1 mine, an underground mine that produces coal for sale or use in or substantially affecting interstate commerce.

2. On the afternoon of July 1, 1993, Lion Mining Company's mine foreman detected 2.8 percent methane (above normal levels) in the 16 Left bleeder. He removed several stoppings to increase ventilation and monitored the area.

3. When no changes occurred, he went to the surface for an MX 240 monitor to get a better methane reading. The 3:00 p.m. crew assigned to the 16 Left section was not sent into the section.

4. The mine foreman, general assistant and safety director went to the 16 Left bleeder where they found that methane levels had increased to over five percent, i.e. an explosive level.¹ Everyone was evacuated from the mine.

5. Lion developed a plan of action and notified MSHA of the methane levels. Three miners were sent underground to monitor the situation and give status reports every half hour. Ventilation to the affected area was increased from approximately 10,000 cubic feet per minute to 20,000.

6. MSHA Inspector Huntley arrived at the mine about 10:45 p.m. The production crews had been sent home, and there was no power on any equipment in the 16 Left section.

7. The inspector arrived at the 16 Left bleeder around midnight, took methane readings and found explosive levels. He determined that an imminent danger existed and issued § 107(a) Order No. 3706548 for the 16 Left section.

8. Later, Inspector Huntley's supervisor, Ted Glusko, instructed him to modify the order to designate the entire mine as the area affected by the order.

9. Explosive levels of methane were found by Inspectors Huntley, Fetsko, and Jardina in the 16 Left bleeder system on July 2 and 3, 1993. By July 3 the operator abated the methane condition by making ventilation changes. The order was terminated by Inspector Kenneth Fetsko around 3:15 p.m. on that date.

10. Inspector Huntley issued the § 107(a) order because of high concentrations of methane in the 16 Left bleeder entry, the possibility that a roof fall could occur igniting the methane, and the danger to miners if normal mining operations were resumed before the methane condition was abated.

11. Had normal mining operations been permitted to resume under the conditions observed by Inspector Huntley, there would have been several ignition sources present in and around the active working section, such as a continuous miner, roof bolters, ram cars, tractors, scoops, non-permissible golf carts, battery charging stations, and an electrical transformer. In addition, check curtains could have been moved or knocked down, causing the

¹Methane is explosive in concentrations of 5 to 15 percent.

methane in the 16 Left bleeder to back up into the active working section.

12. High concentrations of methane can move very rapidly from a bleeder entry into an active working section in the event of a roof fall or a line brattice falling down.

13. In April 1993, high concentrations of methane backed up from the 17 Right bleeder into the active workings of that section as reflected in Order No. 3706477. Inspector Huntley was aware of that order when he issued Order No. 3706548.

14. On April 24, 1992, methane accumulated in the 17 Right section because of a failure to maintain adequate face ventilation. The methane was ignited by heat or sparks generated by cutting bits on a continuous miner. Inspector Huntley participated in the investigation of the methane ignition.

15. On August 19, 1991, methane accumulated in the 16 Right section because of a failure to maintain adequate face ventilation. The methane was ignited by heat or sparks generated by cutting bits of a continuous miner. Inspector Huntley participated in the investigation of that methane ignition.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

An "imminent danger" is defined in § 3(j) of the Act as "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." If an MSHA inspector finds an imminent danger, § 107(a) provides that he or she must:

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 § 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determined that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

The legislative history of § 107(a), which was unchanged when the 1969 Mine Act was amended in 1977, underscores the hazards of methane accumulations:

The most hazardous condition that can exist in a coal mine, and lead to disaster-type accidents, is the accumulation of methane gas in explosive amounts. Methane can be ignited with relative little energy and there are, even under the best mining conditions numerous potential ignition sources always present. . . . [H.R. No. 563, 91st Cong., 1st Sess. 21 (1969).]

The Commission has noted that "the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (1989). The Commission has also noted that the courts have held that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Id., quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. Appl., 491 F.2d 277, 278 (4th Cir. 1974). The Commission has adopted the Seventh Circuit's holding that an inspector's finding of an imminent danger must be upheld "unless there is evidence that he has abused his discretion or authority." 11 FMSHRC at 2164, quoting Old Ben Coal Corp. v. Interior Bd. of Mine Op. App. 523 F.2d 25, 31 (7th Cir. 1975); see also: Wyoming Fuel Co., 14 FMSHRC 1282, 1291 (1992).

While the inspector has considerable discretion in determining whether an imminent danger exists, there must be some degree of imminence to support an imminent danger finding. Utah Power & Light Co., 13 FMSHRC 1617, 1621 (1991).

The evidence shows that a dangerous condition existed in the Grove No. 1 mine on July 2 and 3, 1993. Inspectors Huntley, Fetsko, and Jardina recorded explosive levels of methane in the 16 Left bleeder during that approximately one and one-half day period. High levels of methane were also found at the 10 Left bleeder. A roof fall could have ignited the methane or, had normal mining been permitted to resume, a number of electrical ignition sources would have been present in the active 16 Left section. The Secretary's experts testified, convincingly, about the potential for an immediate explosion that could have quickly traveled to widespread areas of the mine. I find that a preponderance of the reliable evidence supports the inspector's finding that an imminent danger existed. I also find that the reliable evidence supports the modification of the § 107(a) order to include the entire mine.

Lion Mining contends that Inspector Huntley was precluded from issuing a § 107(a) order because it had voluntarily evacuated the mine and deenergized equipment in the 16 Left section. However, § 107(a) orders are intended not only to withdraw miners from a mine or area affected by an imminent danger, but also to prevent resumed mining until "an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent no longer exist." The Act does not contemplate leaving this decision to the operator itself.

In Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, 491 F.2d 277, 278 (4th Cir. 1974), the Court upheld the IBMA's decision affirming an imminent danger order in a similar situation. The Court stated that, although the company:

had voluntarily withdrawn miners from the affected area until the conditions were corrected prior to issuance of the [imminent danger withdrawal] order[,] the Secretary determined, and we think correctly, that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." [Emphasis added.]

The decision of the IBMA, found at 2 IBMA 128 (No. IBMA 73-28, 1973), more fully states the facts of that case. The inspector had issued an imminent danger withdrawal order for a mine entry because of a lack of clearance between the top of a shuttle car and the roof, and because two loose roof bolts were hanging from the roof. When the inspector arrived, the company had removed the shuttle car from the area and was beginning to correct the situation. Nonetheless, the IBMA held:

The dangerous condition cannot be divorced from the normal work activity. The question must be asked -- could normal operations proceed prior to or during abatement without risk of death or serious injury? Although prior evacuation of miners or voluntary work stoppage by an operator may be laudatory and indicate concern for the safety of the miners, such actions, although taken in all good faith, cannot operate to eliminate an otherwise imminently dangerous condition or practice. Likewise, the fact that the process of abatement may have commenced prior to the issuance of the order . . . does not in our view serve to invalidate the order. [2 IBMA at 136; emphasis added.]

The above quoted language of the Fourth Circuit Court in affirming the IBMA's decision has become black letter law. See, e.g., V.P. Mining Co., 15 FMSHRC 1531, 1535 (1933); Wyoming Fuel Co., 14 FMSHRC 1282, 1290 (1992); and Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (1989). In another key case, the Seventh Circuit emphasized that imminent danger orders are intended not only to withdraw miners from a dangerous area, but also "to assure the miners [will] not carry on routine mining operations in the face of imminent dangers." Freeman Coal Mining Co. v. IBMA, 504 F.2d 741, 744 (7th Cir. 1974). Citing the legislative history, the Court noted that an inspector who issues an imminent danger order must "prevent entrance by anyone to that mine or area, except those miners necessary to abate the hazard. . . ." Id. at 744 n.4.²

I find that a preponderance of the evidence shows that the inspector exercised reasonable discretion in issuing the subject § 107(a) order.

CONCLUSION OF LAW

1. The judge has jurisdiction.
2. The Secretary proved that the inspector acted on reasonable grounds and with substantial supporting facts in issuing Order No. 3706548.

ORDER

WHEREFORE IT IS ORDERED that:

1. Order No. 3706548 is AFFIRMED.
2. This proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

²The legislative history cited by the Court further states: "the imminent danger may be due to a violation of a mandatory safety standard or some other cause not covered by a standard, including natural causes. . . ." See also VP-5 Mining Co., 15 FMSHRC 1531 (1993), where the Commission affirmed an imminent danger order but vacated an accompanying citation.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 29 1994

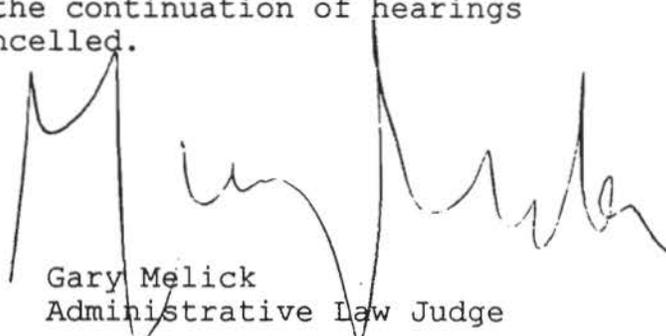
LARRY E. HATTON, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 94-57-D
: MSHA Case No. BARB CD 93-10
ADENA FUELS, INCORPORATED, :
Respondent : Diamond No. 1 Mine

ORDER OF DISMISSAL

Appearances: Tony Opegard, Esq., Mine Safety Project of the
Appalachian Research and Defense Fund of Kentucky,
Inc., Lexington, Kentucky, for the Complainant,
Jerry Wayne Slone, Esq., Weinberg, Campbell and
Slone, Hindman, Kentucky, for the Respondent.

Before: Judge Melick

Following initial commencement and postponement of hearings,
Complainant Larry E. Hatton, in effect, requested approval to
withdraw on the grounds that the parties had reached an agreeable
settlement of the underlying matter. Under the circumstances
herein, permission to withdraw is granted. 29 C.F.R. § 2700.11.
This case is therefore dismissed and the continuation of hearings
scheduled for January 24, 1995, is cancelled.


Gary Melick
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 2 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 94-609
Petitioner	:	A. C. No. 36-08223-03533
v.	:	
ROX COAL INCORPORATED,	:	Docket No. PENN 94-625
Respondent	:	A. C. No. 36-08223-03534
	:	
	:	Docket No. PENN 95-2
	:	A. C. No. 36-08214-03541
	:	
	:	Docket No. PENN 95-10
	:	A. C. No. 36-08223-03535
	:	
	:	Diamond T B Mine

ORDER ACCEPTING APPEARANCE
PREHEARING ORDER

The penalty petitions in the above-captioned cases were filed on behalf of the Secretary by a "Conference and Litigation Representative", hereafter referred to as a CLR. In the cover letter to each petition the CLR advises that he is an employee of the Mine Safety and Health Administration who has been trained and designated as a CLR and is authorized to represent the Secretary in accordance with an attached Limited Notice of Appearance. In the notice submitted for each case the CLR states that he is authorized to represent the Secretary in all prehearing matters and that he may appear at a hearing if an attorney from the Solicitor's office is also present. The operator has filed answers in these cases and has raised no objection to the CLR's notices.

Subparagraph (4) of section 2700.3(b) of the Commission's regulations, 29 C.F.R. § 2700.3(b)(4), provides that an individual who is not authorized to practice before the Commission as an attorney may practice before the Commission as a representative of a party with the permission of the presiding judge. In reviewing these matters, note is taken of the fact that more than 5,000 new cases were filed with the Commission in Fiscal 1994. Obviously, a caseload of this magnitude imposes strains upon the Secretary's resources as well as those of this Commission. It appears that the Secretary is attempting to allocate his resources in a responsible matter. Therefore, I exercise the discretion given me by the regulations, cited above, and determine that in these cases the CLR may represent the Secretary in accordance with the notices he has filed.

It is hereby Ordered that the parties in the above-captioned civil penalty proceedings communicate, by telephone or otherwise,

and discuss (1) possible settlements, (2) the names of the witnesses each party intends to present at the trial, (3) the possibility of stipulating issues that are not in substantial dispute, and (4) any other matter that may expedite the trial of this proceeding. The attorneys must advise by **5:00 p.m., January 18, 1995**, of the results of their discussion.

In the event that **by January 18, 1995**, I have received no communication from the parties informing me that the aforesaid discussion has taken place and that the possibilities of agreement have been exhausted, a prehearing conference will be held in my office on **January 19, 1995, at 10:00 a.m.**, without further notice. Failure to appear at the conference may result in a default order being issued against the party failing to appear.

If, of course, the parties advise me **by 5:00 p.m. on January 18, 1995**, as to the results, if any, of their discussion, no appearance will be necessary.

A handwritten signature in cursive script that reads "Paul Merlin". The signature is written in dark ink and is centered on the page.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 2, 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 94-616
Petitioner : A. C. No. 36-06967-03856
v. :
TANOMA MINING COMPANY, : Tanoma Mine
INCORPORATED, :
Respondent :

ORDER ACCEPTING APPEARANCE
PREHEARING ORDER

The penalty petition in the above-captioned case was filed on behalf of the Secretary by a "Conference and Litigation Representative", hereafter referred to as a CLR. In the cover letter to the petition the CLR advises that he is an employee of the Mine Safety and Health Administration who has been trained and designated as a CLR and is authorized to represent the Secretary in accordance with an attached Limited Notice of Appearance. In the notice the CLR states that he is authorized to represent the Secretary in all prehearing matters and that he may appear at a hearing if an attorney from the Solicitor's office is also present. The operator has filed an answer and has raised no objection to the CLR's notice.

Subparagraph (4) of section 2700.3(b) of the Commission's regulations, 29 C.F.R. § 2700.3(b)(4), provides that an individual who is not authorized to practice before the Commission as an attorney may practice before the Commission as a representative of a party with the permission of the presiding judge. In reviewing this matter, note is taken of the fact that more than 5,000 new cases were filed with the Commission in Fiscal 1994. Obviously, a caseload of this magnitude imposes strains upon the Secretary's resources as well as those of this Commission. It appears that the Secretary is attempting to allocate his resources in a responsible matter. Therefore, I exercise the discretion given me by the regulations, cited above, and determine that in this case the CLR may represent the Secretary in accordance with the notice he has filed.

It is hereby **ORDERED** that the parties in the above-captioned civil penalty proceeding communicate, by telephone or otherwise, and discuss (1) possible settlement, (2) the names of the witnesses each party intends to present at the trial, (3) the possibility of stipulating issues that are not in substantial dispute, and (4) any other matter that may expedite the trial of this proceeding. The attorneys must advise **by 5:00 p.m., January 18, 1995**, of the results of their discussion.

In the event that by **January 18, 1995**, I have received no communication from the parties informing me that the aforesaid discussion has taken place and that the possibilities of agreement have been exhausted, a prehearing conference will be held in my office on, **January 19, 1995, at 10:00 a.m.**, without further notice. Failure to appear at the conference may result in a default order being issued against the party failing to appear.

If, of course, the parties advise me by **5:00 p.m. on January 18, 1995**, as to the results, if any, of their discussion, no appearance will be necessary.

A handwritten signature in cursive script that reads "Paul Merlin". The signature is written in dark ink and is positioned above the printed name and title.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Gerald F. Moody, Jr., Conference and Litigation Representative,
Mine Safety and Health Administration, U. S. Department of Labor,
200 James Place, Monroeville, PA 15146

Joseph A. Yuhas, Esq., 1809 Chestnut Avenue, P. O. Box 25,
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 2, 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 94-563
Petitioner : A. C. No. 36-04281-03908
: :
v. : Dilworth Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

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Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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