DECEMBER 1996

COMMISSION DECISIONS AND ORDERS



ADMINISTRATIVE LAW JUDGE DECISIONS



ADMINISTRATIVE LAW JUDGE ORDERS

**DECEMBER 1996**

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

Daanen & Janssen, Inc. v. Secretary of Labor, MSHA, Docket No. LAKE 95-180-RM, etc. (Judge Barbour, October 22, 1996)

Contractors Sand and Gravel, Inc. v. Secretary of Labor, MSHA, Docket No. EAJ 96-3. (Judge Cetti, October 28, 1996)

Secretary of Labor, MSHA v. Austin Powder Company, Docket No. YORK 95-57-M, etc. (Chief Judge Merlin, October 31, 1996)

Secretary of Labor, MSHA v. Wayne R. Steen, Docket No. PENN 94-15. (Judge Fauver, November 15, 1996)

Secretary of Labor, MSHA v. Ambrosia Coal and Construction Company, Docket No. PENN 93-233. (Judge Fauver, November 15, 1996)

AKZO Nobel Salt, Inc. v. Secretary of Labor, MSHA, Docket No. LAKE 96-66-RM. (Judge Koutras, November 19, 1996)

James M. Ray, employed by Leo Journagan Construction v. Secretary of Labor, MSHA, Docket No. EAJ 96-4. (Judge Fauver, November 21, 1996)

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

Secretary of Labor, MSHA v. Amax Coal Company, Docket No. LAKE 94-55, etc. (Judge Feldman, October 31, 1996)

# COMMISSION DECISIONS AND ORDERS

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 2, 1996

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | : | |
| v. | : | Docket Nos. CENT 95-8-RM<br>CENT 95-9-RM |
| ASARCO, INC. | : | |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA)<br>on behalf of DAVID HOPKINS | : | |
| v. | : | Docket No. CENT 95-122-DM |
| ASARCO, INC. | : | |

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

ORDER

BY THE COMMISSION:

In these consolidated contest and discrimination proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"), the parties filed a Joint Motion To Approve Settlement Agreement on October 23, 1996 ("Joint Motion"). For the reasons set forth below, we deny the Joint Motion without prejudice.

On March 4, 1996, Administrative Law Judge Richard W. Manning issued a decision finding that ASARCO, Inc. ("ASARCO") violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c), when it discharged David G. Hopkins, the complainant. 18 FMSHRC 317, 335 (March 1996) (ALJ). In a Supplemental Decision and Final Order issued on July 16, 1996, Judge

[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

Manning awarded Hopkins reinstatement[2] and $12,752 in back pay (minus payroll deductions), interest, and expenses. 18 FMSHRC 1160, 1163-65 (July 1996) (ALJ). Judge Manning also ordered ASARCO to expunge from Hopkins' personnel records any mention of his discharge, and to pay a civil penalty of $800 for its violation of section 105(c). *Id.* On August 23, 1996, the Commission granted ASARCO's petition for discretionary review challenging the judge's conclusions.[3]

ASARCO subsequently filed with the Commission two motions requesting extensions of the briefing schedule, indicating that the parties were either engaged in settlement discussions or in the process of executing a settlement agreement. The Commission granted both motions and directed ASARCO to file its brief by November 6, 1996. The parties filed their Joint Motion before ASARCO's brief was due. The motion requests, *inter alia*, that the Commission approve the settlement agreement set out in seven numbered paragraphs within the motion. Joint Motion at 3-4.

Under the terms of the settlement agreement, ASARCO agrees to pay Hopkins $15,000 "in settlement of any and all of Mr. Hopkins' claims against [the company]," and to pay $500 in settlement of the $800 fine assessed by the judge. *Id.* at 3. Without further elaboration, the parties state that their proposed penalty "is consistent with the statutory criteria for penalties under the Mine Act." *Id.* Hopkins waives any rights to be reinstated or to seek employment at any facility owned by ASARCO or its subsidiaries, successors, or assigns, and he releases ASARCO from further liability. *Id.* The parties agree to bear their own costs in connection with the proceeding, and represent that the settlement "is in the public interest and will further the intent and purpose of the Mine Act." *Id.* at 3-4. The motion is signed by counsel for ASARCO and the Secretary, and by Hopkins. Included in the motion is a "Confidentiality Agreement" paginated as part of the overall submission and signed by ASARCO's counsel and Hopkins, but not by the Secretary's counsel. *Id.* at 5.

Oversight of proposed settlements is committed to the Commission's sound discretion. *Pontiki Coal Corp.*, 8 FMSHRC 668, 674-75 (May 1986). The Commission has exercised this discretion in the past in both section 105(c)(2) and section 105(c)(3) discrimination cases. *See, e.g., Reid v. Kiah Creek Mining Co.*, 15 FMSHRC 390 (March 1993); *Secretary of Labor on behalf of Gabossi v. Western Fuels–Utah, Inc.*, 11 FMSHRC 134 (February 1989).

On its face, the instant settlement agreement fails to adequately set forth the intent of the parties regarding the nature of ASARCO's $15,000 payment to Hopkins and whether that

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[2] Hopkins declined the offer of reinstatement.

[3] In its PDR, ASARCO also raises the question of whether the judge properly concluded that ASARCO violated 30 C.F.R. § 57.14100(b) in connection with its discharge of Hopkins. *See* 18 FMSHRC at 331-34, 336. Since the Joint Motion requests Commission approval of ASARCO withdrawing its PDR, this issue is moot.

amount represents a net amount to be paid to Hopkins or whether deductions are to be taken out of that amount. We conclude that the parties must more clearly express their intentions regarding the payment to Hopkins to avoid the possibility of future litigation over the terms of the payment.[4]

In addition, the parties have failed to meet the requirements of Commission Procedural Rule 31(b)(3). In keeping with Congress's intention that the Commission "assure that the public interest is adequately protected before approval of any reduction in penalties," S. Rep. No. 181, 95th Cong., 1st Sess. 45 (1977), *reprinted in* Legislative History of the Federal Mine Safety and Health Act of 1977, at 633 (1978), Rule 31(b)(3) requires that a motion to approve settlement include "[f]acts in support of the penalty agreed to by the parties" (29 C.F.R. § 2700.31(b)(3)), so that the Commission can verify that the reduced penalty is appropriate. Here, no such facts were provided by the parties in support of their proposal to reduce the $800 fine assessed by the judge to $500. ASARCO and the Secretary state that their proposed penalty "is consistent with the statutory criteria," but fail to provide any further justification for reducing the penalty. Joint Motion at 3.

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[4] This result is in keeping with our recent ruling in *Secretary of Labor on behalf of Kaczmarczyk v. Reading Anthracite Co.*, 18 FMSHRC 299 (March 1996). In *Kaczmarczyk*, we were presented with a dispute regarding whether deductions should have been taken from an award of monetary damages paid in compensation for unlawful discrimination under section 105(c) of the Mine Act. *Id.* at 300. Noting that the "issue [was] governed by the terms of the Internal Revenue Code, not the Mine Act," we held that "[i]n order for both Reading and Kaczmarczyk to treat that damage award properly for income tax purposes, the basis for the stipulated damages must be categorized in appropriate detail." *Id.*

Accordingly, the parties' joint motion is denied without prejudice. The parties are invited to file a revised joint motion clarifying their intent as to the nature of ASARCO's payment to Hopkins and fulfilling the requirements of Commission Procedural Rule 31(b)(3). Any revised motion to approve settlement shall be filed with the Commission by December 17, 1996. If such a motion is not filed, ASARCO's brief shall be filed with the Commission by December 31, 1996. The Secretary's response brief will be due thirty days thereafter.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

December 10, 1996

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of KENNETH HANNAH, PHILIP PAYNE, and FLOYD MEZO | : | |
| v. | : | Docket No. LAKE 94-704-D |
| CONSOLIDATION COAL COMPANY | : | |

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

## DECISION

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). Following an evidentiary hearing, Administrative Law Judge Gary Melick dismissed a discrimination complaint brought by the Secretary of Labor on behalf of Kenneth Hannah, Floyd Mezo, and Phillip Payne under section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). 17 FMSHRC 666 (April 1995) (ALJ). The judge concluded that disciplinary action taken by Consolidation Coal Company ("Consol") against the three miners for engaging in a work refusal did not violate section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), because, at the time of their refusal, the miners no longer had a good faith, reasonable belief in a hazardous condition. 17 FMSHRC at 671-72. For the reasons that follow, we reverse the judge's determination that the miners' work refusal was unreasonable and unprotected, and his resultant finding that the disciplinary measures taken by Consol against the miners for engaging in a work refusal did not violate the Mine Act. We remand the case for computation of a backpay award and assessment of an appropriate civil penalty.

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this Panel of three Commissioners has been designated to exercise the powers of the Commission.

I.

Factual and Procedural Background

Kenneth Hannah, Floyd Mezo, and Phillip Payne were employed by Consol at its Rend Lake Mine in Sesser, Illinois. Tr. 198-99, 258-59, 310-11. Rend Lake Mine is considered a "gassy" mine because of the amount of methane it liberates. Tr. 160, 219. During the last shift on April 9, 1994, the mine experienced a power outage, causing the ventilating fans to shut down. 17 FMSHRC at 668. In the early morning hours of Sunday, April 10, Hannah, Mezo, Payne and other miners were called to the mine to help restore power underground. *Id.* at 667-68, 670.

On the morning of April 10, Mezo and Payne were in the wash house, waiting to go underground, when three of the miners assigned to perform the preshift examination returned to the surface. *Id.* at 670. Mezo and Payne overheard the examiners discussing among themselves whether the secondary escapeways should have been inspected as part of that examination. *Id.* At least two of the examiners expressed the view that the secondary escapeways should have been included in the preshift examination, and that the escapeways had always been examined in the past following a fan stoppage. Tr. 46-47, 49, 108-09, 262.[2] The examiners indicated that, without such an examination, it was not possible to determine whether methane may have accumulated in the escapeways. Tr. 262-63.

The escapeways are part of the mine ventilation system and are used to carry methane gas out of the mine. Tr. 42-43, 483. Methane can accumulate in the escapeways following a fan stoppage. Tr. 483-84, 522. The escapeways also contain electrical equipment, including pumps, that could trigger an ignition in the event of a malfunction in the presence of explosive levels of methane. Tr. 106-07, 170-71, 275.

Mezo and Payne went to the office of their immediate supervisor, John Moore, to report their concerns about the propriety of the preshift examination and the safety of restoring power in the mine. 17 FMSHRC at 670; Tr. 202-03, 263-64, 454. Payne expressed his concern about a possible methane buildup in the mine. Tr. 491. Moore indicated that he was not a mine examiner and did not know whether the preshift examination was adequate, but he agreed to find out. 17 FMSHRC at 670. Moore then attempted to call someone, and Mezo and Payne returned to the wash house. *Id.* In the wash house, Mezo and Payne discussed with Hannah, a member of the mine safety committee, their concerns about the preshift examination and their meeting with Moore, and asked Hannah to represent them in their discussions with management concerning this safety issue. *Id.* at 668, 670.

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[2] Several mine examiners, including one of these three examiners, had previously been informed after a mine stoppage incident several weeks earlier, that state inspector William Sanders had determined that an inspection of the secondary escapeways was not required following a fan stoppage. 17 FMSHRC at 668 n. 3. There is no evidence, however, that Hannah, Mezo or Payne were aware of this ruling at the time of their work refusal. *Id.*

Before meeting with Moore, Hannah discussed the situation with the three examiners who had returned to the surface. The examiners told Hannah that the entire mine, including the secondary escapeways, should be checked before power is restored. *Id.* at 668. Hannah, Mezo, and Payne then met again with Moore in his office. Hannah explained what he had been told by the examiners and asked Moore if he knew whether the preshift examination had been properly conducted. *Id.* Moore responded that he did not know because he was not experienced in production. *Id.* Hannah replied that he did not know either because he was a surface electrician, with no underground mining experience. *Id.* at 667-68. Moore then called assistant mine superintendent Rick Harris. *Id.* at 668.

While he was on the phone with Harris, Moore called the three mine examiners to his office. *Id.* Two of the examiners expressed the view that the mine had not been properly examined following the fan stoppage because the secondary escapeways had not been inspected. *Id.;* Tr. 266-67, 322. After completing his phone conversation with Harris, Moore told the miners that Harris said the mine examination had been proper. 17 FMSHRC at 668. Moore also told the miners he had discussed the situation with mine superintendent Joseph Wetzel, who also confirmed that the examination had been properly conducted. Tr. 456-57, 477. Hannah told Moore that the mine examiners disagreed and that they needed to get the "proper people" to the mine to make sure it was safe. 17 FMSHRC at 668. Hannah then read to Moore provisions of the applicable collective-bargaining agreement, which provided that in the event of a disagreement between miners and management on a safety issue arising under state or federal law, the appropriate officials were to be contacted. *Id.* at 668-69.

Shortly thereafter, Moore appeared at the wash house and told Hannah, Mezo, and Payne that Consol safety director Kit Phares had contacted state inspector William Sanders, who indicated the preshift examination had been properly conducted and that it was not necessary to inspect escapeways during the examination. *Id.* at 669, 671; Tr. 324-25, 414, 457-58, 548-49. Moore consequently issued a direct order to Mezo and Payne to return to work. Tr. 33, 118-19, 415, 457. Hannah again referred to the contract provision requiring the presence of an appropriate state or federal official to resolve a safety dispute, and asked Moore to either call state inspector Sanders himself, or allow Hannah to call Sanders. 17 FMSHRC at 669, 671; Tr. 325, 458, 464-65, 549. Moore refused, explaining that mine superintendent Wetzel had been called to the mine and would handle the matter thereafter. 17 FMSHRC at 669, 671; Tr. 325-26, 458, 465. Mezo and Payne stated that they were invoking their "safety rights" in response to the work order issued by Moore. 17 FMSHRC at 669; Tr. 86, 270, 326.

Hannah returned to his work area where his foreman, Gary Phelps, directed him to restore power to the mine. Hannah refused, noting that two mine examiners were still underground at the time. 17 FMSHRC at 669. Hannah stated that he was invoking his "individual safety rights" because if there was an electrical fault with methane present, it could trigger an explosion that would kill or maim the examiners still underground. *Id.*; Tr. 330-31, 347, 359. Moore then also gave Hannah a direct order to turn the power on. Hannah again refused with the same explanation. 17 FMSHRC at 669. Hannah then told Moore that he had other work duties to

perform, and Moore told him to return to his other work. *Id.*

A short time later, Hannah was called to a meeting in the office of mine superintendent Wetzel, where Wetzel was questioning Mezo and Payne about the basis for their work refusal. *Id.* Hannah intervened, and explained that the miners were concerned about causing an explosion and killing themselves and fellow workers. *Id.* Hannah also read to Wetzel the applicable contract provision which required calling in an appropriate state or federal official in the event of a safety dispute. Tr. 334-35. Wetzel responded that the state inspector had been called and would be there shortly. Tr. 278, 335. Wetzel and Gerald Kowzan, Consol's supervisor of human resources, warned the miners they could be subject to disciplinary action, including discharge and the removal of Hannah from the safety committee, for improperly invoking their "safety rights" under the Contract. Tr. 278, 335-36, 646-47.

When inspector Sanders arrived at the mine, he met with Wetzel and the three miners. 17 FMSHRC at 669; Tr. 147-48, 279-80, 596-97. Hannah asked Sanders whether an inspection of the mine in its entirety was required following a power outage and fan stoppage. 17 FMSHRC at 669. Sanders responded that under state law secondary escapeways only had to be examined every twenty-four hours, and did not need to be reexamined after a power outage. *Id.* Sanders also indicated that it was safe to turn on the power in the mine. *Id.* Hannah then told Mezo and Payne it was time to turn on the power and return to work. *Id.* at 669-70. Wetzel, however, informed the miners that the matter was not over and that they were subject to discipline and the removal of Hannah from the safety committee. *Id.* at 670.

Consol suspended Hannah, Mezo, and Payne, with the intent to discharge them, because they had failed to obey direct work orders. 17 FMSHRC at 666 n.1; Tr. 599. Hannah subsequently filed a grievance in connection with this disciplinary action, which resulted in a two-day hearing before an arbitrator. Tr. 432, 656. On April 25, the arbitrator issued a decision in which he found that Consol had just cause for disciplining the three miners, but also concluded that the penalty of discharge was too severe because of mitigating factors, and therefore ordered the three miners reinstated without back pay. 17 FMSHRC at 666 n.1; Tr. 599, C. Ex. 1. The record indicates that Hannah, Mezo, and Payne had never previously refused a work order or raised a safety concern, and had not been subject to any prior disciplinary action. Tr. 255-56, 280, 341-42, 492, 521-22, 673.

Hannah, Mezo, and Payne filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"), and the Secretary filed the present complaint on their behalf, pursuant to Section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).[3]

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[3] Section 105(c)(2) provides in part:

> Any miner . . . who believes that he had been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such

The judge concluded the disciplinary action taken by Consol against the three miners did not violate the Mine Act because, at the time of their work refusal, the miners no longer had a good faith, reasonable belief in a hazardous condition that justified their refusal to work. 17 FMSHRC at 671-72. This conclusion was based on the judge's finding that, in response to the miners' stated safety concerns, Consol management had fulfilled its obligation to address the perceived danger communicated by the three miners by contacting a state inspector to confirm that the preshift examination was proper and that no safety hazard existed, and then conveying that information to the miners. *Id.*

The judge further concluded that if the miners did not believe the statements of Consol mine officials concerning their communications with inspector Sanders, it was the miners' obligation to contact Sanders themselves to confirm that the preshift examination had been properly conducted. *Id.* The judge discredited the testimony of the miners that they were prohibited from using telephones at the mine without permission, and instead credited testimony of Consol officials that there was no company policy prohibiting the use of telephones by employees and that the miners could have called the state inspector themselves. *Id.* at 672. The judge concluded that the miners' failure to either accept the reported statements of Sanders or to verify those statements by calling Sanders themselves rendered their continued refusal to work unreasonable, and therefore unprotected. *Id.* He also concluded that their suspension by Consol for their continued work refusal did not violate the Mine Act. *Id.* Accordingly, the judge dismissed the discrimination proceeding. *Id.*

The Commission granted the Secretary's petition for discretionary review, which challenged the judge's finding that the miners' work refusal was unreasonable and unprotected under the Mine Act.

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> violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . alleging such discrimination or interference and propose an order granting appropriate relief.

30 U.S.C. § 815(c)(2).

II.

Disposition

A. General Principles

A miner alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall,* 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). An operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Associated Coal Corp. v. FMSHRC,* 813 F.2d 639, 642 (4th Cir. 1987).

The Mine Act grants miners the right to complain of a safety or health danger, but does not expressly grant the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have inferred a right to refuse to work in the face of a perceived danger. *See Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.,* 6 FMSHRC 516, 519-21 (March 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985); *Price v. Monterey Coal Co.,* 12 FMSHRC 1505, 1514 (August 1990) (citations omitted). A miner refusing work is not required to prove that a hazard actually existed. *See Robinette*, 3 FMSHRC at 812. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Id.*; *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *Robinette*, 3 FMSHRC at 807-12; *Secretary of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810. The purpose of this requirement is to "remove from the Act's protection work refusals involving frauds or other forms of deception." *Id.*

The Commission has held that, for a work refusal to be protected under the Mine Act, a miner should first communicate his safety concerns to some representative of the operator. *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982). If the miner expresses a reasonable, good faith fear concerning safety, the operator has a duty to address the perceived danger. *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 (February 1984), *aff'd sub nom. Brock on behalf of Parker v. Metric Constructors, Inc.*, 766 F.2d 469 (11th Cir. 1985); *Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529,

1534 (September 1983). Once it is determined that a miner has expressed a good faith, reasonable concern about safety, the analysis shifts to an evaluation of whether the operator has addressed the miner's concern "in a way that his fears reasonably should have been quelled." *Gilbert*, 866 F.2d at 1441; *see also Bush*, 5 FMSHRC at 997-99; *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (February 1988), *aff'd mem.*, 866 F.2d 431 (6th Cir. 1989). Accordingly, a miner's continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition. *Bush*, 5 FMSHRC at 998-99.

B. The Adequacy of Consol's Response to the Miners' Safety Concerns

The Secretary contends the judge erred in finding that Consol had taken adequate steps to allay the miners' safety concerns because the operator's response was based upon third-party statements made by the state inspector to a Consol official who was not present at the mine and therefore was not available to explain the situation to the miners directly. S. Br. at 10-16. The Secretary asserts that, in view of the concerns expressed by the miners about a possible methane explosion and the other troubling circumstances, Consol had an obligation to permit the miners to speak directly to the state inspector to confirm that he considered the preshift examination to have been properly conducted. *Id.* at 15-16. In response, Consol does not challenge the good faith of the miners in initially raising concerns about the adequacy of the preshift examination, but contends that the judge correctly determined its response to the miners' expressed safety concerns was sufficient to allay their concerns and to render their subsequent work refusal unreasonable and unprotected. C. Br. at 4-9. Consol argues the Secretary has failed to provide any evidence to show that the miners had a justifiable basis for refusing to believe the assurances of supervisory and managerial personnel regarding the propriety of the preshift examination, or that would warrant imposing an obligation on the company to arrange for the miners to speak directly to the state inspector. *Id.* at 5, 8-9.

The dispositive issue in this case is whether Consol addressed the concerns expressed by the three miners in a manner sufficient to quell their fears, thereby rendering their subsequent work refusal unreasonable and unprotected.[4] We conclude that substantial evidence does not support the judge's finding that the actions taken by Consol officials in response to the miners' safety concerns fulfilled its obligation to address their fears resulting from the perceived

[4] The overwhelming record evidence demonstrates, and Consol does not dispute, that the three miners initially had a reasonable, good faith concern regarding the propriety of the preshift examination and the safety of restoring power to the mine, which they expressed to supervisor Moore. The fact that supervisor Moore initially indicated that he did not know whether the preshift examination was proper or if inspection of the escapeways was required further indicates the reasonableness of the miners' safety concerns.

inadequacy of the preshift examination.[5]

First, the judge failed to adequately consider evidence indicating that the safety concerns raised by the miners were serious in nature, involving the risk of an explosion due to potential accumulations of methane gas in escapeways that would have been detected by an inspection of those areas. The record indicates the three miners were concerned that if power was restored to the mine when there was methane gas present in the escapeways, a spark or electrical problem could cause an explosion that could kill or injure them or their co-workers,[6] and that they repeatedly conveyed these concerns to Consol management.[7] Tr. 215-16, 219-21, 272-73, 275-77, 330-31, 332-33, 394, 557-58, 613, 649. The seriousness of their concerns was corroborated to a significant extent by inspector Sanders, who testified that the type of fan stoppage which occurred at the Rend Lake Mine on April 9 would give rise to a legitimate concern about methane gas accumulations in secondary escapeways, and that a potential hazard exists in re-energizing electrical equipment in an area of methane accumulation that has not been examined. Tr. 155-56, 170-71. The seriousness of the miners' concerns was further underscored by Rend Lake Mine's status as a gassy mine. Tr. 160, 219, 481, 536.

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[5] The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

[6] While Hannah did not work underground, and thus would not himself have been exposed directly to the risk of death or injury from an explosion that could have resulted from restoring power when accumulations of methane gas were present, this does not in itself render his work refusal unprotected. The Commission has held that, in appropriate circumstances, the Mine Act extends protection to a miner who refuses to perform an assigned task due to the danger posed to the health or safety of another miner. *Secretary of Labor on behalf of Cameron v. Consolidation Coal Co.*, 7 FMSHRC 319, 321-24 (March 1985), *aff'd sub nom. Consolidation Coal Co. v. FMSHRC*, 795 F.2d 364 (4th Cir. 1986).

[7] The three complainants had never previously raised safety concerns or refused a work order, and had not been subject to any prior disciplinary action. Tr. 255-56, 280, 341-42, 492, 521-22, 559, 673. This evidence indicates that these three miners were not likely to raise their safety concerns lightly, or in bad faith. *See Secretary of Labor on behalf of Hogan v. Emerald Mines Corp.*, 8 FMSHRC 1066, 1072 (July 1986) (work refusal found protected where there was no evidence in miners' personnel history "suggesting a likelihood of pretext or ulterior motive for their actions"), *aff'd mem.*, 829 F.2d 31 (3d Cir. 1987).

Further, the information provided to the miners by supervisor Moore concerning the propriety of the preshift examination consisted of second and third-hand statements from various Consol officials. The supervisors were not present at the mine to discuss the situation with the miners directly or explain to them why the procedures followed were safe and that there was no danger in restoring power to the mine. The Commission has previously determined that an operator did not respond sufficiently to allay reasonable fears when its assurances of safety were lacking in detail and unaccompanied by any satisfactory explanation. *Hogan,* 8 FMSHRC at 1074.

In addition, the judge did not address uncontradicted testimony from the miners that inspector Sanders acknowledged that his opinion – that examination of the escapeways was not required during a preshift examination following a power outage – represented a change in interpretation of applicable Illinois law. Tr. 280, 378-79, 383. This evidence suggests that the miners had a reasonable basis for questioning statements attributed to state inspector Sanders by Moore and various Consol officials (that the preshift examination had been conducted in accordance with state law since examination of escapeways was not required), and requesting to discuss these matters directly with Sanders. We have held that the reasonableness of a miner's safety concern is to be evaluated from the viewpoint of the miner at the time of the work refusal, and that objective proof that an actual hazard existed is not required. *Hogan*, 8 FMSHRC at 1074; *Pratt,* 5 FMSHRC at 1533-34; *Robinette*, 3 FMSHRC at 811-12.[8]

Moreover, the record indicates that Consol could have easily defused the situation, and resolved this safety dispute, by acceding to the miners' requests to call Sanders to confirm the statements attributed to him regarding the propriety of the preshift examination. Moore did not deny that he refused the miners' request to call Sanders, but only disputed their testimony regarding when such a request was first made. 17 FMSHRC at 670-71. Moore testified that he denied their request because Wetzel, a higher level management official, was already on his way to the mine. *Id.* at 671. Moore admitted that he did not explore the possibility that calling the inspector could have resolved the safety issue. Tr. 480-81. Consol's inability to provide any satisfactory explanation for Moore's refusal to call state inspector Sanders, or to allow the miners to speak to Sanders directly, when such a telephone call would have likely resolved the situation, is a further indication that Consol's response was not sufficient to address the miners' safety concerns, and therefore did not render their work refusal unreasonable or unprotected.

Based on these considerations, we conclude that substantial evidence in the record viewed as a whole does not support the judge's finding that Consol fulfilled its obligation to address the perceived danger communicated by the miners in a manner sufficient to quell their fears, and

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[8] That a perceived hazard is later found not to constitute an actual violation of a health or safety standard does not vitiate the reasonableness of a miner's work refusal. *Hogan*, 8 FMSHRC at 1072 n.3, 1073 n.4.

render their subsequent work refusal unreasonable and unprotected.[9] We therefore reverse the judge's conclusion that the disciplinary measures taken by Consol against the miners for engaging in a work refusal did not violate the Mine Act. We remand the case for computation of a backpay award and assessment of an appropriate civil penalty.

C. The Miners' Obligation to Contact the State Inspector

The Secretary also challenges the judge's determination that if the miners did not believe the statements of mine officials concerning their discussions with the state inspector, it was the miners' obligation to contact the state inspector themselves to determine whether the preshift examination had been properly conducted. *See* 17 FMSHRC at 671-72. The Secretary argues that the burden of contacting the state inspector to determine the propriety of the preshift examination properly resided with Consol, rather than the three miners. S. Br. at 15. Consol contends that the Secretary has failed to establish any basis for imposing an obligation on the company to arrange for the miners to speak directly to the state inspector. C. Br. at 5.

Given our conclusion that substantial evidence does not support the judge's determination that Moore's statement was sufficient to quell the miners' fears, we agree with the Secretary that the judge erred by placing the burden on the miners to contact the state inspector to resolve their safety concerns. Established Commission precedent places the duty of addressing such concerns on the operator. *See Gilbert*, 866 F.2d at 1441; *Pratt*, 5 FMSHRC at 1534.[10]

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[9] To support his conclusion that Consol had "fulfilled its obligation to address the perceived danger . . . communicated by the [miners]" by contacting state inspector Sanders, the judge cited *Braithwaite v. Tri-Star Mining*, 15 FMSHRC 2460 (December 1993). 17 FMSHRC at 672 n.4. In *Braithwaite*, however, we concluded that the miner had failed to adequately communicate his safety concern to the operator, and therefore we had no need to address the adequacy of the operator s response. 15 FMSHRC at 2464-65.

[10] Because we conclude that Consol did not adequately address the safety concerns raised by the three miners, and that the judge therefore erred in shifting to the miners the burden of establishing the adequacy of Consol's actions to quell the miners' fears, we find it unnecessary to address the Secretary's challenge to the judge's decision to credit the testimony of Consol officials that there was no company policy prohibiting the use of telephones by employees and that the miners could have used the phone to call Sanders directly to confirm that inspection of the escapeways was not required as part of the preshift examination. S. Br. at 16-21. As Consol in effect concedes (C. Br. at 10), the issue of whether the miners could have called the state inspector on their own has no bearing on the dispositive issue in this case – the adequacy of Consol's response to the miners' safety concerns at the time of their work refusal.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that the work refusal engaged in by the three miners was unreasonable, and therefore unprotected under the Mine Act, and consequently conclude that Consol's discipline of the miners for their refusal to work violated Section 105(c)(1) of the Mine Act. We remand this matter to the judge for computation of a backpay award and assessment of an appropriate civil penalty.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 10, 1996

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|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JAMES HYLES, DOUGLAS MEARS, DERRICK SOTO, and GREGORY DENNIS | : | Docket Nos. WEST 93-336-DM through WEST 93-339-DM |
| | : | WEST 93-436-DM through WEST 93-439-DM |
| v. | : | WEST 94-21-DM |
| ALL AMERICAN ASPHALT | : | |

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

These discrimination proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), are before the Commission by way of a petition for discretionary review filed by All American Asphalt ("AAA"). In its petition, AAA seeks review of the decision of Administrative Law Judge August Cetti, issued on November 2, 1994, in which he found that AAA's layoff of four employees on two occasions was discriminatory and violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c).[2]

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Section 105(c)(1) provides in part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . in any coal or other mine subject to this Act because such miner . . . has filed or made a complaint under or related to this Act, including a complaint

16 FMSHRC 2232 (November 1994) (ALJ). For the reasons that follow, we vacate the judge's decision and remand this matter for further consideration consistent with this decision.

I.

Factual and Procedural Background

AAA is a general contractor in Corona, California that operates an asphalt plant, a quarry, and a plant that produces rock-based aggregates for its own use and sale to other contractors. Tr. 1136-39. In April 1991, AAA was in the process of completing an addition to its rock finishing plant. 16 FMSHRC at 2235. On Thursday, April 18, James Hyles, a leadman on AAA's third or "graveyard" shift, learned that AAA intended to start running the new plant even though all equipment was not in place. Hyles voiced his concern about safety conditions in the plant to Mike Ryan, plant supervisor and a vice president of AAA. Hyles also spoke to Patrick McGuire, business representative of Local 12 of the International Union of Operating Engineers ("Operating Engineers"), which represented AAA's employees. *Id.* Thereafter, McGuire visited the plant and saw the plant running without numerous pieces of equipment in place. *Id.*; Tr. 177-78.

During the weekend of startup operations, Ryan assigned Hyles to work as leadman on a combined second and third shift. 16 FMSHRC at 2236. When Hyles reported to work on Friday, April 19, at 7:00 p.m., he saw equipment lacking guards, ladders, catwalks, decks, handrails and trip cords. *Id.* at 2235-36. Working under Hyles's supervision in the finish plant area were Greg Dennis, Doug Mears, and Derrick Soto. Hyles warned them to be careful, and they complained to Hyles about conditions in the plant. Later, during the weekend, Hyles videotaped the plant in operation and spoke to Dennis, Mears, and Soto about what he was doing. *Id.* at 2236. Other employees on the videotape observed Hyles' videotaping, including leadman Gary Richter. Tr. 365-70. On Sunday night, Hyles was involved in a minor accident when he fell through a gap in decking. Tr. 367-70; Gov't Ex. 23. Hyles spoke to Dennis, Mears, and Soto about taking the videotape to the field office of the Mine Safety and Health Administration (MSHA). They all agreed that the plant's condition posed dangers to employees and that the tape should be turned in. 16 FMSHRC at 2236; Tr. 370.

On Monday morning, Hyles went to the MSHA field office and turned in the videotape. 16 FMSHRC at 2236; Gov't Ex. 54. After viewing the videotape, MSHA inspectors went to the AAA plant and saw it in operation. MSHA issued numerous citations, including 29 unwar-

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> notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because such miner . . . 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 . . . of any statutory right afforded by this Act.

rantable failure violations. 16 FMSHRC at 2236. Later that day, Ryan called Hyles at home and told him not to report to work that evening because someone had turned them in and MSHA had shut the plant down. *Id.*

About a week later on the first day that the plant reopened, Hyles had lunch with Ryan and Gary White, leadman on the maintenance shift. Ryan asked if either man knew who turned him in. Ryan added that he wanted to find out who it was so he could make life so miserable for them that they would be happy to go to work someplace else. *Id.*; Tr. 375-76. Also after the plant reopened, AAA President William Sisemore stated that he wanted to find out who turned in the company and make it worth their while to go elsewhere. 16 FMSHRC at 2237; Tr. 391, 504.

In June 1991, during a subsequent MSHA investigation, Hyles, Dennis, Mears, and Soto, in addition to other employees, were interviewed in an investigation into Ryan's conduct under 30 U.S.C. § 820(c). *Id.* at 2237; Gov't Exs. 2,3, 4, and 5.

In October 1991, Ryan, without explanation, demoted Hyles from his position as leadman. When asked why he was demoting Hyles, Ryan responded that they no longer saw eye-to-eye. 16 FMSHRC at 2237. On July 7, 1992, due to an equipment move, AAA laid off 16 of its 27 employees, including Hyles, Dennis, Mears, and Soto. Over the succeeding weeks, all employees but the four complainants were called back to work, and some employees were working overtime. When Hyles and Soto went to the plant and saw less senior employees working, the four filed grievances under the collective bargaining agreement between AAA and the Operating Engineers. The grievants contended that the contract required AAA to conduct a "bumping" meeting prior to layoffs where employees could bid on jobs held by less senior employees and bump those employees out of jobs for which the more senior employee was qualified to perform. *Id.* at 2238-39. The grievances went to arbitration, and the arbitrator found that AAA had violated the contract by laying off employees without conducting a bumping meeting; however, he concluded that only Hyles was entitled to relief to bump less senior employees, based on his qualifications. 16 FMSHRC at 2238-39; Gov't Ex. 51, at 11-14.

In September 1992, Hyles, Dennis, Mears, and Soto filed discrimination complaints with MSHA. Following the institution of temporary reinstatement proceedings, AAA reinstated the four complainants on February 11, 1993. 16 FMSRHC at 2239-40. Upon their reinstatement, they were assigned to production work on the day shift. *Id.* at 2240.

In early March 1993, AAA reestablished a third shift as a result of decreased production due to wetness of material that was being processed through the plant. AAA temporarily assigned four of its most senior plant repairmen to perform production work, while paying them at their higher rate of pay as repairmen. It was unusual for senior employees to work the night shift, because the day shift was seen as more desirable and the most senior employees generally bid on it. *Id.* Three weeks later, on March 23, AAA discontinued the third shift and announced a layoff. Rather than reassigning the four repairmen to their regular positions, AAA required the repairmen to participate in a bumping meeting. Rather than bumping into repairmen positions,

they bumped into the production jobs held by Hyles, Dennis, Mears, and Soto. As a result, the complainants were the only four employees laid off. AAA subsequently hired new employees to fill the vacant repairmen positions. *Id.* at 2240-41; Tr. 457, 481, 1693.

On March 24, the four complainants were called into the layoff meeting and told that they had been bumped by more senior employees and that they were to bid on jobs held by less senior employees. They were reluctant to exercise their bumping rights at the meeting for fear that Ryan would refuse to allow them to bump into other jobs because they were not qualified. Hyles and Soto requested that they be given time to consult with counsel from the Solicitor's office because of the pendency of their discrimination complaints. 16 FMSHRC at 2241. Shortly after the meeting, Operating Engineers Business Agent McGuire called Ryan to let him know that Hyles had decided to bump into the plant operator position. Ryan refused the request, stating that it was untimely. AAA refused to accept any of the complainants' subsequent written requests to bump for the same reason. *Id.*

Following the second layoff, Hyles, Dennis, Mears, and Soto filed a second discrimination complaint, alleging that the March 1993 layoff was in retaliation for their MSHA-related safety activity. AAA reinstated the complainants on April 26, 1993. After their reinstatement, the complainants were frequently given reduced working hours. In April 1993, AAA began hiring ten new employees and increased its output of finished material. In August 1993, AAA posted a seniority list indicating that Dennis, Mears, and Soto had seniority dates of January 1993. When Mears asked why the list did not reflect his original seniority date, Ryan responded that he had no seniority. *Id.* at 2242.

The Secretary issued four complaints for each of the two layoffs, and an eight day hearing was held. At the close of the hearing, the judge issued a bench decision granting the complainants temporary reinstatement, and a written decision followed. 16 FMSHRC 31 (January 1994) (ALJ). Thereafter, the judge issued his decision on the merits of the complaints. Initially, the judge dismissed several procedural defenses raised by AAA, including that the complaints were time barred under the Mine Act and that the discrimination complaints were preempted by the National Labor Relations Act, 29 U.S.C. § 141 et seq. (1994). 16 FMSHRC at 2233-35. On the merits, the judge found that AAA had violated section 105(c) of the Mine Act by laying off the complainants on two occasions in retaliation for their MSHA related safety activity. *Id.* at 2247-49.

AAA filed a 95-page petition for discretionary review, raising 83 issues with regard to the judge's decision. A major thrust of AAA's petition is that: "An administrative law judge is required to consider all of the evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal basis for his decision." PDR at 3. AAA argues that the judge repeatedly failed to make credibility findings and adequate factual findings necessary to support his decision. *See id.* at 4, 16, 18-19, 25, 36, 38-39, 40, 51, 53, 62. Further, AAA questions the extent to which the judge relied on the arbitration decision. AAA notes that the judge referred to the decision for establishing that AAA violated the contract by not conducting a

bumping meeting but he failed to acknowledge the arbitrator's finding that three of the four complainants did not qualify for any jobs that were available on the basis of seniority. *Id.* at 28-30.

During the period allowed for filing his brief, the Secretary filed a motion requesting that the Commission remand the matter to the administrative law judge to make necessary findings of fact, conclusions of law, explanations of bases for factual findings, and credibility determinations. S. Mot. at 2. The Secretary argues that the judge must make findings on "critical issues," including the existence of protected activity, whether adverse employment actions--namely, Hyles's demotion and the 1992 layoff--were motivated by protected activity, and whether AAA's reasons for failing to recall the complainants after the 1992 layoff were pretextual. S. Mot. at 4-10.

Over nine months later, on July 2, 1996, the Secretary filed a motion asking permission to file a brief and a stay. AAA filed an opposition to the Secretary's motion, arguing, inter alia, that the Secretary failed to establish good cause for missing the filing deadline and failed to timely seek an extension of time under the Commission's Rules. AAA Opp. at 5-8.

II.

Disposition

Upon review of AAA's petition for review and brief and the Secretary's motion to remand, we are vacating the judge's decision and remanding the case to the judge for further consideration, on the present record, consistent with this opinion.

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of proof to establish that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds sub nom., Consolidation Coal Co. v. Marshall,* 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). "[C]ircumstantial evidence . . . and reasonable inferences drawn therefrom may be used to sustain a prima facie case of discrimination." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982). "Any such inference, however, must be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate facts inferred." *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2153 (November 1989).

Further, the operator may rebut the prima facie case by showing either that no protected activity occurred or the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case, it nevertheless may defend affirmatively 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. *Damron v. Reynolds Metal Co.*, 13 FMSHRC 535, 539 (April 1991) (citing *Pasula*, 2 FMSHRC at 799-800); *Robinette*, 3 FMSHRC at 817-18.

Finally, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "That standard requires that a fact finder weigh all probative record evidence and that a reviewing body examine the fact finder's rationale in arriving at his decision." *Wyoming Fuel Co., n/k/a Basin Resources, Inc.*, 16 FMSHRC 1618 1627 (August 1994), *aff'd*, 81 F.3d 173 (10th Cir. 1996) (table). In order for the Commission to effectively perform its review responsibility, a judge must analyze and weigh the relevant testimony, make appropriate findings, and explain the reasons for his decision. *See Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (citing *Anaconda Co.*, 3 FMSHRC 299, 299-300 (February 1981)). Commission Rule 69(a), 29 C.F.R. § 2700.69(a), also requires that a judge's decision "shall include all findings of fact and conclusions of law, and *the reasons or bases for them*, on all the material issues of fact, law or discretion presented by the record." (Emphasis added).

We agree with AAA that the judge "failed to explain why and how much weight he accorded the arbitrator's decision." PDR at 28-30, 93. The arbitration decision, which the Secretary placed into evidence, deals specifically with whether AAA violated its collective bargaining agreement with the Operating Engineers by implementing a layoff in July 1992 without conducting a pre-layoff bumping meeting. *See* Gov't Ex. 51, at 2-5, 9-11. The judge referred to the arbitrator's award in his decision with regard to the propriety of the July 1992 layoff under the contract. 16 FMSHRC at 2238. However, the judge's deference to the arbitrator's findings on the complainants' seniority and qualifications is unclear. *Id.* at 2238-39, 47. In fashioning relief for the grievants, the arbitrator considered the seniority and qualifications of the complainants for positions at AAA. *See* Gov't Ex. 51, at 5, 11-14. The judge's reliance on the arbitration award for one purpose (propriety of the layoff under the contract), while apparently disregarding it for another (qualifications for positions held by less senior employees) is, without further explication, inconsistent.

In determining whether to give weight to an arbitrator's findings, the Commission has held that the following factors must be considered: the congruence of statutory and contractual provisions; the degree of procedural fairness; adequacy of the record; and the special competence of the arbitrator. *Allan Goode*, 16 FMSHRC 674, 680 (April 1994) (citing *Pasula*, 2 FMSHRC at 2795). It is not apparent whether and to what extent the judge ultimately relied on the arbitration decision to reach his conclusions concerning the layoffs and failure to recall under the Mine Act. Therefore, on remand the judge must clarify in his decision whether he is relying on the arbitration decision, and he must evaluate the arbitration award based on the *Pasula* factors. While the judge may find that reliance on the arbitration decision in one area, but not another, is appropriate, he must explain his reasons for that conclusion.

We also agree with AAA's argument that the judge failed to analyze the evidence concerning several key issues and to make factual determinations that are integrally related to his legal conclusions. The judge recited the correct legal standard for analyzing a discrimination case under section 105(c). 16 FMSHRC at 2246-47. However, he failed to apply that analytical framework to the record evidence before him. *Compare, e.g., Meek v. ESSROC Corp.*, 15 FMSHRC 606, 610-613 (April 1993), *overruled on other grounds by Secretary on behalf of Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1323 (August 1996); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2509-17 (November 1981).

With regard to each of the complainants in each of the layoffs in 1992 and 1993, the judge must make findings regarding the nature of their protected activity and that there was a causal nexus between the adverse employment action--the layoffs--and the complainants' protected activity.[3] In particular, the judge must reconcile his finding that AAA was not aware of Hyles's protected activity prior to his October 1991 demotion with his determination that, by July 1992, AAA was aware of the protected activity of not only Hyles, but Dennis, Mears, and Soto, as well. Further, with regard to the 1992 and 1993 layoffs, AAA contends that economic conditions and weather conditions, respectively, were primary causes for the layoffs. The judge should address the evidence related to those defenses and determine whether those conditions caused the layoffs, or whether they were pretextual. If the judge's findings on these issues are based on credibility determinations, he should so state. Finally, if the layoffs were proper, the judge must make specific findings concerning the complainants' seniority and qualifications for available positions, and, if necessary, address the arbitrator's decision on the issue of qualifications during the 1992 layoff and recall.

After resolving the factual issues, the judge should determine, by applying the *Pasula/Robinette* test, whether the complainants have established a prima facie case of discrimination. If the judge so finds, he should then determine whether AAA has rebutted that case, or has affirmatively defended against it by demonstrating that it would have laid off the complainants and refused to recall them for reasons unrelated to their protected activity.

Also on remand, the judge must state his credibility determinations where there is disputed testimony involving a factual finding. With the exception of a general statement regarding reliance on certain evidence and witnesses to establish AAA's knowledge of the complainants' protected activities prior to the July 1992 layoffs, 16 FMSHRC at 2247, the decision is silent on credibility issues, particularly in such significant areas as alleged statements

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[3] The propriety of AAA's demotion of Hyles from leadman in October 1991 is not before the judge on remand. Commission review is limited to issues raised by a petition for discretionary review, unless the Commission, sua sponte, has directed review of other issues. 30 U.S.C. § 823(d)(2)(B). The Secretary did not preserve the demotion issue for review through a timely filed petition, nor did the Commission order sua sponte review of the issue. Therefore, the judge's determination that Hyles's demotion did not violate section 105(c) of the Mine Act is final. 30 U.S.C. § 823(d)(1).

and inquiries of AAA officials concerning miners' protected activities, AAA's asserted economic and contractual defenses, and the complainants' qualifications for available jobs.

Accordingly, we vacate the judge's decision and remand for further analysis consistent with this opinion.[4]

III.

Conclusion

For the foregoing reasons, this case is remanded for further consideration in light of the issues raised by this decision.[5]

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

[4] On remand, the judge should avoid the wholesale incorporation of either litigant's brief into his decision. *See Energy West Mining Co.,* 16 FMSHRC 1414, 1419 n.8 (July 1994).

[5] In light of our remand, the Secretary's motion to file a brief is moot.

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 12, 1996

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | : | |
| v. | : | |
| AUSTIN POWDER COMPANY | : | |
| | : | Docket Nos. YORK 95-57-M |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | : | YORK 96-13-M |
| v. | : | |
| BRUCE EATON | : | |

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

## DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). On December 10, 1996, the Commission granted the joint petition for discretionary review filed by Austin Powder Company and Bruce Eaton with respect to the issue of whether the judge erred by affirming the citation as one issued under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1).

According to the attachments to the Secretary's proposed penalty assessment filed March 24, 1995, and the Secretary's Preliminary Statement of May 16, 1996, Citation No. 4424405 was modified on December 6, 1994 to reflect that the Secretary was charging the violation under section 104(a) rather than section 104(d)(1). They indicate that the citation was further modified on March 8, 1995 to delete the allegation of unwarrantable failure (although the allegations of negligence and the designation of significant and substantial were retained).

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

The judge's decision makes no reference to these modifications, while affirming the inspector's original section 104(d)(1) determination. Therefore, we vacate the judge's decision and remand for the judge to determine the appropriate designation for the citation and whether any penalty reassessment is warranted.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, 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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FALLS CHURCH, VIRGINIA 22041

DEC 2 1996

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. WEVA 96-115 |
| | : | A. C. No. 46-01816-03939 |
| v. | : | |
| | : | Gary No. 50 Mine |
| U.S. STEEL MINING CO., INC., Respondent | : | |

**DECISION**

Appearances: Ira L. Lee, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Mount Hope, West Virginia, for the Petitioner; Gary R. Kelly, Esq., United States Steel Corporation, for the Respondent.

Before: Judge Feldman

This matter was heard in Beckley, West Virginia, on August 20, 1996. The parties' posthearing proposed findings of fact and conclusions of law, and reply briefs have been considered in the disposition of this proceeding. This proceeding concerns a petition for assessment of civil penalty filed by the Secretary of Labor against the respondent corporation pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). The petition seeks to impose a civil penalty of $220.00 for an alleged unsafe condition on the respondent's Long-Airdox feeder in violation of the mandatory safety standard in section 75.1725(a), 30 C.F.R. § 75.1725(a). This mandatory standard provides:

> Mobile and stationary equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

Preliminary Findings of Fact

The pertinent facts surrounding the alleged violation are not in dispute. This case concerns a feeder manufactured by the Long-Airdox Corporation (Long-Airdox). Shuttle cars dump coal on the feeder conveyor which carries the coal to a crusher where large lumps of coal are broken into smaller pieces. The coal is discharged out the other end of the crusher onto a beltline that transports the coal to the surface. There are three-quarter inch continuous link chains welded into brackets in front of the crusher assembly. These chains are designed to prevent large piles of coal from jamming the receiving section of the crusher. These chains would not prevent the extremities of an individual who had stumbled on the energized conveyor from contacting the crusher.

A fatal accident occurred in early 1977 involving a Long-Airdox feeder when a feeder operator was dragged into the crusher as he attempted to cross over the moving conveyor. As a result of this accident, beginning in 1982, the Long-Airdox Corporation modified the design of its feeders to include emergency stop controls. The Long-Airdox emergency stop control is a cord, hung at approximately shoulder level across the conveyor, that is connected to a stop switch located on the side of the feeder. The purpose of this cord is to enable someone in the feeder hopper area to de-energize the machine if it became energized while he was in this crusher area.

Despite Long-Airdox's safety modification, coal operators routinely remove the emergency stop controls before placing feeders in service to eliminate production delays associated with nuisance tripping of the stop control during the coal loading process. In this regard, at the time of Sylvestor's February 5, 1996, inspection, seven feeders were in service at the respondent's No. 50 Mine. Most, if not all, of these feeders were placed in service after Long-Airdox modified its feeders to include emergency stop controls. With the exception of the cited feeder which had the emergency stop control partially removed, none of the other feeders were equipped with emergency stop controls.

The Mine Safety and Health Aministration (MSHA) policy concerning whether the removal of emergency stop controls on feeders is a violation of section 75.1725(a) is inconsistent. MSHA Inspector John B. Sylvestor, Jr., testified that MSHA

inspectors in District Three interpret section 75.1725(a) as requiring feeders to be equipped with emergency stop controls.[1] By contrast, District Four inspectors do not require emergency stop controls under section 75.1725(a).[2] The respondent's No. 50 Mine is located in District Four.

On February 5, 1996, Sylvestor issued Citation No. 3580959. The citation alleged the respondent was not maintaining its Long-Airdox feeder (Serial No. 54-2070), located in the north section of its No. 50 Mine, in safe operating condition in violation of section 75.1725(a) because the emergency stop control cord installed by the manufacturer had been removed. Sylvestor issued the citation because he observed the emergency pull cord was wrapped around the switch box on the right hand side of the feeder and that the power source leading from the switch box to the electrical panel had been removed. At the time the citation was issued, Sylvestor was aware that none of the respondent's other feeders had emergency stop cords. However, no other feeders were cited under section 75.1725(a). Sylvestor did not consider these to be in violation because the emergency stop cords and switches had been removed entirely. Although Sylvestor expressed reservations over the wisdom of removing the emergency stop cords, he testified that, under the District Four interpretation of section 75.1725(a), on the date of his inspection, he did not consider these feeders to be "unsafe". (Tr. 68-69).

Ultimate Findings and Conclusions

The issue in this case is whether the respondent's removal of an emergency stop cord on the cited feeder, by wrapping the cord around a switch on the side of the feeder and disconnecting the switch, renders the feeder "unsafe" in violation of section 75.1725(a). It is well settled that MSHA is not estopped from citing a violation simply because the violation was overlooked during prior inspections. King Knob Coal Company, Inc., 3 FMSHRC 1417, 1421-22 (June 1981). Throughout this proceeding, however,

---

[1] MSHA District Three has jurisdiction in northern West Virginia, Pennsylvania and Maryland.

[2] MSHA District Four has jurisdiction in southern West Virginia and Virginia.

the Secretary has "admit[ted] that the cited regulation, 30 C.F.R. § 75.1725(a), established no mandatory requirement that a factory installed safety device be kept on equipment put in service." See Sec. Reply Br. at p.4. Therefore, the Secretary concedes MSHA's failure to cite feeders without emergency stop cords was a conscious decision rather than an oversight. The Secretary is consequently not entitled to the anti-estoppel protection expressed in the Commission's King Knob decision.

Although the Secretary admits, perhaps ill-advisedly, that the complete removal of the emergency stop control cord and switch from the feeder is not prohibited, he argues, for reasons not made clear in this proceeding, that the partial removal of the emergency cord is unsafe under section 75.1725(a). The Commission has held that equipment is "unsafe" under section 75.1725(a) when a "reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982).

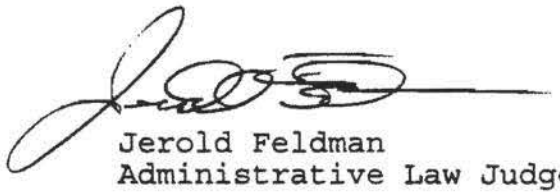
Given the position taken by the Secretary, permissible corrective action in this case under the Alabama By-Products standard would include complete removal of the emergency stop cord and switch. Such removal is reasonably prudent if there is a reasonable concern over ill-fated reliance on a non-functioning cord. However, in this instance there is no evidence that anyone would rely on the emergency cord given its out of service condition and out of reach location at the side of the feeder. Absent a reliance related hazard, the Secretary is left in the unenviable position of citing the respondent for an "unsafe" dismantled and inoperative safety cord that the Secretary concedes is not required in the first place. Somehow, I miss the point.

Consequently, I am unconvinced, based on the arguments made by the Secretary in this case, that a reasonably prudent person would recognize that the cited feeder was unsafe under section 75.1725(a). Accordingly, Citation No. 3580959 must be vacated.

As a final note, the decision to vacate this citation is based on the Secretary's troubling position in this case. While the removal of a safety device installed by the manufacturer without any equally effective safety alternative may constitute prima facie evidence of unsafe equipment, as the trier of fact, I cannot consider arguments that have not been raised. Common sense, however, suggests that MSHA should rethink its position.[3]

**ORDER**

In view of the above, Citation No. 3580959 **IS VACATED** and this matter **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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/mca

[3] As a result of the subject citation issued by Sylvestor, the Mine Safety Agency of the State of West Virginia issued citations requiring the respondent to reinstall emergency stop cords on their Long-Airdox feeders. (Tr. 193).

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 4, 1996

| | | |
|---|---|---|
| SOUTHERN MINERALS, INC., TRUE ENERGY COAL SALES, INC., and FIRE CREEK, INC. Contestants | : | CONTEST PROCEEDINGS<br>Docket Nos. WEVA 92-15-R through WEVA 92-116-R |
| v. | : | Fire Creek No. 1 Mine<br>Mine ID 46-07512 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent | : | |
| SECRETARY OF LABOR, MINE AND SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner | : | CIVIL PENALTY PROCEEDINGS<br>Docket Nos. WEVA 92-786 through WEVA 92-791 |
| v. | : | Fire Creek No. 1 Mine |
| SOUTHERN MINERALS, INC., TRUE ENERGY COAL SALES, INC., and FIRE CREEK, INC., Respondents | : | |

**DECISION**

Appearances: Pamela S. Silverman, Esq., Ronald Gurka, Esq., Mark Malecki, Esq., U. S. Department of Labor, Arlington, Virginia, for the Secretary; Robert I. Cusick, Esq., Marco M. Rajkovich, Jr., Esq., Mindy G. Barfield, Esq., Jean Bird, Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, For Contestants/Respondents.

Before: Judge Barbour

These consolidated contest and civil penalty proceedings arise under section 105 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq.). They involve 102 contests of citations and orders. They also involve 101 alleged violations of mandatory safety standards for underground coal mines for which aggregate civil penalties of $576,681 have been proposed.

The cases are the result of a fatal explosion that occurred at Fire Creek, Inc.'s (Fire Creek) No. 1 Mine. The mine is located on land leased by Southern Minerals, Inc. (Southern Minerals). Fire Creek, through a contract with Southern Minerals, was the production contractor responsible for mining coal at the mine. True Energy Coal Sales, Inc. (True Energy) provided various administrative services to Fire Creek.

Following an investigation of the accident, the Secretary of Labor, (Secretary) through his Mine Safety and Health Administration (MSHA), issued the subject citations and orders to Fire Creek, Southern Minerals, and True Energy. The Secretary contended that the Companies were jointly and severally liable as operators of the mine. Southern Minerals and True Energy (Contestants) denied they were operators and asserted that they were not liable under the Act. Fire Creek did not dispute jurisdiction.

Counsels entered appearances on the record subject to a duly noticed proceeding and expressed their positions regarding how best to try the cases (see. Tr. I). As a result, the proceedings were bifurcated so that the jurisdictional status of Southern Minerals and True Energy could be resolved, prior to addressing the individual merits of the citations, orders, and alleged violations. After extensive discovery, the Secretary, Southern Minerals, and True Energy filed cross motions for summary decision. I denied the motions (Southern Minerals, Inc., 17 FMSHRC 465 (March 1995)), and conducted a hearing of record regarding the issue of operator status (See Tr. II).

Following the hearing, I issued a Partial Decision in which I concluded that Southern Minerals was an operator of the mine within the meaning of the Act and that True Energy was not (Southern Minerals, Inc., 17 FMSHRC 2191, 2217 (December 1995). I dismissed the proceedings with regard to True Energy and scheduled for hearing the contest and civil penalty aspects of the cases as they related to Fire Creek and Southern Minerals (17 FMSRHC at 2218).

The resulting hearing was rescheduled at counsels' request, and counsels again appeared before me and expressed their positions regarding how the trial should proceed (see Tr. III). At the request of counsels, the hearing was postponed to accommodate the parties need for further discovery and to provide the opportunity to explore fully the possibility of settlement.

Shortly before the hearing was to convene, counsels advised me orally that the parties had agreed in principle to settle all of the cases. Counsels orally and in writing explained the broad outline of the proposed settlement, and they requested a further delay while they negotiated the details of the settlement.

Relying upon counsels assurance that their agreement to settle was irrevocable, I continued the proceedings. I ordered counsels to inform me on a periodic basis of their progress in finalizing the settlement (See Orders of July 31, 1996; September 18, 1996).

## THE SETTLEMENT

On November 1, 1996, the parties jointly moved to approve the settlement and to dismiss the proceedings. The parties attached to their motion lists of the specific citations and orders issued to Southern Minerals, True Energy, and Fire Creek and indicated the specific penalty proposed for each violation (See Attachment A).

It is fair to describe the proposed settlement as comprehensive. It is also fair to state that it may serve as a landmark in effective enforcement. While the parties have unresolved differences regarding the status of the Contestants as operators under the Act and the negligence, if any, of the companies in creating the allegedly violative conditions (Motion 3), through mutual trust, diligence, and the persistence of counsels, they have put aside these differences in favor or an innovative, multifaceted agreement. It is an agreement whose purpose is to raise the level of safety not only in the Contestants' production contractor operated mines, but in all such small mines in southern West Virginia.

Under the settlement the parties have created obligations and mechanisms that go beyond the requirements of the Act, while remaining true to its spirit and overall goals. The parties and their counsels are to be commended.

The terms of the settlement are:

1. Southern Minerals will pay civil penalties totaling $50,000 to be apportioned among the violations pro rata.

2. Southern Minerals through a cooperative agreement with MSHA will institute a Production Contractor Safety Promotion Program (Program) at all

current and prospective mines of Southern Minerals operated by production contractors (See Attachment B). (The program creates incentives beyond those imposed by the Act for Southern Minerals' production contractors to create and maintain a safety culture at the mines they operate or that they will operate.)

3. The Program contains specific provisions the parties believe will create an environment to prevent the recurrence of the violative conditions and practices found at the mine during MSHA's investigation. It provides for an evaluation of each prospective contract production operator's ability to comply with the Act, requires periodic audits by Southern Minerals to determine the overall safety performance at each production contractor operated mine, and establishes procedures for effective communication of safety and health concurs among MSHA, Southern Minerals, and the contract production operators. Southern Minerals' participation in these specific activities exceeds the duties and obligations imposed by the Act and its regulations. Southern Minerals will spend $200,000 over a period of 5 years to meet the costs of the Program.

4. Southern Minerals will expeditiously enter into a contact, the terms of which will be approved by the Secretary, with the West Virginia Small-Mines Assistance Center ("Center") to develop mechanisms for the delivery of safety and health expertise, training programs, and other technical assistance tailored to small mine operators. (The Center was established on July 1, 1994, with a grant from the West Virginia Board of Coal Mine Health and Safety and is comprised of Marshall University, West Virginia University and other colleges and schools throughout West Virginia.) Under the contract between Southern Minerals and the Center, Southern Minerals will pay to the Center $40,000 in 1996, and will make a payment of an additional $40,000 during each succeeding year through calendar year 2000, for a total payment of $200,000.

5. The contract between Southern Minerals and the Center, as supported by the annual payments, will assist Southern Minerals in complying with the Program. The contract will result in Southern Minerals contract production operators receiving assistance in the areas of technology transfer, specialization of training

materials, employee assistance programs, training in conducting and recording preshif, onshift, and other required examinations, community outreach, programs addressing smoking materials in the mining environment, the development of safety audit standards and procedures, ventilation, and mine-specific safety workplace practices. (The parties state that "[d]eficiencies in these areas directly contributed to the occurrence of the explosion" at the mine (Motion 5). They also state that the nature and scope of assistance to contract production operators under the contract exceed that available under the Act and its regulations and that the contract between Southern Minerals and the Center is a "substantial inducement" to the Secretary to enter into the proposed settlement (Id. 5-6).)

6. Programs developed by the Center pursuant to the contact will be made available to similar small coal mines in southern West Virginia.

7. Except for proceedings under the Mine Act, none of the settlement agreements and actions taken by the Contestants and Fire Creek is an admission of a violation of the Act or an admission of the allegations contained in the citations or orders or the proposals for penalty. The findings and actions taken under the settlement are solely for the purpose of compromising and settling amicably the subject administrative matters, and may not be used in any judicial or administrative forum for any other purpose, except for proceedings under the Act. Moreover, the parties understand that the settlement is not intended to and does not constitute an admission of civil liability or responsibility for any civil personal injury or wrongful death action. Indeed, Contestants and Fire Creek specifically deny such civil liability or responsibility (Motion 2-7).

## APPROVAL OF THE SETTLEMENT

The parties state, and I agree that "the settlement ... reflects due consideration for the purposes of the Act" (Motion 7). Indeed, it does more. It provides ongoing obligations and mechanisms that specifically address the chronic problem of enhancing safety at small, contractor operated mines. In so doing, it addresses both the immediate concerns raised by the particular accident that triggered the settlement and the general, more pervasive, concerns that all too often have been

endemic in facilities mined by some production contractors. The settlement reflects the mutual recognition of the parties that when it comes to such operators, more is needed from both industry and government to meet the first and foremost priority of the Act – "the health and safety of [the mining industry's] most precious resource – the miner" (30 U.S.C. § 801(a)).

The foregoing having been considered, the parties' motion to approve the settlement is GRANTED.

ORDER

It is ORDERED that:

1. Within 30 days of the date of this Decision and Order, Southern Minerals will pay civil penalties of $50,000 for the violations alleged in these matters. The sum will be apportioned among the violations alleged on a pro rata basis and as shown on Attachment A, which is incorporated by reference.

2. Southern Minerals and the Secretary will implement the Program, Attachment B, which is incorporated by reference.

3. Southern Minerals will provided the Secretary's designated representatives with documentation demonstrating the expenditure of at least $40,000 for costs directly related to implementation of the Program during the 12 months following the date of this Decision and Order.

4. Southern Minerals will provide the Secretary's designated representatives with documentation demonstrating the expenditure of at least $40,000 per year for costs directly related to the implementation of the Program during each succeeding 12 months for a period of 5 years or until a total expenditure of $200,000 is documented.

5. Southern Minerals will enter into a contract, the terms of which are subject to the approval of the Secretary, with the Center to develop mechanisms for the delivery of safety and health expertise, including assistance in the areas of technology transfer, specialization of training materials, employee assistance programs, training in conducting and recording preshift, onshift and other required examinations, community outreach, programs addressing smoking materials in the mining environment, the development of audit standards and procedures, ventilation, mine-specific workplace practices, and other technical assistance tailored to the safety and health needs of small coal mine operators such as Southern Minerals' contract production operators.

6. Southern Minerals will pay $40,000 to the Center in calendar year 1996 and will make a payment of $40,000 during each succeeding year through calendar year 2000 until such payments total $200,000.

Upon payment of the civil penalty of $50,000, these proceedings are DISMISSED WITH PREJUDICE.

David F. Barbour

David F. Barbour
Administrative Law Judge

2 Attachments a/s

Distribution:

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dcp

| Citation or Order Number | Date | Type of Action | Health of safety standard Violated: CFR Title 30 | Proposed Penalty |
|---|---|---|---|---|
| 03726261 | 09/03/91 | 104D2 O | 75.1702 | $50.000.00 |
| 03726262 | 09/03/91 | 104D2 O | 75.1702 | $50.000.00 |
| 03726263 | 09/03/91 | 104D2 O | 75.316 | $50.000.00 |
| 03726264 | 09/03/91 | 104D2 O | 75.313 | $40.000.00 |
| 03726265 | 09/03/91 | 104D2 O | 75.307 | $50.000.00 |
| 03726266 | 09/03/91 | 104D2 O | 75.303A | $50.000.00 |
| 03726267 | 09/03/91 | 104D2 O | 75.303A | $50.000.00 |
| 03726268 | 09/03/91 | 104D2 O | 75.317 | $50.000.00 |
| 03726269 | 09/03/91 | 104D2 O | 75.301 | $50.000.00 |
| 03726270 | 09/03/91 | 104D2 O | 75.300 | $50.000.00 |
| 03726271 | 09/03/91 | 104D2 O | 75.300 | $50.000.00 |
| 03726272 | 09/03/91 | 104A C | 75.1704 | $98.00 |
| 03726273 | 09/03/91 | 104D2 O | 75.306 | $600.00 |
| 03726274 | 09/03/91 | 104A C | 75.316 | $20.00 |
| 03726275 | 09/03/91 | 104A C | 75.316 | $20.00 |
| 03726276 | 09/03/91 | 104A C | 75.316 | $20.00 |
| 03726277 | 09/03/91 | 104A C | 75.316 | $20.00 |
| 03726279 | 09/03/91 | 104A-107A | 75.800 | $850.00 |
| 03726280 | 09/03/91 | 104A-107A | 75.803 | $850.00 |
| 03726281 | 09/03/91 | 104A C | 75.202 | $58.00 |
| | | | | $542,536.00 |

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Attachment A

| Citation or Order Number | Date | Type of Action | Health of safety standard Violated: CFR Title 30 | Proposed Penalty |
|---|---|---|---|---|
| 03726282 | 09/03/91 | 104D2 O | 75.508 | $300.00 |
| 03726283 | 09/03/91 | 104A C | 75.521 | $20.00 |
| 03726284 | 09/03/91 | 104D2 O | 75.601-1 | $400.00 |
| 03726285 | 09/03/91 | 104D2 O | 75.902 | $500.00 |
| 03726286 | 09/03/91 | 104D2 O | 75.601 | $600.00 |
| 03726287 | 09/03/91 | 104D2 O | 75.601 | $600.00 |
| 03726288 | 09/03/91 | 104D2 O | 75.601-1 | $400.00 |
| 03726289 | 09/03/91 | 104D2 O | 75.515 | $450.00 |
| 03726290 | 09/03/91 | 104D2 O | 75.512 | $300.00 |
| 03726291 | 09/03/91 | 104D2 O | 75.515 | $450.00 |
| 03726292 | 09/03/91 | 104D2 O | 75.1722B | $600.00 |
| 03726293 | 09/03/91 | 104D2 O | 75.1101 | $500.00 |
| 03726294 | 09/03/91 | 104D2 O | 75.701 | $600.00 |
| 03726295 | 09/03/91 | 104A C | 75.400 | $98.00 |
| 03726296 | 09/03/91 | 104A C | 75.513 | $20.00 |
| 03726297 | 09/03/91 | 104A C | 75.604B | $98.00 |
| 03726298 | 09/03/91 | 104D2 O | 75.503 | $850.00 |
| 03726299 | 09/03/91 | 104D2 O | 75.503 | $850.00 |
| 03726300 | 09/03/91 | 104D2 O | 75.503 | $850.00 |
| 03726301 | 09/03/91 | 104D2 O | 75.518-1 | $400.00 |
| | | | | $8,886.00 |

| Citation or Order Number | Date | Type of Action | Health of safety standard Violated: CFR Title 30 | Proposed Penalty |
|---|---|---|---|---|
| 03726302 | 09/03/91 | 104A C | 77.512 | $20.00 |
| 03726303 | 09/03/91 | 104A C | 77.505 | $20.00 |
| 03726304 | 09/03/91 | 104A C | 77.504 | $98.00 |
| 03726305 | 09/03/91 | 104A C | 77.701 | $68.00 |
| 03726306 | 09/03/91 | 104A C | 77.400 | $79.00 |
| 03726307 | 09/03/91 | 104A C | 77.904 | $98.00 |
| 03726308 | 09/03/91 | 104A C | 77.505 | $20.00 |
| 03726309 | 09/03/91 | 104A C | 77.506 | $20.00 |
| 03726310 | 09/03/91 | 104A C | 77.701 | $20.00 |
| 03726311 | 09/03/91 | 104A C | 77.505 | $20.00 |
| 03726312 | 09/03/91 | 104A C | 77.904 | $20.00 |
| 03726313 | 09/03/91 | 104A C | 77.701 | $20.00 |
| 03726314 | 09/03/91 | 104D2 O | 77.502 | $600.00 |
| 03726315 | 09/03/91 | 104A C | 77.506 | $20.00 |
| 03726316 | 09/03/91 | 104D2 O | 75.517 | $650.00 |
| 03726317 | 09/03/91 | 104D2 O | 75.503 | $850.00 |
| 03726318 | 09/03/91 | 104D2 O | 75.503 | $850.00 |
| 03726319 | 09/03/91 | 104A C | 75.703 | $98.00 |
| 03726320 | 09/03/91 | 104A C | 75.517 | $98.00 |
| 03726321 | 09/03/91 | 104A C | 75.514 | $20.00 |
| | | | | $3,689.00 |

| Citation or Order Number | Date | Type of Action | Health of safety standard Violated: CFR Title 30 | Proposed Penalty |
|---|---|---|---|---|
| 03726322 | 09/03/91 | 104D2 O | 75.701 | $600.00 |
| 03726323 | 09/03/91 | 104D2 O | 75.901 | $450.00 |
| 03726324 | 09/03/91 | 104D2 O | 75.900 | $500.00 |
| 03726325 | 09/03/91 | 104D2 O | 75.202 | $600.00 |
| 03726326 | 09/03/91 | 104A C | 75.316 | $20.00 |
| 03726327 | 09/03/91 | 104D2 O | 75.1704-2D | $600.00 |
| 03726328 | 09/03/91 | 104D2 O | 75.503 | $850.00 |
| 03726329 | 09/03/91 | 104D2 O | 75.503 | $850.00 |
| 03726330 | 09/03/91 | 104D2 O | 75.1600-1 | $1,200.00 |
| 03726331 | 09/03/91 | 104D2 O | 75.1105 | $600.00 |
| 03726332 | 09/03/91 | 104A C | 75.1707 | $20.00 |
| 03726333 | 09/03/91 | 104D2 O | 75.316 | $450.00 |
| 03726334 | 09/03/91 | 104D2 O | 75.316 | $450.00 |
| 03726335 | 09/03/91 | 104D2 O | 75.326 | $600.00 |
| 03726336 | 09/03/91 | 104D2 O | 75.1101-23 | $500.00 |
| 03726337 | 09/03/91 | 104D2 O | 75.512 | $1,000.00 |
| 03726338 | 09/03/91 | 104D2 O | 75.400 | $600.00 |
| 03726339 | 09/03/91 | 104D2 O | 75.400 | $600.00 |
| 03726340 | 09/03/91 | 104D2 O | 75.507 | $450.00 |
| 03726541 | 09/03/91 | 104D2 O | 75.400 | $600.00 |
| | | | | $11,540.00 |

| Citation or Order Number | Date | Type of Action | Health of safety standard Violated: CFR Title 30 | Proposed Penalty |
|---|---|---|---|---|
| 03726542 | 09/03/91 | 104D2 O | 75.400 | $600.00 |
| 03726543 | 09/03/91 | 104A C | 75.603 | $20.00 |
| 03726544 | 09/03/91 | 104D2 O | 75.512 | $450.00 |
| 03726545 | 09/03/91 | 104D2 O | 75.1722A | $500.00 |
| 03726546 | 09/03/91 | 104D2 O | 75.1722 | $450.00 |
| 03726547 | 09/03/91 | 104D2 O | 75.316 | $400.00 |
| 03726548 | 09/03/91 | 104A C | 75.316 | $20.00 |
| 03726549 | 09/03/91 | 104A C | 75.1715 | $20.00 |
| 03726550 | 09/03/91 | 104D2 O | 75.900 | $350.00 |
| 03726551 | 09/03/91 | 104D2 O | 75.517 | $500.00 |
| 03726552 | 09/03/91 | 104D2 O | 75.601 | $600.00 |
| 03726553 | 09/03/91 | 104D2 O | 75.904 | $450.00 |
| 03726554 | 09/03/91 | 104D2 O | 75.601 | $600.00 |
| 03726555 | 09/03/91 | 104D2 O | 75.515 | $350.00 |
| 03726556 | 09/03/91 | 104A C | 75.810 | $20.00 |
| 03726557 | 09/03/91 | 104D2 O | 75.300 | $1,000.00 |
| 03726558 | 09/03/91 | 104D2 O | 75.403 | $800.00 |
| 03726559 | 09/03/91 | 104D2 O | 75.400 | $650.00 |
| 03726560 | 09/03/91 | 104D2 O | 75.400 | $650.00 |
| 03726561 | 09/03/91 | 104D2 O | 75.316 | $600.00 |
| | | | | $9,030.00 |

| Citation or Order Number | Date | Type of Action | Health of safety standard Violated: CFR Title 30 | Proposed Penalty |
|---|---|---|---|---|
| 03726562 | 09/03/91 | 104D2 O | 75.305 | $1,000.00 |
| | | | | $1,000.00 |

**SOUTHERN MINERALS INC.'S PRODUCTION CONTRACTOR SAFETY PROMOTION PROGRAM**

## I. Preamble:

Southern Minerals, Inc. ("Southern Minerals") strives to promote safety at its independent contractor coal mining operations. Southern Minerals believes that effective safety programs require the active involvement of the front-line managers who have responsibility for the safety of their respective employees.

The Mine Safety and Health Administration, ("MSHA"), recognizes that the efforts of companies such as Southern Minerals can significantly contribute to the cause of safety and health, particularly as applied to small contract coal mines.

Consistent with this theme, and the mutual desire of Southern Minerals and MSHA to promote safe operations among production contractors, the below outlined cooperative program ("Program") will be implemented. It is the objective of Southern Minerals and MSHA, through this program and other tools, to create powerful incentives for production contractors to create and maintain a safety culture at their respective mines.

The purpose of this Program is to establish procedures for Southern Minerals to utilize in the selection of production contractors, to provide for effective communication between MSHA, Southern Minerals, and Production Contractors, and to establish a MSHA recognized production contractor safety promotion program.

The parties view this effort as a "mine safety promotion partnership" which documents MSHA's and Southern Minerals' contributions to a common goal and pledges their continued good faith efforts to promote safety in contract coal mines. The Program is open ended -there are no time limits or an expiration date for this initiative. Implicit in this understanding is the mutual pledge between MSHA and Southern Minerals to maintain a candid dialogue concerning the effectiveness of the Program, to continually strive to promote safety pertaining to contract coal mines, and to consult in good faith with one another before taking action to modify or terminate the Program.

## II. Definitions:

For the purposes of this Program, the following terms shall mean the same as set out below:

A. "Mine Act" shall mean the Federal Mine Safety and Health Act of 1977, and the regulations lawfully promulgated pursuant thereto.

B. "Certified" person(s) shall mean as defined in 30 CFR 75.2 or 77.2, as applicable.

C. "Qualified" person(s) shall mean as defined in 30 CFR 75.2 or 77.2, as applicable.

D. "Property" shall mean the premises of a fee, lease, sublease or license interest or estate from which the holder of the same has a right to mine and sell coal.

E. "Production Contractor" (i) shall mean an independent contractor who mines coal from any Property of Southern Minerals and is obligated to deliver such coal, by virtue of its contract mining agreement, to locations designated by Southern Minerals and (ii) shall not mean any grantor, grantee, lessor, lessee, sublessor, sublessee, licensor or licensee (which is not an above mentioned independent contractor) of Southern Minerals. Production Contractor does not mean a person or entity falling within the scope of 30 CFR 45.2(c).

F. "Initial Production Contractor" shall mean a Production Contractor who, together with its affiliates, has not mined coal from the property of Southern Minerals.

G. "Established Production Contractor" shall mean a Production Contractor who is now mining and will mine coal on the property of Southern Minerals on or after the effective date of this Program and such Production Contractor affiliates.

H. "Final civil penalties" shall mean penalties which are final under the review procedures of the Mine Act, and all appeal(s) thereof, and are more than thirty (30) days past due.

I. "Southern Minerals" shall mean Southern Minerals, Inc. and any related company.

**III. <u>Program Implementation</u>:**

A. Upon the effective date of this Program, MSHA and Southern Minerals shall expeditiously, and in good faith, fully implement its elements. MSHA recognizes a period of up to twelve (12) calendar months may be required for Southern Minerals to fully implement all elements of this Program pertaining to all Production Contractors.

B. Upon the effective date of this Program, Southern Minerals will provide the appropriate District officials of MSHA with a current listing of Southern Minerals' Production Contractors and their corresponding federal mine identification numbers. Such listing will be updated and/or otherwise modified, as necessary and appropriate, by Southern Minerals.

**IV. Selection of Production Contractors:**

A. Southern Minerals will evaluate the ability of prospective Production Contractors to carry out mining operations consistent with the Mine Act when awarding their respective contract mining agreements. During the selection process, Southern Minerals will examine:

1. Accidents and injuries, and related frequency rates, to the extent that such data has been established and is available for the prior twenty-four (24) month period, at the coal mines (i) operated by the prospective Production Contractor and (ii) operated by the companies and/or individuals who operate or own the prospective Production Contractor. Such data shall be expeditiously and timely supplied by MSHA upon Southern Minerals' reasonable request;

2. The MSHA violation history for the prior twenty-four (24) month period to the extent that information has been established and is available for the coal mine(s) operated (i) by the prospective Production Contractor or (ii) by the companies who operate or own the prospective Production Contractor. Copies of such history(ies) shall be expeditiously and timely supplied by MSHA upon Southern Minerals' reasonable request;

3. Whether the prospective Production Contractor will employ, prior to commencement of operation of the mine, the Certified and/or Qualified person(s) as necessary to perform pre-shift, on-shift, and weekly examinations required by the Mine Act;

(i) Each prospective Production Contractor will be required to identify the individuals expected to perform such exams and provide, as appropriate, state and federal certification or qualification numbers. A listing of these persons will be posted and kept current on the mine bulletin board at each respective Production Contractor's mine;

(ii) Southern Minerals will not allow a prospective Production Contractor to begin operation at a mine until that Production Contractor has established a written program for conducting and recording the mandatory examinations (pre-shift, on-shift and weekly) required by the Mine Act; and,

4. A prospective Production Contractor will not be allowed (subject to the guidelines below) to begin operation at a mine until Southern Minerals determines that all civil penalties, which became final after the effective date of this Program, have been paid in full and that the prospective Production Contractor is current in making payments pursuant to a written

payment plan covering its civil penalties which became final before the effective date of this Program, unless the same have been previously paid.

The following guidelines will be used in making the above determination:

Pertaining to an Initial Production Contractor -- the mine(s) operated (i) by the prospective Production Contractor or (ii) by the companies and/or individuals who operate or own the prospective Production Contractor will be evaluated to determine the status of payment of all final civil penalties assessed during the then prior sixty (60) calendar month period at mining operations previously operated or presently operating.

Pertaining to an Established Production Contractor -- the mine(s)operated on Southern Minerals' properties and which were owned and/or operated by the prospective Production Contractor, will be evaluated to determine the status of payment of all final civil penalties assessed at mining operations active on or after the effective date of this Program; provided, however, if a Production Contractor has not operated on Southern Minerals' properties for a period exceeding two (2) years and has been operating on other coal properties, such determination will be made in the same manner as for an Initial Production Contractor.

B. Southern Minerals will make reasonable efforts to obtain the information necessary to evaluate prospective Production Contractors in accordance with this Program.

C. Southern Minerals will give due consideration to such findings in determining whether to award a contract to a prospective Production Contractor.

D. Southern Minerals will make written inquiry of a prospective Production Contractor to ascertain information relative to this Section; however, Southern Minerals will not be required to unilaterally gather information beyond that which the same normally gathers in making its own determination regarding a prospective Production Contractor. Moreover, Southern Minerals will not be required to verify the information provided by the prospective Production Contractor in response to such inquiry, nor will it be responsible for any such information which is erroneous.

E. Southern Minerals will require each Production Contractor to implement a written safety program designed for the conditions at each contractor operated mine. These safety programs shall provide for the active involvement of the production contractor's management and other employees.

## V. Periodic Audit of Production Contractors:

A. Southern Minerals, or a third party approved by Southern Minerals, will perform periodic audits of each Production Contractor operated mine to assess the overall safety performance at the mine, compliance with the applicable written mine safety program, and the effectiveness of this Program. Such audits shall be conducted at least twice a year, and may be conducted more frequently as safety performance and other circumstances may warrant. Such audits shall include: the collection, maintenance and evaluation of the mine's compliance and civil penalty payment history; the review of accidents and injuries utilizing available workman's compensation records, MSHA data and accident reports; the review and analysis of training programs related to that mine; the review of the Production Contractor's written safety program; and observation of the active areas of the mine to determine actual compliance by the Production Contractor with its written safety program. Copies of all MSHA reports, histories and other information pertaining to such audits shall be provided by MSHA in a timely manner upon Southern Minerals' request.

B. The individual performing the observation of the active areas of the mine shall make appropriate notes of conditions observed. These notes shall be maintained in the audit file and a copy of the notes shall be forwarded to the applicable Southern Minerals' contractor.

C. Southern Minerals acknowledges that MSHA encourages the participation by Southern Minerals in any MSHA accident investigation conducted at mines operated by Production Contractors.

D. Southern Minerals shall require each Production Contractor to promptly report to such Southern Minerals all accidents resulting in personal injuries occurring on mine property and to file a report demonstrating a review of each lost time accident and consideration of procedures and policies designed to minimize future accidents and injuries at the subject mine.

F. When requested by MSHA, a representative of Southern Minerals will make reasonable efforts to attend the "close-out conference" at the conclusion of each quarterly inspection of the Production Contractor's mine(s).

E. If a Production Contractor is issued an order of withdrawal pursuant to Section(s) 104(b), 104(d), 104(g), or 107(a) of the Mine Act, MSHA shall promptly notify Southern Minerals of the issuance of the order and report the facts surrounding the issuance of the order.

F. As reasonably requested by MSHA, a representative of Southern Minerals will attend meetings between MSHA and the Production Contractor to discuss required mine plans or enforcement issues.

G. Southern Minerals will consider safety performance, efforts to improve safety performance, and compliance history in determining whether to extend or renew contracts with Production Contractors.

VI. **Training Commitments**:

A. Southern Minerals shall require that each Production Contractor obtain all required federal and state safety training from safety sources identified to Southern Minerals and which Southern Minerals believes in good faith to be competent.

B. Southern Minerals and MSHA agree to work together to develop appropriate training materials on the methodology for conducting and recording pre-shift, on-shift and weekly examinations required by the Mine Act and the proper evaluation of the results of such examinations; and,

C. Southern Minerals, at its discretion, may provide each Production Contractor with materials and information for use in training, safety meetings, mine site training, and technical problem-solving.

D. To the extent that such participation is practical, Southern Material agrees that training programs conducted pursuant to the Program shall be open to participation by miners at mines located in McDowell and Wyoming counties.

VII. **Costs Associated with the Program**

A. Southern Minerals agrees that it shall provide the Secretary's designated representative with documentation demonstrating the expenditure of a minimum of forty thousand ($40,000) dollars for costs directly related to the implementation of the Program during the twelve (12) months following implementation of the Program.

B. Southern Minerals agrees that it shall provide the Secretary's designated representative with documentation demonstrating an expenditure of a minimum of forty thousand ($40,000) dollars for costs directly related to the continuation of the Program during each subsequent twelve (12) month period until a toal expenditure of two hundred ($200,000) dollars is documented.

**VIII. Cooperation by the Mine Safety and Health Administration:**

A. MSHA will assist and cooperate with Southern Minerals in the implementation and administration of this Program by timely and expeditiously providing Southern Minerals, with the following information and assistance:

1. Detailed violation history reports for Production Contractors as identified by corresponding Federal Mine Identification Number(s);

2. Accident/injury data for Production Contractors as identified by corresponding Federal Mine Identification Number(s);

3. The dates that Production Contractors are required to submit their required plans and revisions to MSHA;

4. The dates of all "close-out" conferences for MSHA's quarterly inspections at mines covered by this Program;

5. The dates of all conferences scheduled between Production Contractors and MSHA conference/litigation representatives to discuss MSHA citations and/or orders issued at mines operated by Production Contractors;

6. Notice of the initiation and the conclusion of 105(c) discrimination investigations at mines operated by Production Contractors;

7. Upon reasonable request, MSHA will expeditiously inform Southern Minerals of the status of civil penalty payments for any and all of Southern Minerals' currently existing or prospective Production Contractors; and,

8. MSHA will systematically provide Southern Minerals with copies of all citations, orders and modifications of citations and orders issued by MSHA at mines operated by Production Operators. MSHA will, upon the issuance of any order to a Production Contractor, provide Southern Minerals with prompt notification of the issuance of orders of withdraw and a verbal report regarding the circumstances surrounding the issuance of such order.

B. MSHA will make reasonable efforts to provide for and accommodate participation by Southern Minerals in "close-out" conferences for quarterly inspections, conferences between Production Contractors and MSHA conference/litigation representatives and meetings between MSHA officials and Production Contractors.

C. MSHA may review training programs developed by Southern Minerals and will endeavor to make available MSHA resources through its Education and Training Branch, the National Mine Health and Safety Academy and other technical branches in the development of training programs and materials.

D. MSHA District officials will meet with Southern Minerals personnel to discuss the effectiveness of this Program, in general or related to any mine operated by a Production Contractor and, the potential effectiveness of suggested changes in this Program.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 12 1996

| | | |
|---|---|---|
| PRABHU DESHETTY, Complainant | : | DISCRIMINATION PROCEEDING |
| | : | Docket No. KENT 96-201-D |
| v. | : | BARB CD 96-05 |
| | : | |
| | : | Mine: No. 2 |
| MANALAPAN MINING CO., Respondent | : | Mine ID: 15-02002 |

**DECISION**

Appearances: Timothy L. Wells, Esq., Hyden, Kentucky, for the Complainant;
Susan C. Lawson, Esq., Harlan, Kentucky, for the Respondent.

Before: Judge Melick

This case is before me upon the complaint by Prabhu Deshetty under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," alleging that the Manalapan Mining Company (Manalapan) discharged him on December 30, 1995, in violation of Section 105(c)(1) of the Act.[1]

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[1] Section 105(c)(1) of the Act provides as follows:

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

In particular Mr. Deshetty alleges that his discharge was a direct result of safety complaints regarding the mine access bridge, the availability and use of permissible pumps and the Respondent's alleged failure to properly evacuate miners during periods of ventilation fan shutdowns.

Deshetty has a bachelor's degree in geology and mining engineering and a master's degree in mining engineering. He also has 20 years experience in the mining industry including work as a section foreman and mine foreman. Deshetty was hired as Vice-President for Operations (in charge of both production and maintenance) by Manalapan President Duane Bennett on July 10, 1995. Bennett was looking for someone to take over and improve production.

Deshetty testified at hearing regarding his four alleged safety complaints made between the commencement of his work on July 10, 1995, and his discharge on December 30, 1995. Toward the end of July, about two weeks after he began working for Manalapan, as he was driving home from work he heard on his "CB" radio that there had been a power outage at the mine causing a ventilating fan stoppage. Returning to the mine and arriving about 30 minutes later, Deshetty met Ralph Napier, the overall superintendent of Manalapan mines. Napier told Deshetty that the miners were still underground and that the fan was still down. Deshetty observed that the law requires miners to be evacuated if the fan is down for 15 minutes. Deshetty described his meeting with Napier in the following colloquy:

> Judge Melick: And What did you learn when you got back to mine property?
>
> The Witness: The power was still off. That's when I asked Ralph, you know, "What are the people doing?" He said, you know, "They are still underground." . . .
>
> The Witness: He said, "The power is off. They are still underground. They are working."

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Footnote 1 Continued

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 the Act."

Judge Melick: Any further conversation?

The Witness: Yes. I told him, you know, "I can't believe this. We are supposed to bring the people out after 15 minutes." And I cautioned him right then, you know, that it should not happen anymore.

Judge Melick: Were the men brought out at that time?

The Witness: No. Then the next question for me was -- I asked him, "How long will it take to get the power and the fans back on?" He said, "In about 15, 20 minutes, they will have the power back up, and the fan started."

Although he was in charge of the mine and Napier was his subordinate, Deshetty did not order the miners to be evacuated. Napier agreed with Deshetty that the mine should have been evacuated and agreed to evacuate the miners if a fan stoppage occurred again. Deshetty apparently maintains that his protected complaint occurred a few days later when he saw mine owner Duane Bennett and "mentioned that to him, you know, this has been going on, and I don't like it." (Tr. 18). Bennett agreed that the miners should be removed from the mine whenever there is a fan stoppage.

Subsequently, at the end of September, Deshetty's position had changed so that he was in charge only of maintenance. Carson Shepherd was then brought in to handle operations and production. Deshetty testified that when this change was made Bennett warned both he and Shepherd that if production did not improve they would both be removed.

Deshetty alleges that his second protected activity resulted from events in October 1995, regarding an intentional fan stoppage while power cables were being replaced. According to Deshetty, the fan had already been off for 15 minutes when he arrived and they began running another cable with the fan still off. When he complained to Shepherd about this procedure Shepherd purportedly responded only that "there is one more cable to be done" (Tr. 23). Deshetty maintains that when he later told Bennett about this incident, Bennett responded "I am not worried about something happening, because we don't have that much gas in these mines" (Tr. 25). Deshetty did nothing to stop this apparently unlawful procedure claiming that he was not then in charge.

The third alleged protected activity occurred sometime before the first week of November, 1995. A security guard had reported to Deshetty that truck drivers had been complaining about the safety of a county-owned bridge providing the only access to mine property. Gary Tucker, Manalapan's resident engineer, told Deshetty that the bridge had a load limit of 3 tons and Deshetty was aware that the trucks using the bridge weighed 30 tons. Deshetty had also observed that one of the bridge slabs was so weak you could see it move when the loaded trucks passed over (Tr. 30). Deshetty accordingly directed Tucker to contact the department of transportation regarding its safety. One of the bridge slabs subsequently collapsed and it was repaired by Manalapan.

Later, at a meeting with Bennett at which Larry Ellis, Olin Pennington and Carson Shepherd were also present, Bennett asked Deshetty if he had approached the "DOT" about the bridge. When Deshetty admitted that he had done so Bennett purportedly responded as follows:

> You should not have done that. You should not have gone over my head. Don't do this in the future. . . You know what happens if the bridge -- if something happens to the bridge . . . We both better hope nothing will happen to the bridge.[2]

The fourth alleged safety complaint occurred during the first week of December after a citation had been issued for a non-permissible pump in the return air course. Deshetty told Bennett of the need for a new permissible pump and Bennett purportedly responded "[h]ere we go again. . . You want to spend more money" (Tr. 40). Deshetty nevertheless directed the purchasing department to obtain the pumps.

According to Deshetty, at the December 30 meeting at which he was terminated, Bennett told him that he had not accomplished anything and that he could not afford to retain him. Deshetty acknowledged that when hired he was told to increase production and reduce costs in the four existing mines and that he was to open a fifth mine. He acknowledged that he never did get the fifth mine operating in the three months he was in charge.

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[2] Bennett later testified that he was concerned that government officials might condemn the bridge, the only access to the mine, thereby shutting down operations.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on grounds, sub nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra.* See also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir, 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). *Cf. NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

It may reasonably be concluded that the two conversations Deshetty had with Bennett concerning the fan stoppages and his conversation with Bennett regarding the need to obtain a permissible pump were protected safety complaints. Deshetty's initiation of complaints to the county government "DOT" concerning the safety of a bridge providing access to mine property is more problematic because the bridge was not in fact on mine property. Under Section 105(c)(1) a complaint is protected if it is "under or related to" the Act. Since the bridge at issue provided the only access over which coal haulage trucks could transport coal from the subject mine thereby exposing miners to a serious safety hazard, I conclude that the action of Deshetty in initiating safety complaints about that bridge were sufficiently "related" to the Act to be within its protections. Accordingly I find all four of Deshetty's claimed activities to have been protected under the Act.

As noted, the second element of a *prima facie* case of discrimination is a showing that the adverse action was motivated in any part by the protected activity. As this Commission observed in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981) rev'd on other grounds sub nom. *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983), "[d]irect evidence of

motivation is rarely encountered; more typically, the only available evidence is indirect." The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility towards protected activity; coincidence of time between the protected activity and the adverse action; and disparate treatment. In examining these indicia the Commission noted that the operator's knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case."

With the exception of Deshetty's complaint about the unsafe bridge access to mine property none of his alleged "safety complaints" to Bennett were made in a context from which one would expect retaliation. Indeed, with respect to the first fan outage incident, it was Deshetty's own responsibility as Vice President of Operations, after he learned that miners remained underground longer than the 15 minutes allowed by law, to have those miners evacuated. Deshetty merely cautioned his subordinate, Ralph Napier, that the miners should have been evacuated and warned him not to let it happen again. Moreover, in discussing this incident with his supervisor, Manalapan President Duane Bennett, the next morning, Bennett agreed that when the fan is "out" for more than 15 minutes, the miners should be evacuated from underground. Deshetty acknowledged moreover that Bennett was not angry at this meeting and there is in fact no evidence to suggest that Bennett bore any animus toward Deshetty as a result of this incident. I cannot therefore conclude that Deshetty's discharge about five months later was motivated in any part by this incident.

Deshetty's claimed protected activity regarding the second "fan stoppage" incident, in October 1995, was apparently his report of this incident to Bennett the next day. According to Deshetty, Bennett said, in response to his report, that he was not worried about anything happening because there was not much gas in the mine. Bennett denied making the statement. He credibly testified that he was at the mine when the new high voltage line was taken underground and the procedures were explained to him. Deshetty was also then present but turned and drove off apparently without comment. Deshetty fails to suggest any evidence of animus or reason to retaliate for this event. Under the circumstances it cannot reasonably be inferred that Deshetty's subsequent discharge was motivated in any part by this incident.

Around December 9-10, 1995, at a meeting with Mr. Bennett and all the foremen, Deshetty mentioned to Bennett that Manalapan needed to buy some permissible pumps for the No. 2 Mine. Bennett

responded "here you go again, you want to spend more money." Deshetty nevertheless obtained quotes for the pumps and directed the purchasing department to buy the pumps at the lowest price. Deshetty acknowledged that Bennett did not refuse to authorize the purchase of the pumps. Deshetty also acknowledged that Bennett liked to joke around from time to time and that when he made the noted comment Deshetty did not believe the statement would have any impact on his continued employment with Manalapan.

Chief Electrician Earl McKnight testified that when Bennett made the noted comment he thought Bennett was talking to him rather than Deshetty and interpreted it as one of Bennett's jokes because Bennett had a "friendly attitude" at the time. At Bennett's direction, McKnight obtained quotes and gave them to Deshetty. Thereafter, McKnight discovered a permissible pump already at the mine and this pump was utilized without the need to purchase a new one. There is again simply no evidence to suggest that this event had anything to do with Deshetty's discharge.

Clearly however Bennett showed hostility towards Deshetty's protected complaints about the unsafe county-owned access bridge, telling Deshetty that he "should not have done that" and that he "should not have gone over my head". Bennett also told Deshetty not to report problems with the bridge to governmental authorities in the future. Indeed Bennett himself testified that he told Deshetty that he should not get involved in the local politics because he, Bennett, had lived in Harlan County all of his life and it "came back to him." He was concerned that if the bridge was condemned then mine operations would have to close down. Bennett denied however that Deshetty's activities in this regard had anything to do with his firing.

There was also a close relationship in timing between this protected activity and the adverse action in that the bridge defects were apparently reported to the county in early November and on December 30th Deshetty was discharged. I therefore conclude that Bennett (and therefore Manalapan) was motivated, at least in part, by this protected activity. Deshetty has accordingly established a *prima facie* case of discrimination that is unrebutted.

In accordance with the *Pasula* analysis the issue then is whether Respondent has affirmatively defended by proving that it would have taken the adverse action in any event on the basis of Deshetty's unprotected activity alone. In this regard Bennett testified that Deshetty was discharged solely because he was not productive and that things were going from "bad to worse". In

addition Deshetty had failed to open the new fifth mine during his tenure. Bennett testified that by August he noted in regard to production, maintenance and the "whole management of the mines" that "instead of things going forward, I saw them going backwards" (Tr. 215-216). According to Bennett, July was a losing month and August was even a "much bigger loser." The average cost per clean ton in the first six months of 1995 had been $15.73 and in July it went up to $25.05. While costs came down to $20.47 in August, to $17.37 in September, to $17.69 in October, to $18.09 in November and to $14.30 in December, Bennett observed that over the last six months of the year the mine lost over a million dollars. He noted that the $15.73 average cost per clean ton in the first six months went up to $18.01 for the last six months.

Bennett also noted, and it is undisputed, that, while Deshetty had been transferred out of production responsibilities and into maintenance around the end of September he told both Deshetty and Carson Shepherd (who assumed the production responsibilities) that they would both be removed if production did not improve. When production did not improve and Deshetty "never got a maintenance program off the ground" they were both removed. Bennett also found that Deshetty was not aggressive in getting things done.

Within this framework of evidence I conclude that indeed Respondent has sustained its burden of proving that it would have discharged Complainant in any event for unprotected reasons alone. In reaching this conclusion I am cognizant that Shepherd was subsequently retained in another capacity at another Manalapan mine. I do not however find that this evidence is of sufficient weight to alter my conclusion herein. This case must accordingly be dismissed.

ORDER

Docket No. KENT 96-201-D is hereby dismissed.

Gary Melick
Administrative Law Judge

Distribution:

Timothy L. Wells, Esq., P.O. Box 1861, Hyden, KY 41749

Susan C. Lawson, Esq., Lawson & Lawson, P.S.C., Wheeler Building, Suite 301, 103 North First Street, P.O. Box 837, Harlan, KY 40831

/jf

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

DEC 12 1996

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|---|---|---|
| SECRETARY OF LABOR, | : | DISCRIMINATION PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | Docket No. KENT 96-219-D |
| on behalf of STEVE BAKER | : | MSHA Case No. PIKE CD-96-02 |
| Complainant | : | |
| v. | : | Mine ID No. 15-17616-F2U |
| | : | |
| CEDAR COAL COMPANY INC., | : | Mine No. 3 |
| Respondent | : | |

## DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant;
Phil A. Stalnaker, Esq., Pikeville, Kentucky, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), on behalf of Steve Baker, against Cedar Coal Company, Inc., under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). For the reasons set forth below, I find that Cedar Coal did not violate section 105(c) when Mr. Baker's employment terminated on November 9, 1995.

A hearing was held on August 8, 1996, in Pikeville, Kentucky. In addition, the parties filed post-hearing briefs in the case.

## Background

Cedar Coal is an independent contractor, owned and operated by Larry Bruce Phillips, providing coal hauling services for, among others, Garrett Mining and Sheep Fork Energy's No. 3 and No. 4 mines. The company has trucks of its own and subcontracts with other haulage companies when additional trucks are needed.

The Complainant was hired by Cedar Coal as a truck driver in July 1995. In September 1995 he was reassigned to operate a front-end loader near the entry to the Sheep Fork No. 3 mine. Coal is brought out of the mine and dumped in a pile. The loader fills trucks from the pile. If coal is not loaded into the trucks, coal cannot be brought from the mine.

Mr. Baker claims that he was fired on November 9, 1995, after he stopped operating his loader because it was unsafe. He filed a discrimination complaint with MSHA on November 20, 1995. Cedar Coal maintains that Baker quit on November 9 because he did not want to operate the loader without a heater.

**Findings of Fact and Conclusions of Law**

Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "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, (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

In order to establish a *prima facie* case of discrimination, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800;

*Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

I find that Mr. Baker's claim that he was concerned about safety when he stopped operating the loader on November 9 is not credible. Consequently, I conclude that he neither refused to operate the loader for safety reasons, nor communicated any safety complaints to management. Therefore, he did not engage in protected activity and his termination was not a violation of the Act. I further find that even if Mr. Baker could be considered to have engaged in protected activity, his refusal to work and subsequent actions were not reasonable.

Baker testified that November 9 was a cold, misty day, with a temperature, according to the radio in his pickup truck, of 19 degrees. He stated that when he arrived at work, at about 6:30 a.m., the windows on the loader were frosted over. He further testified that he attempted to scrape the frost off of the windows with a cassette tape case.

The Complainant stated that the heater and defroster, which had not worked for two or three weeks, were not working and he was unable to keep the windows clear. As a consequence, he related that after loading three or four trucks, and hitting the last one several times, he decided to stop operating the loader. He then "hollered at the scale house man, they call him Leonard, on the radio on the CB, I told him to refer a message to Mudhole that I'm parking the loader. I'm refusing to run it because it didn't have a heater or defroster." (TrI. 32-33)[1]

Baker testified that after parking the loader, at just a little after 7:00 a.m., he

> got in the truck with [Jody Puckett]. I was going to ride down the road with him because the road was rough. I got out there to the dump and I heard them talking about it. I heard Mudhole and them talking about it. I told Jody the best thing to do was just hurry up and dump and take me back to my truck because I didn't want him to get fired.

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[1] The transcript for the Temporary Reinstatement hearing held on July 2, 1996, was made a part of the record in this case. (TrII. 5-6.) Hence, references to that transcript will be "TrI." and references to the transcript for the August 8 hearing will be "TrII."

(TrI. 34-35.) When asked what "they" were talking about, Baker replied: "They said I would get in trouble for getting off the loader like that. I would loose [*sic*] my job." (TrI. 35.) He claimed that he got into Puckett's truck "[b]ecause I was going to get him to drop me off at No. 4 Mines [*sic*] so I could call Larry Phillips because they told us at the No. 3 Mines [*sic*] that we were not allowed in the mine shop." (*Id.*)

The Complainant maintained that after being returned to his pickup truck by Puckett, he drove over to the No. 4 mine, arriving there at about 8:00 a.m. He alleged that he told Daniel McCoy, also known as "Mudhole," who was his supervisor, that "I refused to run that loader without no heater or defroster like it was because it was unsafe. He told me the best thing I could do was call Larry Phillips." (TrI. 38.)

Baker testified that he called Larry Phillips and "told him I refused to run that loader like it was. He told me, 'I no longer need you no more.' I asked him, 'Let me drive the red 800 [coal truck].'" (TrI. 38.) Baker claimed that Phillips replied, "No, you don't need to be on none of my equipment no more. You are fired. I no longer need you no more." (*Id.*)

After the telephone conversation, Baker averred that he returned to the No. 3 mine "a little after 8:00." (TrI. 39.) He testified that he got his personal belongings out of the loader and went to Ancel Little's house to help him with a truck.

Daniel McCoy testified that sometime "in the neighborhood of 8:00" Baker called him on the CB, told him that the heater was not working in the loader and asked him "to call Mr. Phillips and tell him the heater wasn't working. He said that he wasn't going to run it without a heater." (TrI. 90.) McCoy further recounted that Baker "told me that they were going to have to get the heater fixed in it or he was quitting. That he had him another job that he could go to running a loader that would pay him $12 an hour." (TrI. 94.)

McCoy stated that he next talked to Baker a couple of hours later when Baker came over to the No. 4 mine. The Complainant wanted him to call Phillips, but he told Baker to call Phillips himself.

Lynn Perkins was operating the scales on the morning of November 9. He stated that he was communicating on CB channel 30. He testified as follows:

> I was weighing coal using the CB to communicate with trucks on the scales. And Steve Baker hollered at me and told me to get ahold [*sic*] of Mudhole and tell him that the heater was not working in the loader. And at

that point, I said, "You ain't got no heat?"

> And he said, "No. I'm about to freeze to death." And then he went on to say that it was so cold there was ice on the windshield, he said he wouldn't be able to load the trucks. And Mudhole was already on the channel that we was on, and he said he heard him. And from that point on, I didn't talk no more to him.

(TrII. 210.)

Burl King, a truck driver for Kimberly Trucking, testified that he was coming through the gap with a load of coal and heard McCoy and Baker on the CB. He related that, to the best of his recollection, he heard Baker "say that the loader – the heater wasn't working." (TrII. 25.) He agreed that it was cold that morning.

Anthony Rucker, a truck driver for Greg Bentley, testified that he had come through the gap with a load of coal. He stated that his CB was on channel 23. He claimed that he "heard Steve holler at Mudhole and tell him that he couldn't run the loader because it didn't have any heater on it and it was too cold, and he couldn't see what he was doing to load the trucks." (TrII. 34.)

Jody Puckett, an independent truck driver, testified that he picked Baker up at the coal dump, which is three or four miles from the Sheep Fork No. 3 mine, between 8:00 a.m. and 9:00 a.m. He said that Baker got out of his pick-up, got into the truck with him and rode while he transported two loads, about an hour and a half to an hour and three quarters. When asked what Baker had said to him, he recalled that Baker "just told me that he wasn't going to run the loader without any heat. And I asked him what he was going to do, and he told me he was going to go down and talk to Mudhole about it and see what they was going to do." (TrII. 169.)

Baker does not claim that he was in any danger from the cold. He does maintain, however, that he stopped loading coal because he considered the loader unsafe to operate. On the other hand, it is the company's position that he parked the loader for personal comfort reasons, because he was cold. If Baker stopped operating the loader because it was unsafe, then he engaged in activity protected under the Act. If he stopped because it was cold, then he did not engage in protected activity.

I find that Baker has not established that he engaged in protected activity. None of the witnesses in the case corroborate his story. Most significantly, no one heard him claim that it was not safe to operate the loader. On the

contrary, everyone recalled that he complained that the heater would not work and it was cold.

The closest to supporting him was Anthony Rucker who claimed to have heard him say that he could not see what he was doing to load the trucks. However, Rucker was not a credible witness. Not only had he filed his own discrimination complaint against Phillips, giving him ample reason to be disposed to testify against the company, but he demonstrated his hostility toward Phillips while on the stand. (TrII. 50, 52-54, 57.) Furthermore, he claims to have heard the conversation between Baker and McCoy on CB channel 23, when the evidence is clear that it occurred on CB channel 30.

Additionally, none of the rest of Baker's narrative is supported by any witness. Jody Puckett, who was not involved with either of the parties to this proceeding and had no apparent motive to lie, was a very credible witness. His testimony was contrary to the Complainant's on all important points.

Baker claimed that shortly after 7:00 he got in Puckett's truck to go to the No. 4 mine, but Puckett testified that he picked him up, not at the No. 3 mine, but at the dump between 8:00 and 9:00. Baker contended that while in the truck he heard talk on the CB concerning his situation, did not want to get Puckett in trouble, and so had him take him back to his truck. Puckett made no mention of hearing any discussions on the CB while Baker was in his truck, nor of being concerned that he might have trouble because he had Baker in his truck, and, instead, testified that Baker rode around with him for an hour and one half to an hour and three quarters.

Puckett further testified that he was hauling coal from the No. 3 mine to the dump, that he did not go to the No. 4 mine and that Baker never asked him to go to the No. 4 mine. He indicated that Baker did not seem upset, but said he was not going to run the loader without heat and would go talk to Mudhole to see what they were going to do.

Plainly, this evidence does not support Baker's claim that he arrived at the No. 4 mine about 8:00. McCoy remembered that he arrived a couple of hours later, that is, around 10:00. Curtis Thacker testified that he replaced Baker as the loader operator around 9:00 and had been operating for about half an hour when Baker got in his truck. Thacker had the impression that Baker had gotten out of Puckett's truck. Thus, Puckett, McCoy and Thacker all support the conclusion that Baker did not arrive at the No. 4 mine until sometime around 10:00 a.m.

Baker's explanation for having to go to the No. 4 mine, rather than calling from No. 3, was that the employees had been told not to use the phone in the No. 3 mine shop. None of the witnesses agreed with that statement. Phillips said he had not told Baker or anyone else not to use that phone. John Ratliff, the No. 3 mine superintendent, testified that there was no prohibition against Cedar Coal employees or other truck drivers using the phone.

The Complainant's credibility was further undermined by his professed inability to remember any dates, or even approximate times during the year. At the time he testified, none of the important matters had occurred as much as a year before. Such a complete lack of recall, as claimed by Baker, a young man with thirteen years of schooling, is unbelievable.

I conclude that the credible evidence in this case demonstrates that Baker stopped operating the loader because the heater did not work, and not because of any concern for safety. The evidence further shows that he then rode around for several hours before attempting to discuss matters with anyone in authority. Perhaps his temper, which he displayed while testifying, (TrII. 134-35), got the better of him, but this lack of concern for a mining operation that was crucial to coal production certainly justified Phillips' response to Baker, when he finally did get around to calling him, that he was "fired," as claimed by Baker, or that he "quit" and would not be rehired, as claimed by Phillips.

Accordingly, I conclude that the Complainant was not terminated for engaging in protected activity. Since he was not engaging in protected activity, he was not discriminated against within the meaning of the Act.

Moreover, even if Baker's refusal to work could be construed to have been based on safety grounds, his refusal was not reasonable. He did not adequately communicate his safety concern to management, nor did he give management an opportunity to respond to his complaint.

The Act protects "a miner's right to refuse work under conditions that he reasonably and in good faith believes to be hazardous." *Gilbert v. Federal Mine Safety & Health Review Commission*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). Although not fully articulated by him, it appears that Baker's safety concern was that he was having trouble seeing out of the loader's windshield and he was afraid that he would hit either a coal truck or a miner with the loader. If, despite all attempts, the windshield could not be cleared, that might have been a reasonable concern. However, Baker made little or no attempt to clean the windshield.

No evidence was presented at the hearing about what methods were available for keeping the windshield clear. Baker testified that his efforts consisted of using an empty cassette tape case to clean the frost off of the outside of the windshield. Thacker testified that when he took over the loader, and the inside of the windshield misted over, he used paper towels to wipe it off. The loader was in an area near the mine shop, near coal trucks and near miners' personal vehicles, yet Baker apparently did not try to find another means of clearing the windshield.

Additionally, Baker did not adequately communicate his safety concerns to management. McCoy, his immediate supervisor, understood his complaint to be that the heater did not work, not that he was concerned with being injured or injuring someone else. This understanding is supported by the recollections of all of the other witnesses who heard Baker express his complaints. Thus, management had no opportunity to address the perceived danger. Since the "responsibility for the communication of a belief in a hazard that underlies a work refusal rests with the miner," Baker's failure to do so means that his work refusal was not protected by the Act. *Smith v. Reco, Inc.*, 9 FMSHRC 992, 995 (June 1997).

Not only did Baker not convey his safety concern to management so that they could address the problem, but he also failed to give management any time to respond to the complaint. Instead, he stopped operating the loader and went off on a 90 minute ride in Puckett's truck. While the law requires management, in the normal case, to attempt to allay a miner's reasonable fears, management cannot do so if the miner is not present.

The Secretary's argument on this issue, that the company did not meet its obligation to allay Baker's fears because no one told him that a repair part for the heater/defroster was on order before he parked the loader, reveals the weakness in his case. In the first place, as noted above, Baker gave the company little or no time to make such an announcement. In the second place, the fact that a part was on order would not have solved Baker's professed claim that he could not keep the windshield clear to see out of it. Thus, the Secretary argues that by doing nothing the company did not allay Baker's fears, but if the company had told him the part was ordered, then his fears would have been allayed and, by implication, his refusal to work unreasonable. The fallacy in this argument is that either action, doing nothing or telling him the part was on order, would have had the same practical affect on his situation.

In conclusion, I do not find the Complainant's claim that he stopped working for safety reasons believable. Therefore, I conclude that his refusal to work was not protected activity. In addition, even if the Complainant had refused to work out of a concern for his and others safety, I conclude that his refusal was not reasonable and in good faith.

**ORDER**

Accordingly, it is **ORDERED** that the complaint of the Secretary filed on behalf of Steve Baker against Cedar Coal Company, Inc., is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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/lt

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 12 1996

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 96-137-M |
| Petitioner | : | A.C. No. 33-00043-05505 |
| v. | : | |
| | : | Chistman Quarry |
| CHRISTMAN QUARRY, | : | |
| Respondent | : | |

**DECISON**

Appearances: Thomas J. Pavlet, Conference and Litigation Representative, Duluth, Minnesota and Patrick Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio on behalf of Petitioner; Mark Morrison, Esq., Woodsfield, Ohio on behalf of Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," charging Christman Quarry with one violation of the mandatory standard at 30 C.F.R. § 56.14207 and proposing a civil penalty of $500 for that violation. The general issue before me is whether Christman Quarry committed the violation as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Citation No. 4416121, as modified, alleges a "significant and substantial" violation of the noted standard and charges as follows:

> On December 14, 1995 a dozer operator was fatally injured when he attempted to either exit or enter the operators [sic] cab of his machine while the engine was running. The parking brake mechanism had not been set. It is believed the operator accidentally bumped a lever causing the dozer to move in a forward motion. The victim either fell or was standing on the dozer track. This action caused his

body to go beneath the track where he was crushed by the dozer's weight. Citation issuance was delayed due to full review of the accident information.

The cited standard provides, as relevant hereto, that "mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set."

There is no dispute that on December 14, 1995, at approximately 12:30 p.m. Darrin Clift was run over by the bulldozer he had been operating. There were no eyewitnesses and the underlying cause of the incident is unknown. Clift had reported for work at 7:30 that morning. A short meeting was held in the garage area to discuss the day's work with the foreman Darren Dimmerling. After Clift and Dimmerling inspected the dozer, Clift went to work at the lower level of the pit. Later that morning it was decided that top soil on the upper working level bench needed to be removed before drilling could begin. Around 12:10 p.m., Clift parked the dozer in front of the upper face of strip material and shut down the engine, reportedly to eat lunch.

Around 12:30 p.m., employees in the shop area heard the dozer start up. One or two minutes later, Dimmerling and mechanic Fred Ulrich saw the dozer pass through the 20-inch pile of top soil and down the pushed-off material with the dozer blade in the raised position. Suspecting that something was wrong they drove the pick-up truck to where the dozer came to rest. The dozer transmission lever was found in first gear forward and it was running at three quarters to full throttle. Clift's coat, lunch box, a crate and a grease gun were found in the dozer cab.

Not finding Clift, they returned to the area where he had been working. His severed body was found in the track left by the dozer. No autopsy was performed and no investigation was made of the deceased's prior health condition. The county coroner nevertheless opined that death was due to a severed aorta and spine from the bulldozer accident.

Quarry owner Gerald Christman had been operating this mine for 21 years. The deceased was one of his safest and best bulldozer operators. Christman observed that the deceased never left the dozer without putting the blade down and engaging the brake. He speculated that the deceased could have started the dozer while standing on the dozer track but it would then have been in neutral. He agrees that you could reach the throttle

lever from the track but noted that if you grabbed the gear lever from the track you would likely put the dozer in reverse.

The Secretary speculates in his accident investigation report (Government Exhibit No. 5) that the deceased accidentally engaged the throttle lever while he was entering or exiting the bulldozer cab, thereby causing it to move forward. He further speculates that the deceased was pulled to the front of the dozer by its track and run over. The Secretary theorizes therefore that the transmission was in gear, rather than in neutral, and the shift lever should have been locked-out. The dozer would thus have been prevented from moving while unattended, regardless of the throttle setting.

The Act is a "strict liability" statute so that a mine operator is liable without fault for violations committed by its employees, i.e. no fault or negligence is required to establish a violation. *Western Fuels-Utah, Inc., v. FMSHRC, et al.*, 870 F.2d 711, 716 (D.C. Cir. 1989); *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-894 (5th Cir. 1982); *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359 (September 1991). The rationale for strict liability is that it is an incentive for the operator to take all practicable measures to ensure worker safety, the idea being that the operator is in the better position to enforce specific rules than a government agency.

In this case it is not known how the subject bulldozer came to be unattended. What is clear however is that once the deceased had departed from the bulldozer for whatever reason, it was left unattended. It is also clear that the bulldozer controls were not in the park position and the parking brake was not set. Under these circumstances there was a violation of the cited standard and, under the concept of strict liability, the operator is responsible for the violation.

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

> In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety

standard, (2) a discrete safety hazard – that is, a measure of danger to safety – – contributed to by the violation, (3) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

*See also Austin Power Co. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

In this case the precise cause and the particular circumstances surrounding the violation are admittedly unknown. While there has been varied speculation as to the cause of this accident there is simply insufficient reliable evidence from which reasonable inferences can be made as to its cause. It is therefore impossible to properly evaluate this case under the stated criteria. Accordingly there is insufficient proof that the violation was "significant and substantial" or of high gravity. For the same reason there is no basis to find operator negligence.[1] Accordingly and considering all of the criteria under Section 110(i) of the Act, I find that only a nominal penalty of $1 is appropriate.

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[1] While, as previously noted, the lack of operator fault is not a defense to liability under the Act it is nevertheless a factor to be considered in assessing a civil penalty under Section 110(i) of the Act.

**ORDER**

Christman Quarry is hereby directed to pay a penalty of $1 within 30 days of this decision.

Gary Melick
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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DEC 12 1996

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

**REMAND DECISION**

Before: Judge Koutras

Statement of the Case

This case concerns five section 104(a) "S&S" citations issued by MSHA Inspector Frank Terrett on May 19, 1993, during the course of his inspection of six belt transfer stations along the respondent's overland conveyor belt at the subject mine. The transfer stations are two-story buildings housing drive motors providing power to the conveyor. In five of these transfer stations the inspector observed accumulations of coal dust and cited the respondent with five violations of mandatory safety standard 30 C.F.R. 77.202. The citations state as follows:

> An accumulation of coal dust 1/8" to 2 ½" was being allowed to exist in dangerous amounts on the surfaces of structures, enclosures, motors, of the bottom and top floors of the #1 Belt station. (Citation No. 3659083).
>
> An accumulation of coal dust 1/8" to 3" inches was being allowed to exist in dangerous amounts on the surfaces of structures, enclosures, motors of the bottom and top floors of the #2 belt station. (Citation No. 3659084).
>
> An accumulation of coal dust 1/8" to 3" inches was being allowed to exist in dangerous amounts on the surfaces of structures, enclosures, motors, of the bottom and top floors of the #3 belt station. (Citation No. 3659085).
>
> An accumulation of coal dust 1/8" to 4" inches was being allowed to exist in dangerous amounts on the surfaces of structures, enclosures, motors, of the bottom and top floors of the #4 belt station. (Citation No. 3659086).

An accumulation of coal dust 1/2" to 2" inches in depth was being allowed to exist in a dangerous amount on the surface of structures, enclosures, motors, of the bottom and top floors of the #5 belt station. (Citation No. 3659087).

The cited standard, 30 C.F.R. 77.202, provides as follows:

> Coal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts.

Following an evidentiary hearing, former Commission Judge Arthur J. Amchan rejected the inspector's initial "S&S" findings and affirmed each of the citations as non-"S&S" violations. (16 FMSHRC 2451, 2461, 2464-2465, December 1994).

The petitioner filed an appeal of Judge Amchan's decision and asserted that his non-"S&S" findings are not supported by substantial evidence, and that he ignored testimony that an explosion, rather than a fire alone, was reasonably likely to occur and result in serious injury. The Commission agreed that the judge failed to address the explosion hazard and failed to evaluate the evidence or make findings and conclusions in this regard. Under the circumstances, the Commission vacated the judge's non-"S&S" determinations and remanded the matter for further consideration. (18 FMSHRC 1568, 1576-1577, September 16, 1996). The case was reassigned to me for further adjudication.

In response to my order of September 25, 1996, the parties filed additional remand briefs in support of their respective positions with regard to the "S&S" issue addressed by the Commission in its decision and remand order. I have considered these arguments, as well as the existing record, in my remand adjudication of this matter.

## Issue

The "S&S" issue presented on remand is whether or not the cited conditions were reasonably likely to result in an explosion.

## Discussion

### Significant and Substantial Violations

A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contributed 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 S&S "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 reasonable serious

nature." Cement Division, National Gypsum Co. 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 3-4 (January 1984), the Commission explained its interpretation of the term "S&S" 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.

See also Austin Power, Inc. V. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

The question of whether any particular violation is S&S 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, supra, 3 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8 (January 1986).

In United States Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained 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).

The Commission reasserted its prior determinations that as part of his "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or

practice. Peabody Coal Company, 17 FMSHRC 508 (April 1995); Jim Walter Resources, Inc., 18 FMSHRC 508 (April 1996).

Although the inspector testified that the electrical power boxes at all of the cited transfer stations were open, Judge Amchan found that the petitioner only established that the box at transfer station #4 was open. In support of this finding, the judge relied on the fact that the inspector issued a citation for the electrical box at station #4, but not any of the others, and that his field notes indicated that the station #4 box was open, but do not mention the same condition at the other transfer stations. (16 FMSHRC 2460).

With respect to his "S&S" findings, Judge Amchan noted that the inspector assumed that in the event of a fire resulting from the violations, employees would have to jump from the second floor of the transfer house to escape. However, the judge credited the testimony of the respondent's safety director that there was no likelihood of an employee being trapped in the transfer house, and that each house had 2-3 exits on the upper level as well as 3 on the bottom level and that an employee would not have to jump from the second floor to escape a fire. The judge then made the following "S&S" findings at 16 FMSHRC 2461:

> 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."

Petitioner's Arguments

In support of its position that the citations were "S&S," the petitioner cites in some detail the testimony of Inspector Terrett describing potential ignition sources that were present in the cited transfer stations, float coal dust observed by the inspector, potential fire hazards, all of which the petitioner believes support the inspector's conclusion about the likelihood of an explosion and its serious consequences.

Respondent's Arguments

In support of its position that it was not reasonably likely that the cited coal dust conditions would result in an explosion in the course of continued mining operations, the respondent maintains that there is nothing to support the inspector's "bald

allegations" that an explosion could occur or was reasonably likely to occur. In support of its argument, the respondent asserts that a similar issue was raised in Pittsburgh and Midway Coal Mining Co., 7 FMSHRC 2072 (December 1985), and that I vacated an alleged violation of section 77.202, after finding as follows at 7 FMSHRC 2104:

> [I]n order to establish that such accumulations are in fact dangerous, MSHA must establish that they present a realistic fire hazard, or that they are susceptible of being placed in suspension in close proximity to a readily available ignition source capable of placing them in suspension, thereby fueling or propagating an explosion.

The respondent also relies on the Pittsburgh and Midway Coal Mining Co., decision, at 7 FMSHRC 2103, in support of its argument that a coal dust explosion can only occur if there is a fire, and that in the instant case there is no evidence that a fire was likely to occur. The respondent asserts that although the inspector cited "several inches of coal dust in several instances," he did not indicate that they were anywhere near an ignition source, and the respondent concludes that "in all likelihood, they were on the concrete floor where there was no likelihood that they would be the source of a fire."

The respondent further argues that the inspector cited accumulations "on" electrical boxes, and not "in" electrical boxes, thereby significantly decreasing or eliminating the possibility of a fire. Although the inspector testified at the hearing before Judge Amchan that accumulations were "in" electrical boxes, the respondent points out that none of the citations indicated the existence of accumulations "in" or "on" electrical boxes.

Even if the accumulations existed in the electrical boxes, the respondent argues that there is no indication that they posed a fire hazard, and there is no indication as to what those amounts might have been. Respondent maintains that a small deposit of coal dust, even in proximity to an ignition source, is not sufficient to cause a fire, citing Pittsburgh and Midway, at 7 FMSHRC 2103. Further, the respondent points out that the inspector did not cite any electrical defects when he issued the citations, and although he indicated that a belt running out of alignment could result in a fire, and that this was likely to occur, there is no evidence of any belts running out of alignment or that this was likely to occur in an area where the accumulations existed.

With regard to a fire that occurred at a mine transfer station in 1991, the respondent believes that the only relevance in that incident is that the fire was caused by a massive coal spill and it did not result in an explosion.

With regard to the Commission's conclusion at 18 FMSHRC 1576, that the fact that no explosion has ever occurred in a transfer station is not dispositive of an S&S finding, the respondent nonetheless believes that the absence of any prior explosions permits the judge to discount an inspector's unfounded speculation that a dust explosion was likely to occur. In this regard, the respondent argues that if the physical factors present would not permit an explosion to occur then obviously there is no likelihood of an explosion. Even if a remote possibility of an explosion existed, the respondent concludes the fact that there is no evidence of an explosion ever having occurred in a transfer station reduces the likelihood of an explosion occurring in this instance to far less than a reasonable likelihood.

Findings and Conclusions

In the Pittsburgh & Midway Coal Mining Company case, the principal issue was whether or not the cited transfer building float coal dust accumulations, some of which were not measured, and some of which were estimated at approximately 1/8 to 3/16 of an inch, or "paper thin" or 1/16 of an inch, constituted dangerous accumulations within the meaning of section 77.202. I concluded that the evidence adduced by MSHA did not establish that the cited accumulations were dangerous, a condition precedent to establishing a violation of section 77.202. The citation was vacated, and the S&S issue was never reached.

I find that the facts presented in Pittsburgh and Midway, are distinguishable from the facts in the case at hand. The cited accumulations in the instant case are far greater and more extensive; ranging from 1/8" to 4" in all five of the cited transfer stations, and the respondent's argument that section 77.202, was not violated because the petitioner failed to establish that coal dust existed or accumulated in dangerous amounts was rejected by Judge Amchan when he found that company safety director Rodavich's admission that the dust accumulations needed to be cleaned up constituted a concession that coal dust existed in dangerous amounts. (16 FMSHRC 2460, fn 9).

I have reviewed the trial transcript testimony of Inspector Terrett and it reflects a serious concern by the inspector that the cited coal accumulations presented a fire and explosion hazard. The record reflects that the inspector has served as a Federal mine inspector for 2 ½ years, a state inspector for 3 ½ years, and had 20 prior years of experience in the mining industry, including 13 years as a supervisor. He also conducted state training courses in mine fires and coal accumulations, and indicated that he "was involved" in four different mine fires (Tr. 183). Under the circumstances I find that he was knowledgeable and qualified to express opinions on the fire and explosion hazards posed by the cited accumulations in question.

Inspector Terrett testified that each of the belt transfer stations housed a belt electrical drive motor, electrical motors,

and belt rollers, and that during normal mining operations the belts are moving. He stated that in each of the stations he observed "accumulations of coal, fine coal dust all over everything, just laying on top of motors" (Tr. 187-188).

The inspector confirmed that he observed all of the coal dust accumulations described in the citations, and I take particular note of the fact that the electrical motors were covered with coal dust which he described as dry (Tr. 188-191). He further testified that "almost every station had electrical violations with it" and he referred to a citation dated May 19, 1993 (Exhibit G-24), for a control box that was not secured in a closed position and had coal dust inside (Tr. 192).

The inspector believed that the electrical drive motors and turning belt rollers were ignition sources that would reasonably likely cause an ignition. He also described the stationary belt rollers and take-up rollers and indicated that coal dust that builds up at the take-up rollers could cause friction as the roller rubs against the coal dust and commented that "you could get friction and very likely get a fire" (Tr. 193). Since the inspector believed that it would have taken "quite a few days" for the cited coal dust to accumulate, I cannot conclude that the inspector's concern about coal dust building up at the take-up rollers was unreasonable.

The inspector further testified to his notes (Exhibit G-22) which reflected coal build-up at the #2 station where the belt drive was running in coal and coal dust accumulations and coal dust laying around the belt drives (Tr. 194). He further referred to his notes reflecting coal dust accumulations around belt rollers in all of the cited stations, and he was concerned that in the event a belt "went out of line in the slightest bit" it could strike the sides of the belt frames and get hot. Coupled with the friction caused by the belt rollers where they were turning in the coal dust, he believed a fire or ignition would occur and that it was reasonably likely that two miners who were in one of the stations "could have got killed right there" (Tr. 194-195).

Although the inspector conceded that the cited coal dust accumulations were deposited, rather than airborne float coal dust, he nonetheless believed that the deposited dust could be placed in suspension by air breezes through the many station openings or by the action of the moving belt rollers. He further indicated that dust movement was taking place as he was making his inspection "just by moving around and shutting the doors" (Tr. 222-223). In view of the quantities of coal dust he observed, he believed that "it was dangerous either way" (Tr. 211). Further, assuming that coal dust was present inside the electrical boxes, the inspector believed that an arc caused by vibrations of the circuit breaker blades inside the boxes would ignite the coal dust, and if it were in suspension, it could cause an explosion (Tr. 214-215). He further explained as follows at (Tr. 219-220):

Q. What is the danger presented by what was called deposited coal dust?

A. If you did get an explosion or a fire that coal dust will explode. And it's been showed many times in demonstrations through the Bureau of Mines at their experimental lab in Pittsburgh where a fire would blow clear out just by putting coal dust on the top of the roof support inside.

Q. What is the danger, if any, of dust deposited on rollers or near rollers?

A. Friction can ignite it.

Q. And what is the danger with float coal dust? You said you thought those were dangerous?

A. Float coal dust, it's just a fine coal and it's powdery and it will accumulate on top of any ledge or whatever, on top of motors and it will just lay all over top of everything. Once you get a fire it really helps feed it.

Q. Could the opening and closing of doors to a transfer house put float coal dust in suspension?

A. Definitely. A little breeze.

The respondent did not rebut the existence of the cited coal dust accumulations, which I conclude and find were rather extensive throughout all of the cited transfer stations which housed belts, belt rollers, and other electrical components. Indeed, as noted earlier, in affirming the violations of section 77.202, Judge Amchan found that the cited coal dust accumulations existed in dangerous amounts.

The respondent's assertion that the inspector did not indicate that the cited accumulations were anywhere near any ignition sources is not well taken and it is rejected. As noted earlier, the inspector specifically cited at least one open control box with coal dust inside, the electrical drive motors, turning belt rollers, and belt drives, and take-up rollers where he observed coal dust accumulations building up as potential ignition sources that would likely ignite a frictional fire fueled by the coal dust.

The Commission has held that "coal is, by its nature, combustible." Mid-Continent Resources, Inc., 16 FMSHRC 1218, 1222 (June 1994). I believe the same can be said for dangerous accumulations of coal dust. Accordingly, I conclude and find that the cited dry coal dust accumulations, some of which were in contact with, or in close proximity to the aforementioned ignition sources, presented a fire hazard, and that it was

reasonably likely that in the course of continued normal mining operations a serious potential for a fire existed in the cited transfer stations at the time of the May 19, 1993, inspection.

With regard to any coal dust in suspension, although the inspector testified at one point at the hearing that he cited float coal dust, he later conceded that he cited deposited coal dust. However, he testified credibly that the coal dust could easily be put in suspension by the air circulating through the many station openings and the movement of the belt rollers, and he observed such air movement in the course of his inspection. Given the extent of the coal dust accumulations throughout all of the stations, I believe it is reasonable to conclude that in the normal course of mining operations, the deposited coal dust would be placed in suspension by the opening of doors causing air circulation, and the movement of the belts and belt rollers. If this were to occur in close proximity to the potential ignition sources that were present, and in the face of a fire, I believe it was reasonably likely that a serious potential for propagating an explosion existed at the cited transfer stations.

The inspector observed two miners working in one of the transfer stations, and he indicated that their job was to service all of the stations. He also indicated that he observed them working the stations, on the top and bottom floors, when he returned for his re-inspection. (Tr. 192, 195, 209). In the event of an instant fire or explosion, he believed a person would have difficulty in escaping from the station (Tr. 223). I conclude and find that in the event of a fire or explosion, it would be reasonably likely that anyone inside a transfer station would be at risk and exposed to injuries of a reasonably serious nature or death.

Based on the foregoing findings and conclusions, I conclude and find that all of the cited violations were significant and substantial (S&S), and the inspector's initial findings in this regard ARE REINSTATED AND AFFIRMED.

I take note of the fact that the original proposed assessments of $267, for each of the Citation Nos. 3659083, 3659084, and 3659085, were reduced to $100 each by Judge Amchan based on his non-"S&S" findings. Although the Commission's remand order did not specifically include instructions for reconsideration of the penalty assessments for the violations, I would reinstate the original proposed penalty assessments of $267 for each violation, and order the respondent to pay those amounts.

**ORDER**

In view of the foregoing, IT IS ORDERED as follows:

1. Section 104(a) Citation Nos. 3659083, 3659084, 3659085, 3659086, and 3659087, are all AFFIRMED as significant and substantial (S&S) citations.

2. The respondent shall pay civil penalty assessments of $267, for each of the aforementioned citations, and $750 each for the citations and orders previously affirmed and assessed by Judge Amchan in his decision of December 9, 1994, at 16 FMSHRC 2465. Payment is to be made to MSHA within thirty (30) days of the date of my decision and order, and upon receipt of payment, this matter IS DISMISSED.

George A. Koutras
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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FALLS CHURCH, VIRGINIA 22041

DEC 12 1996

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDINGS |
| | : | Docket No. WEVA 96-108 |
| | : | A.C. No. 46-01433-04185 |
| v. | : | |
| | : | Loveridge No. 22 Mine |
| CONSOLIDATION COAL COMPANY, Respondent | : | |

**DECISION**

Appearances: Melonie McCall, Esq., and Elizabeth Lopes Beason, Esq., Office of the Solicitor, U.S. Dept. of Labor, Arlington, Virginia, for the Petitioner; Elizabeth Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Melick

This civil penalty proceeding is before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," to challenge two withdrawal orders issued by the Secretary of Labor to Consolidation Coal Company (Consol) and to contest the civil penalties proposed for the violations charged therein. The general issue before me is whether Consol violated the cited standards and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Additional issues concerning the validity of Order No. 3321649 are addressed as noted.

At hearing, a settlement motion was submitted with respect to Order No. 3717223. Consol agreed to pay the proposed civil penalty of $1,800 in full. I have considered the relevant representations and documentation and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act. An order directing payment of the penalty will be incorporated in this decision.

The one order remaining for disposition, Order No. 3321649, issued pursuant to Section 104(d)(1) of the Act[1], alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.523-3(b) and charges as follows:

> On 5 right section, the S&S Scoop Serial No. 488-1253, Approval No. 2G-2831-2, does not have operative emergency parking brakes. With DC power off and brakes set, the rear pad gapped 3/16 inch from rotor, and front pad gapped 1/8 inch from rotor. When adjusting bolt was turned to tighten brakes, bolt threads were very corroded and could barely be tightened, indicating brakes have been loose for a long time. Violation is very hazardous, requiring increased attention by operator to prevent its occurrence. Violation is repetitious: Citation No. 3717237 issued on 11-20-95 and Citation No. 3717238 issued on 11-20-95, were for inoperative emergency parking brakes on S&S scoops. Citation No. 3717239 was issued on 11-20-95 for inadequate weekly examination of electrical equipment, due to the continued existence of inoperative emergency parking brakes on these scoops. Operator therefore should have known that emergency parking brakes on the 5 right scoop should be

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[1] Section 104(d)(1) of the Act reads as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

checked and either corrected or the scoop removed from service. This scoop was listed in the record of weekly electrical examinations for 5 right on 11-27-95: Dangerous conditions - none found. The Review Commission has determined that a rank-and-file miner acts as an agent of the operator while conducting required electrical examinations in the mine. Since violation existed for a long time, was particularly serious, was repetitious, and operator should have known of its existence, operator had aggravated conduct and violation is unwarrantable.

The Secretary maintains that the order charges a violation under four of the five subsections of 30 C.F.R § 75.523-3(b). In relevant part the standard provides as follows:

> Automatic emergency-parking brakes shall -
>
> (1) Be activated immediately by the emergency deenergization device required by 30 C.F.R. 75-523-1 and 75.523-2;
>
> (2) Engage automatically within 5.0 seconds when the equipment is deenergized;
>
> (3) Safely bring the equipment when fully loaded to a complete stop on the maximum grade on which it is operated;
>
> (4) Hold the equipment stationary despite any contraction of brake parts, exhaustion of any non-mechanical source of energy, or leakage.

***

On November 28, 1995, experienced electrical engineer and inspector for the Mine Safety and Health Administration (MSHA), Spencer Alvin Shriver, was conducting an electrical inspection at the Loveridge No. 22 Mine accompanied by Doug McClure, Consol's maintenance supervisor and miner's representative, Ted Tuttle. At the 5 Right Section he examined the cited scoop finding that indeed it did not have an operative emergency parking brake. The brake could not function because, when engaged, there remained a significant gap between the brake pad and the rotor estimated by Shriver as 3/16 of an inch on the rear and 1/8 inch on the front. He used a feeler gauge to measure the gaps and found them to be in excess of the .034-inch gauge. While Shriver was able to see, and his feeler gauge was able to reach, only about one-half of surface of the rotors, he found no evidence of warpage. His

conclusion, therefore, that the described gaps existed over the entire area of the rotors, is reasonable. I also find Shriver's testimony to be credible. Under the circumstances the emergency parking brake clearly could not function and therefore the violation existed as charged.

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

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

*See also Austin Power Co.* v. *Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

Inspector Shriver credibly described the basis for his findings in the following colloquy:

> JUDGE MELICK: Why did you label that a S and S violation?

THE WITNESS: I considered that there was the possibility of an accident from two ways. One, the scoop could be traveling and in an emergency need to stop suddenly, and without the automatic parking brakes, that the scoop could not be stopped.

JUDGE MELICK: What about the service brakes? Couldn't you use the service brakes?

THE WITNESS: The service brakes, if they are working, is a viable way to stop the scoop. There are, however, problems that can develop with the service brakes.

They have a hydraulic line or hose which can burst. The parts of the linkage in the service brakes can break. If there is an accumulation of material in the operator's compartment, it can wedge under the service brakes and the pedal can't be depressed.

JUDGE MELICK: All right.

THE WITNESS: The other way would be if a person stopped the scoop, set the emergency parking brakes, got out of it, and the scoop then started rolling, it could roll over him.

We had some fatalities throughout the country from that source. It could also, if it decided to run very far, could run into electrical equipment, start a fire.

There are several possibilities taken altogether that in my judgment represented a reasonable likelihood of a serious accident occurring.

JUDGE MELICK: Which several possibilities taken together would result in a reasonable likelihood of an accident?

THE WITNESS: The possibility if the scoop is in operation that an emergency would arise and the scoop could not be stopped if the service brakes didn't work.

The other would be if the scoop were parked and the power was turned off, assuming the parking brakes would sit, and they did not, and then the scoop would run away.

Also, the tram pedal of the scoop, if it sticks in for any reason, then the service brakes are really not able to

stop the scoop. If the panic bar is then operated, it would stop the drive to the wheels, but if the parking brakes don't set then the scoop won't stop, and when the panic bar is operated, the scoop does not have any steering. It loses steering capability (Tr. 47-49).

Within the above framework it is clear that this violation was "significant and substantial". In reaching this conclusion I have not disregarded Respondent's arguments that the cited defects would have been discovered during the required pre-operational checks of the brakes, that the scoop had operational service brakes, and that it was the practice to leave unattended scoops with their buckets on the ground. While these factors do tend to mitigate the gravity of the violation I find them insufficient to negate the findings herein.

The Secretary also maintains that the violation was the result of "unwarrantable failure". Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "lack of reasonable care." *Id.* at 2003-04; *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 193-194 (February 1991). Relevant issues therefore include such factors as the extent of a violative condition, the length of time that it existed, whether an operator has been placed on notice that it existed, whether an operator has been placed on notice that greater efforts are necessary for compliance and the operator's efforts in abating the violative condition. *Mullins and Sons Coal Company*, 16 FMSHRC 192, 195 (February 1994).

It may reasonably be inferred from the existence of a significant gap between the rotor and the brake pads found on November 28 and the fact that the brake adjustment screw had been so significantly corroded that the cited condition had indeed existed for days or even weeks – – just as Inspector Shriver credibly opined. This evidence alone supports a finding of high negligence and "unwarrantable failure".

The Secretary also observes that Inspector Shriver himself had cited similar conditions on the same type of equipment on November 20, 1995, only eight days before the instant violation was discovered. (Government Exhibits 3 and 4). In addition Shriver had also cited Consol on November 20 for an inadequate examination of electrical equipment and, in particular, the failure to report defective emergency parking brakes on battery powered scoops. According to Inspector Shriver, corroborated by

Consol maintenance superintendent Donald Bucklew, following the issuance of the November 20 citations and in connection with the abatement of those violations, the persons who perform the weekly electrical inspections were re-instructed regarding the necessity to check the emergency parking brakes during such inspections. Inspector Shriver noted that the scoop at issue herein was the subject of such a weekly electrical examination on the midnight shift on November 27, 1995, the day before the order at bar was issued. Accordingly the cited defective brake should clearly have then been discovered and corrected. This evidence also independently supports findings of high negligence and "unwarrantable failure".

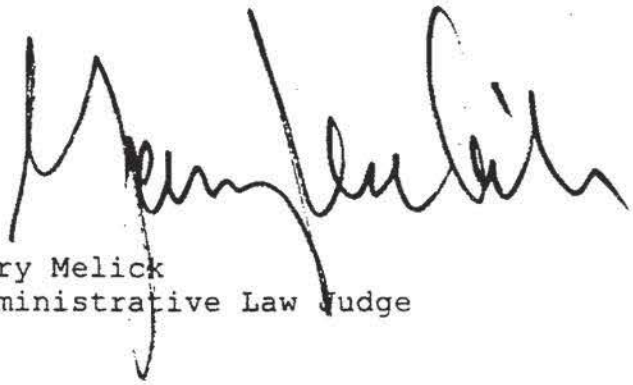
Consol nevertheless maintains that the prior citations were issued to scoops in a geographically separate area of the mine and were the responsibility of a separate maintenance group. It implicitly argues, therefore, that the prior negligence, notice and heightened awareness provided by the prior citations cannot be attributed to Consol herein. Operator responsibility cannot however be so compartmentalized as to limit liability for negligence and unwarrantable failure. Clearly the prior negligence, notice and heightened awareness from the prior citations is chargeable to the operator as a whole and is not limited to only those employees who may have participated in the violation or to a portion of the mine where they work. This argument also ignores the evidence that all persons at the mine who perform weekly inspections were purportedly "re-instructed" following the issuance of these citations regarding the necessity of inspecting the emergency parking brakes during such inspections.

Consol further argues that, because the citations issued the prior week for inoperative automatic emergency parking brakes originated from a different problem i.e. they were damaged in moving the scoops, the operator was not placed on notice that greater efforts were necessary for compliance with Section 75.523-3(b) on the 5 Right Section. This argument overlooks, however, that regardless of the underlying cause of the earlier defects, notice was thereby in fact provided to the operator that greater attention needed to be given the inspection of the emergency parking brakes.

Under the circumstances I agree that the violation was the result of high negligence and "unwarrantable failure" and Order No. 3321649 must be affirmed. Considering the criteria under Section 110(i) of the Act, I further find that the proposed civil penalty of $2,200 is appropriate.

## ORDER

Order Nos. 3717223 and 3321649 are affirmed and Consolidation Coal Company is hereby directed to pay a civil penalty $4,000 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

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| BUCK CREEK COAL, INC., Contestant | : | CONTEST PROCEEDINGS |
| v. | : | Docket No. LAKE 94-263-R |
| | : | Citation No. 4056445; 5/24/94 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | |
| | : | Docket No. LAKE 94-265-R |
| | : | Citation No. 4056447; 5/24/94 |
| | : | |
| | : | Docket No. LAKE 94-266-R |
| | : | Citation No. 4056448; 5/24/94 |
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| | : | Docket No. LAKE 94-267-R |
| | : | Citation No. 4056449; 5/24/94 |
| | : | |
| | : | Docket No. LAKE 94-282-R |
| | : | Citation No. 4259169; 5/24/94 |
| | : | |
| | : | Docket No. LAKE 94-283-R |
| | : | Citation No. 4259170; 5/24/94 |
| | : | |
| | : | Docket No. LAKE 94-285-R |
| | : | Citation No. 4259172; 5/25/94 |
| | : | |
| | : | Docket No. LAKE 94-286-R |
| | : | Citation No. 4259173; 5/25/94 |
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| | : | Docket No. LAKE 94-294-R |
| | : | Citation No. 4259815; 5/23/94 |
| | : | |
| | : | Docket No. LAKE 94-305-R |
| | : | Citation No. 4259879; 5/25/94 |
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| | : | Docket No. LAKE 94-306-R |
| | : | Citation No. 4259880; 5/25/94 |
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| | : | Docket No. LAKE 94-322-R |
| | : | Citation No. 4261681; 5/25/94 |
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| | : | Docket No. LAKE 94-344-R |
| | : | Citation No. 4261880; 5/28/94 |
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| | : | Docket No. LAKE 94-382-R |
| | : | Citation No. 4262307; 5/24/94 |
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| | : | Docket No. LAKE 94-383-R |
| | : | Citation No. 4262308; 5/24/94 |
| | : | |
| | : | Docket No. LAKE 94-385-R |
| | : | Citation No. 4262310; 5/25/94 |
| | : | |
| | : | Docket No. LAKE 94-388-R |
| | : | Citation No. 4262313; 5/28/94 |
| | : | |
| | : | Docket No. LAKE 94-389-R |
| | : | Citation No. 4262314; 5/28/94 |
| | : | |
| | : | Docket No. LAKE 94-419-R |
| | : | Citation No. 4262070; 5/28/94 |
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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 94-602 |
| Petitioner | : | A.C. No. 12-02033-03629 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |
| | : | |
| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. LAKE 94-253-R |
| | : | Citation No. 3861722; 6/1/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 94-254-R |
| ADMINISTRATION (MSHA), | : | Citation No. 3861723; 6/1/94 |
| Respondent | : | |
| | : | Docket No. LAKE 94-256-R |
| | : | Citation No. 3862685; 6/1/94 |
| | : | |
| | : | Docket No. LAKE 94-258-R |
| | : | Citation No. 3862686; 6/1/94 |
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| | : | Docket No. LAKE 94-259-R |
| | : | Citation No. 3862687; 6/1/94 |
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| | : | Docket No. LAKE 94-260-R |
| | : | Citation No. 3862688; 6/1/94 |
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| | : | Docket No. LAKE 94-261-R |
| | : | Citation No. 3862689; 6/1/94 |
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| | : | Docket No. LAKE 94-262-R |
| | : | Citation No. 3862690; 6/1/94 |
| | : | |
| | : | Docket No. LAKE 94-269-R |
| | : | Citation No. 4056454; 5/31/94 |
| | : | |
| | : | Docket No. LAKE 94-270-R |
| | : | Citation No. 4056455; 6/1/94 |
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| | : | Docket No. LAKE 94-271-R |
| | : | Citation No. 4056456; 6/1/94 |
| | : | |
| | : | Docket No. LAKE 94-272-R |
| | : | Citation No. 4056457; 6/1/94 |
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| | : | Docket No. LAKE 94-273-R |
| | : | Citation No. 4056458; 6/1/94 |
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| | : | Docket No. LAKE 94-274-R |
| | : | Citation No. 4056459; 6/1/94 |
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| | : | Docket No. LAKE 94-307-R |
| | : | Citation No. 4261519; 6/1/94 |
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| | : | Docket No. LAKE 94-308-R |
| | : | Citation No. 4261520; 6/1/94 |
| | : | |
| | : | Docket No. LAKE 94-309-R |
| | : | Citation No. 4261541; 6/1/94 |
| | : | |
| | : | Docket No. LAKE 94-327-R |
| | : | Citation No. 4261722; 5/31/94 |
| | : | |
| | : | Docket No. LAKE 94-332-R |
| | : | Citation No. 4261741; 6/1/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 94-603 |
| Petitioner | : | A.C. No. 12-02033-03630 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |
| | : | |

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| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. LAKE 94-275-R |
| | : | Citation No. 4056460; 6/2/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 94-328-R |
| ADMINISTRATION (MSHA), | : | Citation No. 4261726; 6/3/94 |
| Respondent | : | |
| | : | Docket No. LAKE 94-333-R |
| | : | Citation No. 4261742; 6/1/94 |
| | : | |
| | : | Docket No. LAKE 94-334-R |
| | : | Citation No. 4261745; 6/4/94 |
| | : | |
| | : | Docket No. LAKE 94-337-R |
| | : | Citation No. 4261748; 6/5/94 |
| | : | |
| | : | Docket No. LAKE 94-357-R |
| | : | Citation No. 4262073; 6/5/94 |
| | : | |
| | : | Docket No. LAKE 94-394-R |
| | : | Citation No. 4262320; 6/1/94 |
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| | : | Docket No. LAKE 94-417-R |
| | : | Citation No. 4262056; 6/1/94 |
| | : | |
| | : | Docket No. LAKE 94-418-R |
| | : | Citation No. 4262059; 6/4/94 |
| | : | |
| | : | Docket No. LAKE 94-421-R |
| | : | Citation No. 4262072; 6/3/94 |
| | : | |
| | : | Docket No. LAKE 94-422-R |
| | : | Citation No. 4262074; 6/5/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 94-604 |
| Petitioner | : | A.C. No. 12-02033-03631 |
| v. | : | |
| | : | |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |

**DEFAULT DECISION**

Before: Judge Hodgdon

These cases are before me on Notice of Contest filed by Buck Creek Coal, Inc., and Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 60 violations of the Secretary's mandatory health and safety standards and seek penalties of $9,407.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $9,407.00.

These cases are several in a long line of proceedings involving Buck Creek.[1] At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**"

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[1] Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for filings in any of the cases. However, this decision identifies, in the caption, the specific docket numbers of the cases involved.

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

## ORDER

Based on the above, I find the Respondent, Buck Creek Coal, Inc., in default in these cases. Accordingly, Citation Nos. 4262255, 4259815, 4056445, 4056447, 4056448, 4056449, 4259169, 4259170, 4262307, 4262308, 4259172, 4259173, 4259879, 4259880, 4261681, 4262310, 4261880, 4262070, 4262313 and 4262314 in Docket Nos. LAKE 94-263-R, LAKE 94-265-R, 94-266-R, LAKE 94-267-R, LAKE 94-282-R, LAKE 94-283-R, LAKE 94-285-R, LAKE 94-286-R, LAKE 94-294-R, LAKE 94-305-R, LAKE 94-306-R, LAKE 94-322-R, LAKE 94-344-R, LAKE 94-382-R, LAKE 94-383-R, LAKE 94-385-R, LAKE 94-388-R, LAKE 94-389-R, LAKE 94-419-R and LAKE 94-602; Citation Nos. 4056454, 4261722, 3861722, 3861723, 3862685, 3862686, 3862687, 3862688, 3862689, 3862690, 4056455, 4056456, 4056457, 4056458, 4056459, 4261519, 4261520, 4261541, 4261542 and 4261741 in Docket Nos. LAKE 94-253-R, LAKE 94-254-R, LAKE 94-256-R, LAKE 94-258-R, LAKE 94-259-R, LAKE 94-260-R, LAKE 94-261-R, LAKE 94-262-R, LAKE 94-269-R, LAKE 94-270-R, LAKE 94-271-R, LAKE 94-272-R, LAKE 94-273-R, LAKE 94-274-R, LAKE 94-307-R, LAKE 94-308-R, LAKE 94-309-R, LAKE 94-327-R, LAKE 94-332-R and LAKE 94-603; Citation Nos. 4261742, 4262056, 4262320, 3862189, 4056460, 4056781, 4056782, 4261723, 4261724, 4261725, 4261726, 4262072, 3861724, 3862190, 3862691, 4261745, 4262059, 4261748, 4262073 and 4262074 in Docket Nos. LAKE 94-275-R, LAKE 94-328-R, LAKE 94-333-R, LAKE 94-334-R, LAKE 94-337-R, LAKE 94-357-R, LAKE 94-394-R, LAKE 94-417-R, LAKE 94-418-R, LAKE 94-421-R, LAKE 94-422-R and LAKE 94-604 are **AFFIRMED**. Buck Creek Coal Inc., or its successor,[2] is **ORDERED TO PAY** civil penalties of **$9,407.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

[2] According to a July 19, 1996, news release, issued by the United States Attorney for the Southern District of Indiana, the company is now known as Indiana Coal Company.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 13 1996

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| BUCK CREEK COAL, INC., Contestant | : | CONTEST PROCEEDINGS |
| v. | : | Docket No. LAKE 94-276-R |
| | : | Citation No. 4258952; 6/6/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 94-277-R |
| ADMINISTRATION (MSHA), | : | Citation No. 4258953; 6/6/94 |
| Respondent | : | |
| | : | Docket No. LAKE 94-279-R |
| | : | Citation No. 4258955; 6/8/94 |
| | : | |
| | : | Docket No. LAKE 94-291-R |
| | : | Citation No. 4259243; 6/8/94 |
| | : | |
| | : | Docket No. LAKE 94-310-R |
| | : | Citation No. 4261543; 6/6/94 |
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| | : | Docket No. LAKE 94-311-R |
| | : | Citation No. 4261544; 6/6/94 |
| | : | |
| | : | Docket No. LAKE 94-312-R |
| | : | Citation No. 4261545; 6/6/94 |
| | : | |
| | : | Docket No. LAKE 94-314-R |
| | : | Citation No. 4261547; 6/7/94 |
| | : | |
| | : | Docket No. LAKE 94-315-R |
| | : | Citation No. 4261548; 6/7/94 |
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| | : | Docket No. LAKE 94-316-R |
| | : | Citation No. 4261549; 6/7/94 |
| | : | |
| | : | Docket No. LAKE 94-317-R |
| | : | Citation No. 4261550; 6/8/94 |
| | : | |
| | : | Docket No. LAKE 94-318-R |
| | : | Citation No. 4261551; 6/8/94 |
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| | : | Docket No. LAKE 94-323-R |
| | : | Citation No. 4261702; 6/7/94 |
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| | : | Docket No. LAKE 94-324-R |
| | : | Citation No. 4261703; 6/8/94 |
| | : | |
| | : | Docket No. LAKE 94-325-R |
| | : | Citation No. 4261704; 6/8/94 |
| | : | |
| | : | Docket No. LAKE 94-338-R |
| | : | Citation No. 4261749; 6/7/94 |
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| | : | Docket No. LAKE 94-339-R |
| | : | Citation No. 4261750; 6/7/94 |
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| | : | Docket No. LAKE 94-414-R |
| | : | Citation No. 4262376; 6/5/94 |
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| | : | Docket No. LAKE 94-415-R |
| | : | Citation No. 4262483; 6/6/94 |
| | : | |
| | : | Docket No. LAKE 94-424-R |
| | : | Citation No. 4262076; 6/5/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 94-605 |
| Petitioner | : | A.C. No. 12-02033-03632 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |
| | : | |
| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. LAKE 94-280-R |
| | : | Citation No. 4258956; 6/9/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 94-281-R |
| ADMINISTRATION (MSHA), | : | Citation No. 4258957; 6/9/94 |
| Respondent | : | |
| | : | Docket No. LAKE 94-320-R |
| | : | Citation No. 4261553; 6/9/94 |
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| | : | Docket No. LAKE 94-340-R |
| | : | Citation No. 4261751; 6/8/94 |
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| | : | Docket No. LAKE 94-341-R |
| | : | Citation No. 4261752; 6/8/94 |
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| | : | Docket No. LAKE 94-342-R |

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| | : | Citation No. 4261753; 6/8/94 |
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| | : | Docket No. LAKE 94-343-R |
| | : | Citation No. 4261754; 6/9/94 |
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| | : | Docket No. LAKE 94-425-R |
| | : | Citation No. 4267381; 6/9/94 |
| | : | |
| | : | Docket No. LAKE 94-447-R |
| | : | Citation No. 4261755; 6/10/94 |
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| | : | Docket No. LAKE 94-448-R |
| | : | Citation No. 4261756; 6/10/94 |
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| | : | Docket No. LAKE 94-450-R |
| | : | Citation No. 4262379; 6/11/94 |
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| | : | Docket No. LAKE 94-451-R |
| | : | Citation No. 4262380; 6/11/94 |
| | : | |
| | : | Docket No. LAKE 94-453-R |
| | : | Citation No. 4262125; 6/11/94 |
| | : | |
| | : | Docket No. LAKE 94-454-R |
| | : | Citation No. 4266737; 6/12/94 |
| | : | |
| | : | Docket No. LAKE 94-462-R |
| | : | Citation No. 4262127; 6/13/94 |
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| | : | Docket No. LAKE 94-463-R |
| | : | Citation No. 4262161; 6/13/94 |
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| | : | Docket No. LAKE 94-464-R |
| | : | Citation No. 4262485; 6/13/94 |
| | : | |
| | : | Docket No. LAKE 94-466-R |
| | : | Citation No. 4262486; 6/14/94 |
| | : | |
| | : | Docket No. LAKE 94-484-R |
| | : | Citation No. 4055272; 6/15/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 94-606 |
| Petitioner | : | A.C. No. 12-02033-03633 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |

**DEFAULT DECISION**

Before: Judge Hodgdon

These cases are before me on Notices of Contest filed by Buck Creek Coal, Inc., and Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 39 violations of the Secretary's mandatory health and safety standards and seek penalties of $7,344.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $7,344.00.

These cases are several in a long line of proceedings involving Buck Creek.[1] At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**"

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[1] Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for filings in any of the cases. However, this decision identifies, in the caption, the specific docket numbers of the cases involved.

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

## ORDER

Based on the above, I find the Respondent, Buck Creek Coal, Inc., in default in these cases. Accordingly, Citation Nos. 4262076, 4262376, 4258952, 4258953, 4261543, 4261544, 4261545, 4262483, 4261547, 4261548, 4261549, 4261702, 4261749, 4261750, 4258955, 4259243, 4261550, 4261551, 4261703 and 4261704 in Docket Nos. LAKE 94-276-R, LAKE 94-277-R, 94-279-R, LAKE 94-291-R, LAKE 94-310-R, LAKE 94-311-R, LAKE 94-312-R, LAKE 94-314-R, LAKE 94-315-R, LAKE 94-316-R, LAKE 94-317-R, LAKE 94-318-R, LAKE 94-323-R, LAKE 94-324-R, LAKE 94-325-R, LAKE 94-338-R, LAKE 94-339-R, LAKE 94-414-R, LAKE 94-415-R, LAKE 94-424-R and LAKE 94-605; Citation Nos. 4258956, 4258957, 4261553, 4261751, 4261752, 4261753, 4261754, 4267381, 4261755, 4261756, 4262379, 4262380, 4262125, 4266737, 4262127, 4262161, 4262485, 4262486 and 4055272 in Docket Nos. LAKE 94-280-R, LAKE 94-281-R, LAKE 94-320-R, LAKE 94-340-R, LAKE 94-341-R, LAKE 94-342-R, LAKE 94-343-R, LAKE 94-425-R, LAKE 94-447-R, LAKE 94-448-R, LAKE 94-450-R, LAKE 94-451-R, LAKE 94-453-R, LAKE 94-454-R, LAKE 94-462-R, LAKE 94-463-R, LAKE 94-464-R, LAKE 94-466-R, LAKE 94-484-R and LAKE 94-606 are **AFFIRMED**. Buck Creek Coal Inc., or its successor,[2] is **ORDERED TO PAY** civil penalties of **$7,344.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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[2] According to a July 19, 1996, news release, issued by the United States Attorney for the Southern District of Indiana, the company is now known as Indiana Coal Company.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 13 1996

| | | |
|---|---|---|
| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. LAKE 94-288-R |
| | : | Citation No. 4259175; 5/25/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 94-465-R |
| ADMINISTRATION (MSHA), | : | Citation No. 4262128; 6/14/94 |
| Respondent | : | |
| | : | Docket No. LAKE 94-498-R |
| | : | Citation No. 4261759; 6/16/94 |
| | : | |
| | : | Docket No. LAKE 94-500-R |
| | : | Citation No. 4261737; 6/17/94 |
| | : | |
| | : | Docket No. LAKE 94-504-R |
| | : | Citation No. 3862537; 6/19/94 |
| | : | |
| | : | Docket No. LAKE 94-505-R |
| | : | Citation No. 3862538; 6/19/94 |
| | : | |
| | : | Docket No. LAKE 94-507-R |
| | : | Citation No. 3862540; 6/19/94 |
| | : | |
| | : | Docket No. LAKE 94-508-R |
| | : | Citation No. 3862709; 6/19/94 |
| | : | |
| | : | Docket No. LAKE 94-517-R |
| | : | Citation No. 3859801; 6/19/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 94-669 |
| Petitioner | : | A.C. No. 12-02033-03636 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |
| | : | |

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| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. LAKE 94-526-R |
| | : | Citation No. 3859804; 6/21/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 94-527-R |
| ADMINISTRATION (MSHA), | : | Citation No. 3861581; 6/21/94 |
| Respondent | : | |
| | : | Docket No. LAKE 94-535-R |
| | : | Citation No. 3861587; 6/22/94 |
| | : | |
| | : | Docket No. LAKE 94-537-R |
| | : | Citation No. 4259236; 6/22/94 |
| | : | |
| | : | Docket No. LAKE 94-538-R |
| | : | Citation No. 4259237; 6/22/94 |
| | : | |
| | : | Docket No. LAKE 94-543-R |
| | : | Citation No. 4267424; 6/22/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 94-670 |
| Petitioner | : | A.C. No. 12-02033-03637 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |
| | : | |
| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. LAKE 94-546-R |
| | : | Citation No. 4261765; 6/23/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 94-547-R |
| ADMINISTRATION (MSHA), | : | Citation No. 4261904; 6/23/94 |
| Respondent | : | |
| | : | Docket No. LAKE 94-548-R |
| | : | Citation No. 4262129; 6/23/94 |
| | : | |
| | : | Docket No. LAKE 94-552-R |
| | : | Citation No. 4261906; 6/26/94 |
| | : | |
| | : | Docket No. LAKE 94-555-R |
| | : | Citation No. 4261962; 6/28/94 |
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| | : | Docket No. LAKE 94-556-R |
| | : | Citation No. 4386113; 6/28/94 |
| | : | |
| | : | Docket No. LAKE 94-558-R |
| | : | Citation No. 4261882; 6/29/94 |
| | : | |
| | : | Docket No. LAKE 94-562-R |
| | : | Citation No. 4386114; 6/30/94 |
| | : | |
| | : | Docket No. LAKE 94-569-R |
| | : | Citation No. 4261910; 7/1/94 |
| | : | |
| | : | Docket No. LAKE 94-571-R |
| | : | Citation No. 4261486; 7/2/94 |
| | : | |
| | : | Docket No. LAKE 94-574-R |
| | : | Citation No. 4261912; 7/5/94 |
| | : | |
| | : | Docket No. LAKE 94-580-R |
| | : | Citation No. 4267449; 7/6/94 |
| | : | |
| | : | Docket No. LAKE 94-582-R |
| | : | Citation No. 4050833; 7/7/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 94-671 |
| Petitioner | : | A.C. No. 12-02033-03638 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |

**DEFAULT DECISION**

Before: Judge Hodgdon

These cases are before me on Notices of Contest filed by Buck Creek Coal, Inc., Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 28 violations of the Secretary's mandatory health and safety standards and seek penalties of $8,200.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $8,200.00.

These cases are several in a long line of proceedings involving Buck Creek.[1] At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**"

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

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[1] Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for filings in any of the cases. However, this decision identifies, in the caption, the specific docket numbers of the cases involved.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

**ORDER**

Based on the above, I find the Respondent, Buck Creek Coal, Inc., in default in these cases. Accordingly, Citation Nos. 4259175, 4262128, 4261759, 4261737, 3862537, 3862538, 3862540, 3862709 and 3859801 in Docket Nos. LAKE 94-288-R, LAKE 94-465-R, 94-498-R, LAKE 94-500-R, LAKE 94-504-R, LAKE 94-505-R, LAKE 94-507-R, LAKE 94-508-R, LAKE 94-517-R and LAKE 94-669; Citation Nos. 3859804, 3861581, 3861587, 4259236, 4259237 and 4267424 in Docket Nos. LAKE 94-526-R, LAKE 94-527-R, LAKE 94-535-R, LAKE 94-537-R, LAKE 94-538-R, LAKE 94-543-R and LAKE 94-670; and Citation Nos. 4261765, 4261904, 4262129, 4261906, 4261962, 4386113, 4261882, 4386114, 4261910, 4261486, 4261912, 4267449 and 4050833 in Docket Nos. LAKE 94-546-R, LAKE 94-547-R, LAKE 94-548-R, LAKE 94-552-R, LAKE 94-555-R, LAKE 94-556-R, LAKE 94-558-R, LAKE 94-562-R, LAKE 94-571-R, LAKE 94-574-R, LAKE 94-580-R, LAKE 94-582-R and LAKE 94-671 are **AFFIRMED**. Buck Creek Coal Inc., or its

successor,[2] is **ORDERED TO PAY** civil penalties of **$8,200.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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

Mr. Chuck Shultise, President, Buck Creek Coal Co., Inc., RR5, Box 203, Sullivan, IN 47882 (Certified Mail)

Mr. Randall Hammond, Superintendent, Buck Creek Coal Co., Inc., 2156 S. County Rd., 50 West St., Sullivan, IN 47882 (Certified Mail)

Terry G. Farmer, Esq., Bamberger, Foreman, Oswald, & Hahn, 708 Hulman Bldg., P.O. Box 657, Evansville, IN 47704 (Certified Mail)

/lt

[2] According to a July 19, 1996, news release, issued by the United States Attorney for the Southern District of Indiana, the company is now known as Indiana Coal Company.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 13 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. LAKE 94-600<br>A.C. No. 12-02033-03626 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., Respondent | : | |
| BUCK CREEK COAL, INC., Contestant | : | CONTEST PROCEEDINGS |
| v. | : | Docket No. LAKE 94-370-R<br>Citation No.4262274; 5/18/94 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Docket No. LAKE 94-372-R<br>Citation No. 4262276; 5/18/94 |
| | : | Docket No. LAKE 94-376-R<br>Citation No. 4262301; 5/19/94 |
| | : | Docket No. LAKE 94-408-R<br>Citation No. 4262369; 5/17/94 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. LAKE 94-601<br>A.C. No. 12-02033-03627 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., Respondent | : | |

**DEFAULT DECISION**

Before: Judge Hodgdon

These cases are before me on Notices of Contest filed by Buck Creek Coal, Inc., and Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek

pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 33 violations of the Secretary's mandatory health and safety standards and seek penalties of $4,628.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $4,628.00.

These cases are several in a long line of proceedings involving Buck Creek.[1] At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

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Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

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In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

**ORDER**

Based on the above, I find the Respondent, Buck Creek Coal, Inc., in default in these cases. Accordingly, Citation Nos. 4262355, 4259862, 4262042, 4262044, 4262045, 4262359, 4259863, 4259864, 4262050, 4259223, 4259224, 4262256, 4262257, 4386043, 4386044, 4386045, 4262051, 4262052, 4262258 and 4262259 in Docket No. LAKE 94-600; and Citation Nos. 4262267, 4262268, 4262270, 4262271, 4262272, 4262273, 4259873, 4259874, 4262053, 4262369, 4262274, 4262276 and 4262301 in Docket Nos. LAKE 94-370-R, LAKE 94-372-R, LAKE 94-376-R and LAKE 94-408-R and LAKE 94-601 are

**AFFIRMED.** Buck Creek Coal Inc., or its successor,[2] is **ORDERED TO PAY** civil penalties of **$4,628.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED.**

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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

Mr. Chuck Shultise, President, Buck Creek Coal Co., Inc., RR5, Box 203, Sullivan, IN 47882 (Certified Mail)

Mr. Randall Hammond, Superintendent, Buck Creek Coal Co., Inc., 2156 S. County Rd., 50 West St., Sullivan, IN 47882 (Certified Mail)

Terry G. Farmer, Esq., Bamberger, Foreman, Oswald, & Hahn, 708 Hulman Bldg., P.O. Box 657, Evansville, IN 47704 (Certified Mail)

/lt

[2] According to a July 19, 1996, news release, issued by the United States Attorney for the Southern District of Indiana, the company is now known as Indiana Coal Company.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D. C. 20006-3868

December 16, 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. YORK 95-57-M |
| Petitioner | : | A. C. No. 19-00020-05501 E24 |
| v. | : | |
| | : | Lynn Sand & Stone Quarry |
| AUSTIN POWDER COMPANY, | : | |
| Respondent | : | |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. YORK 96-13-M |
| Petitioner | : | A. C. No. 19-00020-05502 E24 |
| v. | : | |
| | : | Lynn Sand & Stone Quarry |
| BRUCE EATON, EMPLOYED BY | : | |
| AUSTIN POWDER COMPANY, | : | |
| Respondent | : | |

DECISION ON REMAND

Before: Judge Merlin

These cases are before me pursuant to the Commission's decision dated December 12, 1996.

In my decision dated October 31, 1996, I entered orders affirming a finding of unwarrantable failure and affirming Citation No. 4424405 as issued under section 104(d)(1) of the Act. 18 FMSHRC 1878, 1889. These orders were issued in error. The subject citation was originally issued under section 104(d)(1), but the Secretary subsequently deleted the unwarrantable failure designation and modified the citation to one issued under section 104(a). Therefore, the orders in question must be vacated.

I have reviewed the assessed penalties in light of the fact that the citation was issued under section 104(a). My determination of appropriate penalties was premised in part upon a finding of very high negligence which remains unchanged. supra at 1887. Accordingly, the penalty assessments previously entered will not be modified.

In light of the foregoing, it is ORDERED that the decision dated October 31, 1996, be MODIFIED to delete the unwarrantable failure finding and to affirm the citation under section 104(a)

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Gail Glick, Esq., Office of the Solicitor, U.S. Department of Labor, One Congress Street, 11th Floor, P.O. Box 8396, Boston, MA 02114

John T. Bonham, Esq., Jackson & Kelly, P. O. Box 553, Charleston, WV 25322

/gl

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 16 1996

| | | |
|---|---|---|
| STANDARD LAFARGE,<br>Contestant | : | CONTEST PROCEEDING |
| v. | : | Docket No. LAKE 95-114-RM<br>Citation No. 4413670; 11/05/94 |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Respondent | : | Marblehead Quarry<br>Mine ID No. 33-00099 |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. LAKE 95-239-M<br>A. C. No. 33-00099-05546 |
| v. | : | Marblehead Quarry |
| LAFARGE CONSTRUCTION MATERIALS,<br>Respondent | : | |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. LAKE 96-28-M<br>A.C. No. 33-00099-05548A |
| v. | : | Marblehead Quarry |
| THEODORE M. DRESS, Employed<br>by LAFARGE CONSTRUCTION<br>MATERIALS,<br>Respondent | : | |

## DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor, U.S. Dept. Of Labor, Cleveland, Ohio for Secretary of Labor;
William K. Doran, Esq., Smith, Heenan & Althen, Washington, D.C., for LaFarge Construction Materials.

Before: Judge Barbour

These consolidated contest and civil penalty proceedings arise under sections 105(d), 110(a) and 110(c) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §§§ 815(d), 820(a), 820(c)). They involve a citation issued by the Secretary of

Labor's (Secretary) Mine Safety and Health Administration (MSHA) as the result of an investigation of an accident at the Marblehead Quarry of Standard Lafarge (Lafarge) (also known as Lafarge Construction Materials (Tr. 9)). The quarry is located in Ottawa County, Ohio.

The citation alleges that Lafarge violated mandatory safety standard 30 C.F.R. §56.16002(a)(1) when a miner who climbed into a surge bin to work was trapped by falling rock. Section 56.16002(a)(1) requires surge bins to be "[e]quipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by caving or sliding materials". In addition, the citation alleges that the violation was a significant and substantial contribution to a mine safety hazard (S&S) and was due to Lafarge's high negligence and unwarrantable failure to comply (30 U.S.C. § 815(d)(1).

Lafarge contested the citation, asserting that it did not state a violation. Also, Lafarge challenged the citation's S&S, unwarrantable, and negligence findings.

After the citation was issued, the Secretary petitioned the Commission to assess Lafarge a civil penalty of $3,800 and to assess Theodore Dress, the foreman in charge at the time of the accident, a civil penalty of $3,000. Lafarge and Dress challenged the petitions.

A hearing was conducted in Toledo, Ohio, at which the parties presented oral testimony and documentary evidence. Subsequently, counsels filed helpful briefs.

## THE ISSUES

The principal issues with regard to Lafarge are whether it violated section 56.16002(a)(1); if so, whether the violation was S&S and unwarrantable, and the amount of the civil penalty that must be assessed, taking into consideration the statutory civil penalty criteria set forth in section 110(i) of the Act (30 U.S.C. §820(i)).

The principal issues with regard to Dress are whether the alleged violation occurred, whether he knowingly authorized, ordered, or carried it out, and, if so, the amount of the civil penalty that must be assessed, taking into consideration the applicable section 110(i) criteria.

## STIPULATIONS

The parties stipulated that:

1. The Marblehead Quarry is owned and operated by Lafarge ... [and] is subject to the ... Act;

2. [T]he Administrative Law Judge has jurisdiction to hear and decide the matters;

3. Inspector James D. Strickler, who issued [the c]itation [,]... is a duly authorized representative of the Secretary;

4. [A] copy of the [c]itation ... was served on Lafarge ... and on Dress ...;

5. [I]mposition of any appropriate civil money penalty will not affect the ability of Lafarge ... to continue in business;

6. Lafarge ... is a large operator;

7. [T]he assessed violation history report [Gov. Exh. 1] may be used in determining an appropriate civil money penalty (Tr. 8-9).

In addition to the stipulations, counsel for the Secretary agreed that Lafarge had a small number of pervious violations. He characterized the company's history of violations as "good" (Tr. 130). Counsel also agreed that Dress had no applicable history of violations (Tr. 130).

## THE ACCIDENT, THE INVESTIGATION, AND THE CITATION

The Marblehead Quarry is a dolomitic limestone extraction and processing facility. The operation encompasses 2,500 acres and produces 3,500,000 tons of limestone a year (Tr. 89). At the quarry, limestone shot from the face is transported to the primary crusher, where it is reduced in size to 10 inches or smaller. It is then transported by two conveyor belts to a surge bin. The crushed limestone is dumped from the belts into the bin. When the bin is vibrated the stone passes through the bin and falls onto a conveyor belt below the bin. The stone then travels along the belt to other facilities for further processing (Tr. 14-15,51,90; Resp. Exh.1).

The surge bin is approximately 22 feet wide, 22 feet long,

and 13 feet high (Tr. 91-92). At the bottom of the bin are a chute and vibrating feeders (Tr. 55, 92). The feeders allow the rock to flow evenly out of the chute and onto the lower conveyor belt (Tr. 52). The chute and vibrators, which are integral parts of the bin, hang below the bin floor.

The floor is flat. It has two rectangular openings in the middle (Tr. 47, 92). As stone falls into the bin from the overhead conveyor belts, it piles on the floor between the two openings. As the vibrators shake the bin, the rock "sloughs off" the piles and falls through the openings, into the chute, and onto the lower conveyor belt (Tr. 96).

The bin was installed at the quarry in 1992. When the bin was first used, some of the rock around the openings was compacted. This rock is so solid that it only can be removed by chiseling or by using high pressure water hoses (Tr. 41, 45, 90, 95). The solid material is called the "dead bed" (29). The dead bed forms ridges around the openings in the bin floor. Rock on the sides of the ridges opposite the openings slids away from the openings and does not pose a hazard to anyone working below. Rock on the other sides of the ridges slids down through the openings (Tr. 41, 49-50; 96 see also Tr. 42-43; Resp Exh. R-2).

David Nelson, the plant manager, testified that miners did not "regularly" work around the bin and that it was not a "standard practice" for someone to work at or in the bin (Tr. 92-93). Nelson believed miners worked inside the bin approximately one time a year (Tr. 94-95). Nelson was familiar with the bin because his duties required him daily to check it (Tr. 96-97).

When a miner was assigned to work inside the bin, the normal procedure at the quarry was to run the vibrators until the sensor at the bin control tower indicated the bin was empty. Then, the vibrators were left running for an additional time to shake out and dislodge anything remaining in the bin (Tr. 97-98). After that, all of the electricity to the bin was disconnected (Tr. 98). However, Nelson admitted that because the bin had not been emptied that often in the past, Lafarge officials did not know "automatically" how long it took to clean out the bin (Tr. 105).

According to Nelson, when Lafarge's employees had to work in the bin, they were instructed "to check the bin for loose material, look at it and use [their] own judgment" (Tr. 98-99). Usually, employees looked into the bin from below. They were closer to any remaining material if they looked from below then if they looked from above (Tr 100). Nelson agreed, however, that if miners looked into the bin from the top, they would get a

"different perspective" (Id.) Nelson was of the opinion, that if loose material remained in the bin after it had been vibrated, the only way to ensure safety was to go to the top of bin, take a bar, and knock out the loose the material (Tr. 105-106).

On July 15, 1994, Daniel Harder worked as a laborer at the quarry. He had been at the quarry for less than two years, but he had a long work history at other quarries (Tr. 33-34). Dress was Harder's foreman. Dress's duties were to supervise miners and to oversee production (Tr. 111-112).

As Dress came to work on July 15, the surge bin was operating normally. However, Dress noticed sand leaking through a hole near the bottom of the bin. Dress looked at the hole and decided that it should be patched. He also decided that the patch could be applied from inside the bin (Tr. 112-113).

To get the bin ready for the repair work, Dress ordered that the vibrators be kept operating. As has been noted, this was the procedure normally used to clean loose rock out of the bin (Tr. 40, 98, 113). The vibrators operatored for approximately 20 minutes to a half hour more.

Dress told Harder and another miner, Brian Chumley, to go the bin. In the meantime, Dress went to the building housing the controls of the bin, disconnected the bin's electricity, and locked out its electrical circuits.

Dress then went to the bin. Harder and Chumley were there. Dress and Harder looked into the bin from below (Tr. 113-114). Dress saw "a cone ... of hard-packed fines ... like a wall of hard-packed sand. And laying up above ... on the other level ... [was] some loose surge material" (Tr. 116-117). Dress did not believe any of this material could fall (Tr. 117). As he recalled, the rock was lying on the side of the dead bed away from the opening (Tr. 41). According to Dress, he and Harder discussed the situation and concluded that it was safe for Harder to patch the hole (Id.).

Harder essentially agreed with Dress. When Harder looked into the bin, he too saw some rock, but like Dress, Harder did not believe that it would fall. Harder did not think that the situation was dangerous (Tr. 21, 24-25, 57). Both Dress and Harder stated that if the rock had looked loose, they would have gone to the top of the bin and knocked it out with a bar.

While Harder prepared to patch the hole, Dress left to find Harder a wooden bock upon which to stand so that Harder could

better reach the hole. When Dress returned, Harder had climbed up into the bin and did not need the block (Tr. 118-119). This was the first time Harder had worked inside of the bin.

Once inside, Harder began to weld the patch over the hole. Dress remained outside, along with Chumley (Tr. 22). No other miners were working in the vicinity. During the course of the repair work, Dress and Chumley left so that Chumley could do other work (Tr. 22, 53, 93). However, Dress returned periodically to check on Harder (Tr. 53).

Harder welded for approximately 45 minutes. He was almost finished when he heard rocks begin to fall around him. Harder jumped down to get out of the bin. Harder managed to got his head out of the bottom opening, and he assumed a crouched position. Rocks continued to fall about his back and shoulders. He could not get all of the way out (Tr. 23, 37). Fortunately for Harder, Dress had returned. He came immediately to Harder's aid. He helped Harder remove some of the rocks, and Harder was able to free himself (Id.).

Harder estimated that he was trapped for about five minutes (Tr. 36). He suffered minor cuts. Dress took him for first aid, and asked if Harder wanted to go home. Harder responded that he felt "okay" (Tr.37). He stayed and finished the shift. When describing the experience, Harder stated, "[I]t was scary, that's for sure" (Id.).

In October 1995, Strickler was conducting an inspection at the quarry when an employee told him about the accident (Tr. 64). Strickler investigated and concluded there had been a violation of section 56.16002(a)(1). In Strickler's view, the violation centered around the company's failure to remove the loose material before Harder entered the bin (Tr. 77-78, 79-80). Strickler stated:

> There was a buildup of material in ... [the bin]. They observed it. They tried to make a correction, but it was still there. They made no other attempt to remove the material above the individual and put him in that situation (Tr. 65, see also Tr. 76-77).

In Strickler's opinion, to comply with the standard Dress should have "made sure that there wasn't any loose material in [the] bin" (Tr. 82). The company should have run the vibrators more and should have barred down the rock from the top of the bin, if necessary (Tr. 68). Strickler stated; "That's taking a little bit more time and more precaution. And evidently, there

had to be loose stuff in there because something came loose and covered ... [Harder] up" (Id.).

Strickler testified that the violation was abated when the company "had a safety meeting and instructed the employees on working inside bins and hoppers" (Tr. 127). As best Strickler could recall, the instruction concerned the use of safety belts and lines when going into hoppers (Id.). It also involved instructions in the procedures to take when removing loose material from bins, e.g., running the vibrators. Abatement did not include the installation of any additional devices on the bin (Tr. 128).

Strickler cited the company pursuant to section 104(a) of the Act (30 U.S.C. § 814(a)). After discussing the citation with his supervisor, Strickler modified it to one issued pursuant to section 104(d)(1) (Tr. 67-68). The modification was based on Strickler's belief that the violation was due to Lafarge's unwarrantable failure to company with section 56.16002(a)(1). He explained that the company knew that rock had built up in the bin, nevertheless Dress assigned Harder to work inside the bin (Tr. 68). Strickler also believed that the company was "highly negligent" (Tr. 69). Finally, Strickler found that the violation was S&S because he believed it reasonably likely that Harder would have suffocated (Tr. 69).

## THE MOTION TO DISMISS

Following presentation of the Secretary's case-in-chief, counsel for Lafarge and Dress moved to dismiss the proceedings. Counsel argued that the Secretary had not proven a violation, in that section 56.16002(a)(1) states its requirements are applicable during "normal operations", and patching the hole in the bin "was definitely not a part of the normal operations" (Tr. 85). Counsel for the Secretary responded that patching the hole constituted maintenance of the bin and that "maintenance is considered part of ... normal operations" (Tr.86). I agreed with counsel for the Secretary, and denied the motion (Id.).

## THE VIOLATION

The first issue is whether there was a violation of section 56.16002(a)(1). If not, Lafarge's contest must be granted and the Secretary's civil penalty proceedings dismissed.

Citation No. 4413670 states:

> On 7-15-94 a maintenance employee was required to

perform the task of welding a metal patch on the inside of [the] ... surge bin. The employee started out by standing on top of the vibrating feeder, in order to gain a better angle to weld, he climbed up inside the bin. After a short period of time, loose material began to fall, the employee attempted to exit the discharge chute, when the loose material entrapped him.... The foreman at the scene was able to free him by removing some of the large rocks and getting him off the feeder (Gov. Exh. 3).

Subsequently, the citation was modified as follows:

> It was management's responsibility to take the necessary precautions to eliminate the hazards involved, [p]rior to assigning an employee to the task of welding a metal patch on the inside of the ... bin. After running the bin vibrators to remove most of the material from inside the bin, management observed material attached to the sides of the bin but made no attempt to remove loose material prior to the work being started (Id. at 2).

Subpart O of the regulations for metal and nonmetal mines contains standards for "Materials Storage and Handling". Section 56.16002 of Subpart O contains standards for "[b]ins, hoppers, silos, tanks, and surge piles." As noted, section 56.16002(a)(1) states in pertinent part

> (a) Bins ... where loose unconsolidated materials are stored, handled or transferred shall be –
> (1) Equipped with mechanical devices or other effective means of handling materials so that during normal operations person are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials[.]

The wording of the standard makes clear that the specified facilities used for storing and handling materials – bins, hoppers, silos, etc. – must either be equipped with mechanical devices or with other means so that persons are not required to enter or work where they are exposed to entrapment. It also makes clear that the standard is applicable during normal operations.

Here, the vibrators were the "mechanical devices" with which the bin was equipped to prevent persons from being trapped. They were an integral part of the bin. Although they were used

primarily to shake stone into the feeder and to facilitate its even flow onto the belt below, they also could be and were used to comply with the standard. (Strickler and Dress essentially agreed that the company tried to eliminate all of the loose material by running the vibrators until the loose rock was cleared from the bin (see especially Tr. 65, 76-77).) That the mechanical devices had a dual purpose does not prevent them from meeting the singular goal of the standard.

In addition to the "mechanical devices" required by the standard, the record supports finding the bin was equipped with another "effective means" to prevent entrapment. The inspector and Lafarge's witnesses agreed that a bar could be used from above to knock down and eliminate loose material (Tr. 68, 105-106, Tr. 120). While it is true that unlike the vibrators, the bar was not attached to bin, the bin was nonetheless "equipped" with the bar in that the it readily was available when necessary (Tr. 120) (Webster's Third New International Dictionary 768 (1968)).

Since the bin was equipped with mechanical devices to prevent persons from working where they were exposed to entrapment by caving or sliding materials, Lafarge was required to use the devices to achieve the mandated result. In other words, Lafarge was required to operate the vibrators to clear the loose rock so that Harder would not be trapped. If its operation of the vibrators did not sufficiently clear the rock, Lafarge was required to make sure a bar was used to complete the task. In other words, under the standard, both the means for achieving the end and effective use of the means were required.

By failing to operate the vibrators to eliminate all of the loose rock, and by failing to ensure that the remaining loose rock was barred down prior to Harder entering the bin, Lafarge violated the standard, provided patching the hole was a "normal operation".

As used in the standard, "normal" connotes a regular or periodic pattern (see Webster's 1540). Nelson, the plant manager, testified that miners worked inside the bin approximately once a year (Tr. 94-95). Thus, they were regularly exposed, albeit on an annual basis, to the hazards of such work. This periodic exposure was sufficient to make such work a "normal operation".

In addition, the hole in the bin, was the result of the regular use of the bin. Repair of the hole was simply a necessary extension of this regular use and, as counsel for the

Secretary argued, in this way too was a "normal operation".

Therefore, I conclude that Lafarge violated the standard.

S&S AND GRAVITY

A violation is properly designated S&S, "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)). There are four things the Secretary must prove to sustain an S&S finding:

> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety contributed to be 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 (Mathies Coal Co, 6 FMSHRC 1, 3-4 (January 1984); see also Austin Power Co. v. Secretary, 861 F.2d 99, 104-105 (5th Cir. 1988) (approving Mathies criteria).

Here, the Secretary has proven all four. There was a violation of section 56.16002(a)(1). It contributed to a measure of danger to safety in that the failure to ensure the vibrators were used effectively or that a bar was used to eliminate the remaining loose rock, meant that a person entering the bin was subject to being trapped by the rock. Moreover, there was a reasonable likelihood that the hazard contributed to would result in an injury. Given Harder's presence under the rock and given the work he was doing, the loose rock was likely to fall on Harder at any time and to subject him to crushing injuries or suffocation. Harder was lucky. He suffered only minor cuts. However, it was reasonably likely that he would have been more severely injured or even killed.

In addition to being a significant and substantial contribution to a mine safety hazard, the violation was very serious. It long has been held that to determine the gravity of a violation, the violation should be analyzed in terms of its potential hazard to the safety of miners and the probability of that hazard occurring (Robert G. Lawson Coal Co., 1 IBMA 115, 120 (May 1972)). The potential hazard was injury due to cuts and/or

broken bones, or death due to asphyxiation. Because Harder was required to work in the immediate presence of loose rock, it was probable that an accident causing serious injury or even causing death would happen.

UNWARRANTABLE FAILURE AND NEGLIGENCE

Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act" (Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (December 1987)). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care" (Emery, 9 FMSHRC at 2003-04).

While the violation was not caused by intentional misconduct, the company was guilty of a serious lack of reasonable care. First, patching the hole from inside the bin potentially was a very dangerous job. Any miner assigned to do the job was subject to being injured or killed unless loose rock above the miner was removed. This potential threat required heightened precautions on the part of Lafarge and those acting for it. Rather than exhibit heightened care, the company and Dress relied on procedures normally used at the quarry to make sure the bin was safe.

The evidence leads inescapably to the conclusion that no one at Lafarge knew enough about emptying the bin to be certain that the procedures were adequate. As has been noted, the procedures involved the visual examination of the bin from below after the vibrators had been run for approximately 25 minutes (Tr. 101-102, 117), and for a "judgment call" based on the examination (Tr.98). Nelson candidly admitted that Lafarge officials did not "automatically" know how long it took to clear the bin, because they had not done it that often (Tr. 105). Moreover, visual inspection from below did not give a sufficiently full perspective of what remained in the bin. Inspection from above also was necessary (see Tr. 74, 79-80). In view of these factors, it was not enough for the company to have miners "look at it and use [their] own judgement" to determine whether or not loose rock remained (Tr. 98). The company should have required more.

For example, before a miner entered the bin, the company should have mandated inspection from both below and above and should have required that a bar be used from above, no matter how long the vibrators had run.

To put the matter another way, given the company's relative unfamiliarity with emptying the bin and given the danger inherent in the work assignment, the company should have erred, if at all, on the side of safety. Its failure to make sure that the normal prework procedure did not involve more than vibrating the bin for a period it believed, but was not certain, was adequate, and did not involve more than miners, who were unfamiliar with assessing what they saw, visually inspecting the bin, represented a serious lack of reasonable care. I conclude therefore that the violation was caused by the unwarrantable failure of Lafarge to comply with the standard.

Having concluded the company exhibited a serious lack of reasonable care in allowing the violation to exist, I also conclude that the company commensurately was negligent.

## CIVIL PENALTY ASSESSMENT

The violation was very serious. Lafarge was extemely lucky Harder was not disabled, or worse. The violation was caused by the company's serious lack of care. These criteria, along with the company's large size, would warrant a substantial penalty, if they stood alone. However, the are balanced by the mitigating effect of the company's prompt abatement of the violation and by its small history of previous violations.

The violation was not part of a pattern of neglect of the company's statutory responsibilities. Rather, as indicated by the company's history of previous violations, it was more in the nature of an isolated incident. Although, the Secretary has proposed a civil penalty of $3,800, I conclude that a penalty of $2,500 should be assessed.

## KNOWING VIOLATION

Section 110(c) of the Act provides for the assessment of a civil penalty when any agent of a corporation "knowingly [has] authorized, ordered, or carried out" a violation of a mandatory health or safety standard (30 U.S.C. § 820(c)). Since there is no dispute about the corporate status of Lafarge and Dress' status as an agent, the critical question is whether, as the Secretary alleges Dress knowingly violated section 56.16002(a)(1).

The Commission has approved the description of "knowingly" found in U.S. v. Sweet Briar, Inc., 92 F. Supp. 777 (W.D.S.C. 1950)). There, the court stated that the word:

> does not have any meaning of bad faith or evil

> purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence (92 F. Supp at 780).

The Commission has found that this interpretation:

> is consistent with both the statutory language and the remedial intent of the ... Act (Kenny Richardson, 3 FMSHRC 8, 16 (January 1981), aff'd, 689 F.2d 623 (6th Cir. 1982).)

It has explained that:

> If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute (Kenny Richardson, 3 FMSHRC at 16).

In addition, the Commission has held that to violate section 110(c), the person's conduct must be "aggravated", i.e., it must involve more than ordinary negligence. Wyoming Fuel Co., 16 FMSHRC 1618, 1630 (August 1994); Beth Energy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992).

It is certain that Dress did not intentionally violate the standard. Harder was sure that Dress never would assign him to do a job that Dress believed was dangerous, and I agree (Tr. 24). The respect Dress and Harder had for one another was apparent at the hearing. Both clearly were troubled by what had happened and relieved and grateful the consequences had been slight.

This said, it also is clear that intent is not the issue. Rather, and as explained by the Commission, the question is whether Dress should have known of the violation and whether he exhibited more than ordinary negligence in allowing the violation to occur.

As a foreman, Dress had a high standard of care to the company for whom he worked and to the miners who worked pursuant to his directions. When Dress assigned Harder to work under conditions that were potentially very hazardous, it became

incumbent upon him to meet a standard of care proportionate with the danger. Rather than do this, Dress relied on the usual procedures of running the vibrators and of visual inspecting the bin from below in order to assess and remove the danger, and, as I have found, these procedures were wholely inadequate.

Because of the unfamiliarity of company personnel with emptying the bin, because of the unfamiliarity of miners with working in the bin, because Harder never had worked in the bin before, there were too many uncertainties involved (see Tr. 105). In view of them, and of the fact that Harder easily could have been trapped, severely injured, or killed if he misjudged the situation, Dress should have know that loose material might remain and should have insisted that the bin be viewed from above and a bar be used. He did not.

I conclude, therefore, that Dress should have known of the violation and that his failure represented more than ordinary negligence. As a result, he knowingly violated the standard.

CIVIL PENALTY ASSESSMENT

This was a very serious violation, and Dress exhibited more than ordinary negligence in failing to make sure that Harder was not exposed to entrapment by sliding and falling rock. The Secretary has proposed that Dress pay a civil penalty of $3,000. However, I find it incongruous that the Secretary proposes Dress, an individual, pay a civil penalty greater than three fourths the amount of that proposed for Lafarge, a large operator.

Moreover, although Dress used bad judgement in placing Harder in harm's way, there is no suggestion that Dress was habitually careless in assigning miners to work in violation of mandatory safety standards. Indeed, the company's overall good history of previous violations and the fact that Dress has no applicable history of previous violations suggests exactly the opposite (Tr. 130).

In view of the fact that the violation appears to have been the result of a single, isolated lapse of judgment on Dress's part, I conclude that a penalty of $500 is appropriate.

ORDER

DOCKET NO. LAKE 95-114-RM

| CITATION NO. | DATE | 30 C.F.R. |
|---|---|---|
| 4413570 | 10/5/94 | § 56.16002(a)(1) |

The citation is AFFIRMED, and DOCKET NO. LAKE 95-114-RM is DISMISSED.

DOCKET NO. LAKE 95-239-M

| CITATION NO. | DATE | 30 C.F.R. | PROPOSED PENALTY | ASSESSED PENALTY |
|---|---|---|---|---|
| 4413570 | 10/5/94 | § 56.16002(a)(1) | $3,800 | $2,500 |

Lafarge is ORDERED to pay a civil penalty of $2,500 within 30 days of the date of this decision.

DOCKET NO. LAKE 95-28-M

| CITATION NO. | DATE | 30 C.F.R. | PROPOSED PENALTY | ASSESSED PENALTY |
|---|---|---|---|---|
| 4413570 | 10/5/94 | § 56.16002(a)(1) | $3,000 | $500 |

Dress is ORDERED to pay a civil penalty of $500 within thirty days of the date of this decision.

Upon receipt of the payments, DOCKET NO. LAKE 95-239-M and DOCKET NO. LAKE 95-28-M are DISMISSED.

David F. Barbour

David F. Barbour
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 16 1996

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| BUCK CREEK COAL, INC., Contestant | : | CONTEST PROCEEDINGS |
| v. | : | Docket No. LAKE 94-420-R |
| | : | Citation No. 4262071; 5/28/94 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Docket No. LAKE 94-326-R |
| | : | Citation No. 4261721; 5/31/94 |
| | : | Docket No. LAKE 94-549-R |
| | : | Citation No. 4262130; 6/23/94 |
| | : | Docket No. LAKE 94-551-R |
| | : | Citation No. 4261943; 6/24/94 |
| | : | Docket No. LAKE 94-559-R |
| | : | Citation No. 4261883; 6/30/94 |
| | : | Docket No. LAKE 94-570-R |
| | : | Citation No. 4261911; 7/2/94 |
| | : | Docket No. LAKE 94-581-R |
| | : | Citation No. 3037100; 7/6/94 |
| | : | Docket No. LAKE 94-583-R |
| | : | Citation No. 4050834; 7/7/94 |
| | : | Docket No. LAKE 94-585-R |
| | : | Citation No. 3847801; 7/7/94 |
| | : | Docket No. LAKE 94-590-R |
| | : | Citation No. 4261968; 7/12/94 |
| | : | Docket No. LAKE 94-591-R |
| | : | Citation No. 4261969; 7/13/94 |
| | : | Docket No. LAKE 94-592-R |
| | : | Citation No. 4261971; 7/13/94 |
| | : | Docket No. LAKE 94-593-R |
| | : | Citation No. 4261972; 7/13/94 |

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| | : | Docket No. LAKE 94-594-R |
| | : | Citation No. 4261976; 7/15/94 |
| | : | |
| | : | Docket No. LAKE 94-595-R |
| | : | Citation No. 4261978; 7/15/94 |
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| | : | Docket No. LAKE 94-596-R |
| | : | Citation No. 4261977; 7/15/94 |
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| | : | Docket No. LAKE 94-597-R |
| | : | Citation No. 4261980; 7/15/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 94-677 |
| Petitioner | : | A.C. No. 12-02033-03640 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |
| | : | |
| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. LAKE 94-607-R |
| | : | Citation No. 4261521; 7/18/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 94-608-R |
| ADMINISTRATION (MSHA), | : | Citation No. 4261522; 7/18/94 |
| Respondent | : | |
| | : | Docket No. LAKE 94-609-R |
| | : | Citation No. 4261523; 7/19/94 |
| | : | |
| | : | Docket No. LAKE 94-611-R |
| | : | Citation No. 3843963; 7/20/94 |
| | : | |
| | : | Docket No. LAKE 94-612-R |
| | : | Citation No. 4261526; 7/21/94 |
| | : | |
| | : | Docket No. LAKE 94-619-R |
| | : | Citation No. 4259797; 7/26/94 |
| | : | |
| | : | Docket No. LAKE 94-620-R |
| | : | Citation No. 4259798; 7/26/94 |
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| | : | Docket No. LAKE 94-623-R |
| | : | Citation No. 4261579; 7/26/94 |
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| | : | Docket No. LAKE 94-624-R |
| | : | Citation No. 4261580; 7/26/94 |
| | : | |
| | : | Docket No. LAKE 94-628-R |
| | : | Citation No. 4260021; 7/28/94 |
| | : | |
| | : | Docket No. LAKE 94-629-R |
| | : | Citation No. 4261960; 7/28/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 94-707 |
| Petitioner | : | A.C. No. 12-02033-03641 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |

**DEFAULT DECISION**

Before: Judge Hodgdon

These cases are before me on Notices of Contest filed by Buck Creek Coal, Inc., Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 28 violations of the Secretary's mandatory health and safety standards and seek penalties of $6,162.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $6,162.00.

These cases are several in a long line of proceedings involving Buck Creek.[1] At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

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[1] Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for filings in any of the cases. However, this decision identifies, in the caption, the specific docket numbers of the cases involved.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**"

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

## ORDER

Based on the above, I find the Respondent, Buck Creek Coal, Inc., **IN DEFAULT** in these cases. Accordingly, Citation Nos. 4262071, 4261721, 4262130, 4261943, 4261883, 4261911, 3037100, 4050834, 3847801, 4261968, 4261969, 4261971, 4261972, 4261976, 4261978, 4261977 and 4261980 in Docket Nos. LAKE 94-420-R, LAKE 94-326-R, 94-549-R, LAKE 94-551-R, LAKE 94-559-R, LAKE 94-570-R, LAKE 94-581-R, LAKE 94-583-R, LAKE 94-585-R, LAKE 94-590-R, LAKE 94-591-R, LAKE 94-592-R, LAKE 94-593-R, LAKE 94-594-R, LAKE 94-595-R, LAKE 94-596-R, LAKE 94-597-R and LAKE 94-677; and Citation Nos. 4261521, 4261522, 4261523, 3843963, 4261526, 4259797, 4259798, 4261579, 4261580, 4260021 and 4261960 in Docket Nos. LAKE 94-607-R, LAKE 94-608-R, LAKE 94-609-R, LAKE 94-611-R, LAKE 94-612-R, LAKE 94-619-R, LAKE 94-620-R, LAKE 94-623-R, LAKE 94-624-R, LAKE 94-628-R, LAKE 94-629-R and LAKE 94-707 are **AFFIRMED**. Buck Creek Coal Inc., or its successor,[2] is **ORDERED TO PAY** civil penalties of **$6,162.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

[2] According to a July 19, 1996, news release, issued by the United States Attorney for the Southern District of Indiana, the company is now known as Indiana Coal Company.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 17 1996

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| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. LAKE 94-292-R |
| | : | Citation No. 4259813; 5/23/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 94-293-R |
| ADMINISTRATION (MSHA), | : | Citation No. 4259814; 5/23/94 |
| Respondent | : | |
| | : | Docket No. LAKE 94-356-R |
| | : | Citation No. 4262068; 5/18/94 |
| | : | |
| | : | Docket No. LAKE 94-371-R |
| | : | Citation No. 4262275; 5/18/94 |
| | : | |
| | : | Docket No. LAKE 94-378-R |
| | : | Citation No. 4262303; 5/20/94 |
| | : | |
| | : | Docket No. LAKE 94-379-R |
| | : | Citation No. 4262304; 5/20/94 |
| | : | |
| | : | Docket No. LAKE 94-380-R |
| | : | Citation No. 4262305; 5/20/94 |
| | : | |
| | : | Docket No. LAKE 94-503-R |
| | : | Citation No. 4262080; 6/17/94 |
| | : | |
| | : | Docket No. LAKE 94-162-R |
| | : | Citation No. 4261879; 4/1/94 |
| | : | |
| | : | Docket No. LAKE 94-499-R |
| | : | Citation No. 4261736; 6/17/94 |
| | : | |
| | : | Docket No. LAKE 94-525-R |
| | : | Citation No. 3859803; 6/21/94 |
| | : | |
| | : | Docket No. LAKE 94-610-R |
| | : | Citation No. 4261524; 7/20/94 |
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| | : | Docket No. LAKE 94-618-R |
| | : | Citation No. 4259796; 7/26/94 |
| | : | |
| | : | Docket No. LAKE 94-621-R |
| | : | Citation No. 4259799; 7/26/94 |
| | : | |
| | : | Docket No. LAKE 94-626-R |
| | : | Citation No. 4260062; 7/27/94 |
| | : | |
| | : | Docket No. LAKE 94-638-R |
| | : | Citation No. 3843968; 8/1/94 |
| | : | |
| | : | Docket No. LAKE 94-645-R |
| | : | Citation No. 4261925; 8/4/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 94-708 |
| Petitioner | : | A.C. No. 12-02033-03642 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |
| | : | |
| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. LAKE 94-264-R |
| | : | Citation No. 4056446; 5/24/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 94-278-R |
| ADMINISTRATION (MSHA), | : | Citation No. 4258954; 6/8/94 |
| Respondent | : | |
| | : | Docket No. LAKE 94-284-R |
| | : | Citation No. 4259171; 5/24/94 |
| | : | |
| | : | Docket No. LAKE 94-287-R |
| | : | Citation No. 4259174; 5/25/94 |
| | : | |
| | : | Docket No. LAKE 94-313-R |
| | : | Citation No. 4261546; 6/7/94 |
| | : | |
| | : | Docket No. LAKE 94-319-R |
| | : | Citation No. 4261552; 6/8/94 |
| | : | |
| | : | Docket No. LAKE 94-329-R |
| | : | Citation No. 4261727; 6/5/94 |
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| | : | Docket No. LAKE 94-330-R |
| | : | Citation No. 4261728; 6/5/94 |
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| | : | Docket No. LAKE 94-331-R |
| | : | Citation No. 4261730; 6/6/94 |
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| | : | Docket No. LAKE 94-335-R |
| | : | Citation No. 4261746; 6/4/94 |
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| | : | Docket No. LAKE 94-336-R |
| | : | Citation No. 4261747; 6/4/94 |
| | : | |
| | : | Docket No. LAKE 94-384-R |
| | : | Citation No. 4262309; 5/24/94 |
| | : | |
| | : | Docket No. LAKE 94-386-R |
| | : | Citation No. 4262311; 5/25/94 |
| | : | |
| | : | Docket No. LAKE 94-387-R |
| | : | Citation No. 4262312; 5/25/94 |
| | : | |
| | : | Docket No. LAKE 94-390-R |
| | : | Citation No. 4262316; 5/28/94 |
| | : | |
| | : | Docket No. LAKE 94-391-R |
| | : | Citation No. 4262317; 5/31/94 |
| | : | |
| | : | Docket No. LAKE 94-416-R |
| | : | Citation No. 4262055; 6/1/94 |
| | : | |
| | : | Docket No. LAKE 94-423-R |
| | : | Citation No. 4262075; 6/5/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 94-709 |
| Petitioner | : | A.C. No. 12-02033-03643 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |

**DEFAULT DECISION**

Before: Judge Hodgdon

These cases are before me on Notices of Contest filed by Buck Creek Coal, Inc., Petitions for Assessment of Civil Penalty

filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 37 violations of the Secretary's mandatory health and safety standards and seek penalties of $179,310.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $179,310.00.

These cases are several in a long line of proceedings involving Buck Creek.[1] At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**"

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

---

[1] Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for filings in any of the cases. However, this decision identifies, in the caption, the specific docket numbers of the cases involved.

On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

## ORDER

Based on the above, I find the Respondent, Buck Creek Coal, Inc., **IN DEFAULT** in these cases. Accordingly, Order Nos. 4259813, 4259814, 4262068, 4262275, 4262303, 4262304, 4262305 and 4262080 and Citation Nos. 4261879, 4262334, 4261736, 3859803, 4261524, 4259796, 4259799, 4260062, 3843968 and 4261925 in Docket Nos. LAKE 94-292-R, LAKE 94-293-R, LAKE 94-356-R, LAKE 94-371-R, LAKE 94-378-R, LAKE 94-379-R, LAKE 94-380-R, LAKE 94-503-R, LAKE

94-162-R, LAKE 94-499-R, LAKE 94-525-R, LAKE 94-610-R, LAKE 94-618-R, LAKE 94-621-R, LAKE 94-626-R, LAKE 94-638-R, LAKE 94-645-R and LAKE 94-708; and Order Nos. 4056446, 4258954, 4259171, 4259174, 4261546, 4261552, 4261727, 4261728, 4261730, 4261746, 4261747, 4262309, 4262311, 4262312, 4262316, 4262317, 4262055, 4262075 and 4262315 in Docket Nos. LAKE 94-264-R, LAKE 94-278-R, LAKE 94-284-R, LAKE 94-287-R, LAKE 94-313-R, LAKE 94-319-R, LAKE 94-329-R, LAKE 94-330-R, LAKE 94-331-R, LAKE 94-335-R, LAKE 94-336-R, LAKE 94-384-R, LAKE 94-386-R, LAKE 94-387-R, LAKE 94-390-R, LAKE 94-391-R, LAKE 94-416-R, LAKE 94-423-R and LAKE 94-709 are **AFFIRMED**. Buck Creek Coal Inc., or its successor,[2] is **ORDERED TO PAY** civil penalties of **$179,310.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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

Mr. Chuck Shultise, President, Buck Creek Coal Co., Inc., RR5, Box 203, Sullivan, IN 47882 (Certified Mail)

Mr. Randall Hammond, Superintendent, Buck Creek Coal Co., Inc., 2156 S. County Rd., 50 West St., Sullivan, IN 47882 (Certified Mail)

Terry G. Farmer, Esq., Bamberger, Foreman, Oswald, & Hahn, 708 Hulman Bldg., P.O. Box 657, Evansville, IN 47704 (Certified Mail)

/lt

[2] According to a July 19, 1996, news release, issued by the United States Attorney for the Southern District of Indiana, the company is now known as Indiana Coal Company.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 18 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. EMPIRE ENERGY, INC., Respondent | : | CIVIL PENALTY PROCEEDING<br>Docket No. WEVA 94-33<br>A. C. No. 46-08066-03503<br>Seng Camp 1-A |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. WAR EAGLE CONSTRUCTION CORPORATION, Respondent | : | CIVIL PENALTY PROCEEDING<br>Docket No. WEVA 94-34<br>A. C. No. 46-08066-03503<br>Seng Camp 1-A |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. KENNIE COMPTON, Respondent | : | CIVIL PENALTY PROCEEDING<br>Docket No. WEVA 94-35<br>A. C. No. 46-08066-03503<br>Seng Camp 1-A |

## DEFAULT DECISION

Before: Judge Maurer

These cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor; acting through his Mine Safety and Health Administration (MSHA), against Empire Energy, Inc., War Eagle Construction, and Kennie Compton, personally pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 11 violations of the Secretary's mandatory health and safety standards and seek penalties of $135,000 from each respondent. For the reasons set forth below, I find the respondents in default, affirm the orders and citations, and assess penalties of $135,000 against each of the respondents.

On June 7, 1994, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the respondents. On August 13, 1996, counsel filed a Motion to Compel stating that although respondents had received the discovery requests, no response to them had been made. Consequently, the Secretary requested that the respondents be compelled to respond to the requests and that if the respondents did not respond to the requests a default decision be issued in the proceedings. Respondents did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on September 17, 1996. Respondents were ordered to respond to the Secretary's discovery requests within 15 days of the date of the order. The respondents were further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**

The order was sent by Certified Mail-Return Receipt Requested to respondents. The Return Receipt Card has been received from Kennie Compton indicating that the order was received on September 21, 1996. The envelopes addressed to Empire Energy, Inc. and War Eagle Construction were returned marked unclaimed.

On November 22, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the respondents had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Respondents have not responded to the motion.

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the respondents' consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the respondents in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The respondents' subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's

motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

**ORDER**

Based on the above, I find the respondents, Empire Energy, Inc., War Eagle Construction, and Kennie Compton in default in these cases. Accordingly, all citations/orders contained in the captioned dockets are **AFFIRMED**. Empire Energy, Inc., War Eagle Construction, and Kennie Compton are each **ORDERED TO PAY** civil penalties of $135,000 within 30 days of the date of this decision. Upon receipt of payment, these proceedings are **DISMISSED**.

Roy J. Maurer
Administrative Law Judge

Distribution:

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

Empire Energy, Inc., P. O. Box 329, Mallory, WV 25634 (Certified Mail)

War Eagle Construction Corporation, P. O. Box 691, Gilbert, WV 25621 (Certified Mail)

Mr. Kennie Compton, 107 Timberide Drive, Beckley, WV 25801 (Certified Mail)

dcp

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 19 1996

| | | |
|---|---|---|
| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. LAKE 94-475-R |
| | : | Citation No. 4056791; 6/14/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 94-490-R |
| ADMINISTRATION (MSHA), | : | Citation No. 4261735; 6/15/94 |
| Respondent | : | |
| | : | Docket No. LAKE 94-495-R |
| | : | Citation No. 4261565; 6/16/94 |
| | : | |
| | : | Docket No. LAKE 94-637-R |
| | : | Citation No. 3843967; 8/1/94 |
| | : | |
| | : | Docket No. LAKE 94-641-R |
| | : | Citation No. 3843971; 8/2/94 |
| | : | |
| | : | Docket No. LAKE 94-644-R |
| | : | Citation No. 3843974; 8/3/94 |
| | : | |
| | : | Docket No. LAKE 94-646-R |
| | : | Citation No. 4261926; 8/4/94 |
| | : | |
| | : | Docket No. LAKE 94-664-R |
| | : | Citation No. 4261928; 8/9/94 |
| | : | |
| | : | Docket No. LAKE 94-665-R |
| | : | Citation No. 4261929; 8/9/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 94-710 |
| Petitioner | : | A.C. No. 12-02033-03644 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |
| | : | |

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| BUCK CREEK COAL, INC., Contestant | : | CONTEST PROCEEDINGS |
| v. | : | Docket No. LAKE 94-321-R |
| | : | Citation No. 4261554; 6/9/94 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Docket No. LAKE 94-449-R |
| | : | Citation No. 4261757; 6/10/94 |
| | : | Docket No. LAKE 94-429-R |
| | : | Citation No. 4386047; 5/17/94 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. LAKE 94-714 |
| | : | A.C. No. 12-02033-03645 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., Respondent | : | |
| BUCK CREEK COAL, INC., Contestant | : | CONTEST PROCEEDINGS |
| v. | : | Docket No. LAKE 94-642-R |
| | : | Citation No. 3843972; 8/2/94 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Docket No. LAKE 94-660-R |
| | : | Citation No. 3843975; 8/8/94 |
| | : | Docket No. LAKE 94-661-R |
| | : | Citation No. 3843976; 8/8/94 |
| | : | Docket No. LAKE 94-662-R |
| | : | Citation No. 4260022; 8/9/94 |
| | : | Docket No. LAKE 94-663-R |
| | : | Citation No. 4260023; 8/9/94 |
| | : | Docket No. LAKE 94-666-R |
| | : | Citation No. 3843979; 8/11/94 |
| | : | Docket No. LAKE 94-667-R |
| | : | Citation No. 3843980; 8/11/94 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. LAKE 94-745 |
| | : | A.C. No. 12-02033-03646 |
| v. | : | |
| | : | Buck Creek Mine |

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| BUCK CREEK COAL, INC., Respondent | : | |
| BUCK CREEK COAL, INC., Contestant | : | CONTEST PROCEEDING |
| v. | : | Docket No. LAKE 94-492-R |
| | : | Citation No. 4262078; 6/15/94 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. LAKE 94-746 |
| | : | A.C. No. 12-02033-03647 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., Respondent | : | |

**DEFAULT DECISION**

Before: Judge Hodgdon

These cases are before me on Notices of Contest filed by Buck Creek Coal, Inc., Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 20 violations of the Secretary's mandatory health and safety standards and seek penalties of $38,723.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $38,723.00.

These cases are several in a long line of proceedings involving Buck Creek.[1] At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

[1] Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for filings in any of the cases. However, this decision identifies, in the caption, the specific docket numbers of the cases involved.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**"

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

## ORDER

Based on the above, I find the Respondent, Buck Creek Coal, Inc., **IN DEFAULT** in these cases. Accordingly, Order Nos. 4056791, 4261735, 4261565, and Citation Nos. 3843967, 3843971, 3843974, 4261926, 4261928, and 4261929 in Docket Nos. LAKE 94-475-R, LAKE 94-490-R, LAKE 94-495-R, LAKE 94-637-R, LAKE 94-641-R, LAKE 94-644-R, LAKE 94-646-R, LAKE 94-664-R, LAKE 94-665-R, and LAKE 94-710; and Order Nos. 4261554 and 4261757 and Citation No. 4386047 in Docket Nos. LAKE 94-321-R, LAKE 94-449-R, LAKE 94-429-R, and LAKE 94-714; Citation Nos. 3843972, 3843975, 3843976, 4260022, 4260023, 3843979 and 3843980 in Docket Nos. LAKE 94-642-R, LAKE 94-660-R, LAKE 94-661-R, LAKE 94-662-R, LAKE 94-663-R, LAKE 94-666-R, LAKE 94-667 and LAKE 94-745; and Order No. 4262078 in Docket Nos. LAKE 94-492-R and LAKE 94-746 are **AFFIRMED**. Buck Creek Coal Inc., or its successor,[2] is **ORDERED TO PAY** civil penalties of **$38,723.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hoddon
Administrative Law Judge

---

[2] According to a July 19, 1996, news release, issued by the United States Attorney for the Southern District of Indiana, the company is now known as Indiana Coal Company.

Distribution:

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

Mr. Chuck Shultise, President, Buck Creek Coal Co., Inc., RR5, Box 203, Sullivan, IN 47882 (Certified Mail)

Mr. Randall Hammond, Superintendent, Buck Creek Coal Co., Inc., 2156 S. County Rd., 50 West St., Sullivan, IN 47882 (Certified Mail)

Terry G. Farmer, Esq., Bamberger, Foreman, Oswald, & Hahn, 708 Hulman Bldg., P.O. Box 657, Evansville, IN 47704 (Certified Mail)

/lt

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 23 1996

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| BUCK CREEK COAL, INC., Contestant | : | CONTEST PROCEEDINGS |
| v. | : | Docket No. LAKE 94-554-R |
| | : | Citation No. 4261760; 6/27/94 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Docket No. LAKE 94-530-R |
| | : | Citation No. 3859805; 6/22/94 |
| | : | Docket No. LAKE 94-575-R |
| | : | Citation No. 3037098; 7/5/94 |
| | : | Docket No. LAKE 94-584-R |
| | : | Citation No. 4050835; 7/7/94 |
| | : | Docket No. LAKE 94-681-R |
| | : | Citation No. 4260423; 8/17/94 |
| | : | Docket No. LAKE 94-682-R |
| | : | Citation No. 4260424; 8/18/94 |
| | : | Docket No. LAKE 94-683-R |
| | : | Citation No. 4260425; 8/22/94 |
| | : | Docket No. LAKE 94-684-R |
| | : | Citation No. 4260426; 8/22/94 |
| | : | Docket No. LAKE 94-685-R |
| | : | Citation No. 4260427; 8/25/94 |
| | : | Docket No. LAKE 94-687-R |
| | : | Citation No. 3844462; 8/18/94 |
| | : | Docket No. LAKE 94-688-R |
| | : | Citation No. 4258569; 8/23/94 |
| | : | Docket No. LAKE 94-689-R |
| | : | Citation No. 4258570; 8/24/94 |

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| | : | Docket No. LAKE 94-690-R |
| | : | Citation No. 4261934; 8/23/94 |
| | : | |
| | : | Docket No. LAKE 94-691-R |
| | : | Citation No. 4261935; 8/24/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 95-24 |
| Petitioner | : | A.C. No. 12-02033-03648 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |
| | : | |
| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. LAKE 94-412-R |
| | : | Citation No. 4262374; 5/28/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 94-413-R |
| ADMINISTRATION (MSHA), | : | Citation No. 4262375; 5/28/94 |
| Respondent | : | |
| | : | Docket No. LAKE 94-560-R |
| | : | Citation No. 4259847; 6/30/94 |
| | : | |
| | : | Docket No. LAKE 94-561-R |
| | : | Citation No. 4259848; 6/30/94 |
| | : | |
| | : | Docket No. LAKE 94-373-R |
| | : | Citation No. 4262277; 5/29/94 |
| | : | |
| | : | Docket No. LAKE 94-374-R |
| | : | Citation No. 4262278; 5/29/94 |
| | : | |
| | : | Docket No. LAKE 94-375-R |
| | : | Citation No. 4262279; 5/29/94 |
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| | : | Docket No. LAKE 94-727-R |
| | : | Citation No. 4260432; 9/12/94 |
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| | : | Docket No. LAKE 94-728-R |
| | : | Citation No. 4268171; 9/13/94 |
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| | : | Docket No. LAKE 94-729-R |
| | : | Citation No. 4268172; 9/13/94 |
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| | : | Docket No. LAKE 94-730-R |
| | : | Citation No. 4268173; 9/13/94 |

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| | : | Docket No. LAKE 94-731-R |
| | : | Citation No. 4268174; 9/13/94 |
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| | : | Docket No. LAKE 94-732-R |
| | : | Citation No. 4268175; 9/13/94 |
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| | : | Docket No. LAKE 94-733-R |
| | : | Citation No. 4268176; 9/14/94 |
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| | : | Docket No. LAKE 94-734-R |
| | : | Citation No. 4268177; 9/14/94 |
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| | : | Docket No. LAKE 94-735-R |
| | : | Citation No. 4268178; 9/14/94 |
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| | : | Docket No. LAKE 94-736-R |
| | : | Citation No. 4268179; 9/14/94 |
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| | : | Docket No. LAKE 94-738-R |
| | : | Citation No. 4057021; 9/14/94 |
| | : | |
| | : | Docket No. LAKE 94-739-R |
| | : | Citation No. 4057022; 9/14/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 95-49 |
| Petitioner | : | A.C. No. 12-02033-03651 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |
| | : | |
| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. LAKE 94-737-R |
| | : | Citation No. 4268180; 9/14/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 94-740-R |
| ADMINISTRATION (MSHA), | : | Citation No. 4057023; 9/15/94 |
| Respondent | : | |
| | : | Docket No. LAKE 94-741-R |
| | : | Citation No. 4057024; 9/15/94 |
| | : | |
| | : | Docket No. LAKE 94-742-R |
| | : | Citation No. 4057025; 9/15/94 |
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| | : | Docket No. LAKE 94-743-R |
| | : | Citation No. 4057026; 9/15/94 |
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| | : | Docket No. LAKE 94-744-R |
| | : | Citation No. 4057027; 9/15/94 |
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| | : | Docket No. LAKE 95-1-R |
| | : | Citation No. 4260037; 9/16/94 |
| | : | |
| | : | Docket No. LAKE 95-2-R |
| | : | Citation No. 4262135; 9/19/94 |
| | : | |
| | : | Docket No. LAKE 95-3-R |
| | : | Citation No. 4262136; 9/19/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 95-50 |
| Petitioner | : | A.C. No. 12-02033-03652 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |
| | : | |
| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. LAKE 94-516-R |
| | : | Citation No. 3862717; 6/19/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 94-520-R |
| ADMINISTRATION (MSHA), | : | Citation No. 3862718; 6/20/94 |
| Respondent | : | |
| | : | Docket No. LAKE 94-686-R |
| | : | Citation No. 4260428; 8/25/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 95-51 |
| Petitioner | : | A.C. No. 12-02033-03649 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |

**DEFAULT DECISION**

Before: Judge Hodgdon

These cases are before me on Notices of Contest filed by Buck Creek Coal, Inc., Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek pursuant to

section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 45 violations of the Secretary's mandatory health and safety standards and seek penalties of $94,426.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $94,226.00.

These cases are several in a long line of proceedings involving Buck Creek.[1] At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**"

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

---

[1] Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for filings in any of the cases. However, this decision identifies, in the caption, the specific docket numbers of the cases involved.

On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

## ORDER

Based on the above, I find the Respondent, Buck Creek Coal, Inc., **IN DEFAULT** in these cases. Accordingly, Order No. 4261760, and Citation Nos. 3859805, 3037098, 4050835, 4260423, 4260424, 4260425, 4260426, 4260427, 3844462, 4258569, 4258570, 4261934 and 4261935 in Docket Nos. LAKE 94-554-R, LAKE 94-530-R, LAKE 94-575-R, LAKE 94-584-R, LAKE 94-681-R, LAKE 94-682-R, LAKE 94-683-R, LAKE 94-684-R, LAKE 94-685-R, LAKE 94-687-R, LAKE 94-688-R, LAKE 94-689-R, LAKE 94-690-R, LAKE 94-691-R and LAKE 95-24; and Order Nos. 4262374, 4262375, 4259847 and 4259848 and Citation Nos.

4262277, 4262278, 4262279, 4260432, 4268171, 4268172, 4268173, 4268174, 4268175, 4268176, 4268177, 4268178, 4268179, 4057021 and 4057022 in Docket Nos. LAKE 94-412-R, LAKE 94-413-R, LAKE 94-560-R, LAKE 94-561-R, LAKE 94-373-R, LAKE 94-374-R, LAKE 94-375-R, LAKE 94-727-R, LAKE 94-728-R, LAKE 94-729-R, LAKE 94-730-R, LAKE 94-731-R, LAKE 94-732-R, LAKE 94-733-R, LAKE 94-734-R, LAKE 94-735-R, LAKE 94-736-R, LAKE 94-738-R, LAKE 94-739-R and LAKE 95-49; Citation Nos. 4268180, 4057023, 4057024, 4057025, 4057026, 4057027, 4260037, 4262135 and 4262136 in Docket Nos. LAKE 94-737-R, LAKE 94-740-R, LAKE 94-741-R, LAKE 94-742-R, LAKE 94-743-R, LAKE 94-744-R, LAKE 95-1-R, LAKE 95-2-R, LAKE 95-3-R and LAKE 95-50; and Order Nos. 3862717 and 3862718 and Citation No. 4260428 in Docket Nos. LAKE 94-516-R, LAKE 94-520-R, LAKE 94-686-R and LAKE 95-51 are **AFFIRMED**. Buck Creek Coal Inc., or its successor,[2] is **ORDERED TO PAY** civil penalties of **$94,426.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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

Mr. Chuck Shultise, President, Buck Creek Coal Co., Inc., RR5, Box 203, Sullivan, IN 47882 (Certified Mail)

Mr. Randall Hammond, Superintendent, Buck Creek Coal Co., Inc., 2156 S. County Rd., 50 West St., Sullivan, IN 47882 (Certified Mail)

Terry G. Farmer, Esq., Bamberger, Foreman, Oswald, & Hahn, 708 Hulman Bldg., P.O. Box 657, Evansville, IN 47704 (Certified Mail)

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[2] According to a July 19, 1996, news release, issued by the United States Attorney for the Southern District of Indiana, the company is now known as Indiana Coal Company.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

DEC 23 1996

| | | |
|---|---|---|
| WILLIAM F. METZ, Complainant | : | DISCRIMINATION PROCEEDING |
| | : | Docket No. PENN 95-479-DM |
| | : | NE MD 95-06 |
| v. | : | |
| | : | Millard Lime & Stone |
| WIMPEY MINERALS, Respondent | : | Mine ID 36-00017 |

**ORDER OF DISMISSAL**

Before: Judge Melick

The parties in the captioned case have reached agreement regarding damages and request a final order relating thereto. Under the circumstances Respondent is directed to pay total damages, including interest in the amount of $58,158 within 15 days of the date of this order. This case is therefore dismissed.

Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

Thomas P. Harlan, Esq., Henry & Beaver, 937 Willow Street, P.O. Box 1140, Lebanon, PA 17042-1140 (Certified Mail)

Michael T. Heenan, Esq., Smith, Heenan & Althen, 1110 Vermont Ave., N.W., Washington, D.C. 20005 (Certified Mail)

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 2 6 1996

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|---|---|---|
| BUCK CREEK COAL, INC., Contestant | : | CONTEST PROCEEDINGS |
| v. | : | Docket No. LAKE 94-643-R |
| | : | Citation No. 3843973; 8/3/94 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Docket No. LAKE 94-673-R |
| | : | Citation No. 4260421; 8/15/94 |
| | : | Docket No. LAKE 94-674-R |
| | : | Citation No. 4060422; 8/15/94 |
| | : | Docket No. LAKE 94-697-R |
| | : | Citation No. 4260429; 8/30/94 |
| | : | Docket No. LAKE 94-698-R |
| | : | Citation No. 4260430; 9/1/94 |
| | : | Docket No. LAKE 94-701-R |
| | : | Citation No. 4386054; 9/1/94 |
| | : | Docket No. LAKE 94-719-R |
| | : | Citation No. 4262495; 9/6/94 |
| | : | Docket No. LAKE 94-720-R |
| | : | Citation No. 4261939; 9/7/94 |
| | : | Docket No. LAKE 94-721-R |
| | : | Citation No. 4261940; 9/7/94 |
| | : | Docket No. LAKE 94-722-R |
| | : | Citation No. 4262496; 9/8/94 |
| | : | Docket No. LAKE 94-723-R |
| | : | Citation No. 4262497; 9/9/94 |
| | : | Docket No. LAKE 94-724-R |
| | : | Citation No. 4262498; 9/9/94 |

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|---|---|---|
| | : | Docket No. LAKE 94-725-R |
| | : | Citation No. 3844463; 9/10/94 |
| | : | |
| | : | Docket No. LAKE 94-726-R |
| | : | Citation No. 4260431; 9/12/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 95-52 |
| Petitioner | : | A.C. No. 12-02033-03650 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |
| | : | |
| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. LAKE 95-4-R |
| | : | Citation No. 4262138; 9/20/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 95-6-R |
| ADMINISTRATION (MSHA), | : | Citation No. 4262140; 9/21/94 |
| Respondent | : | |
| | : | Docket No. LAKE 95-7-R |
| | : | Citation No. 4260181; 9/21/94 |
| | : | |
| | : | Docket No. LAKE 95-8-R |
| | : | Citation No. 4260050; 9/21/94 |
| | : | |
| | : | Docket No. LAKE 95-9-R |
| | : | Citation No. 4260051; 9/21/94 |
| | : | |
| | : | Docket No. LAKE 95-10-R |
| | : | Citation No. 4260052; 9/21/94 |
| | : | |
| | : | Docket No. LAKE 95-11-R |
| | : | Citation No. 4260053; 9/21/94 |
| | : | |
| | : | Docket No. LAKE 95-13-R |
| | : | Citation No. 4262541; 9/22/94 |
| | : | |
| | : | Docket No. LAKE 95-14-R |
| | : | Citation No. 4262542; 9/22/94 |
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| | : | Docket No. LAKE 95-20-R |
| | : | Citation No. 4258524; 9/27/94 |
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| | : | Docket No. LAKE 95-21-R |
| | : | Citation No. 4258526; 9/27/94 |

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| | : | Docket No. LAKE 94-718-R |
| | : | Citation No. 4386058; 9/6/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 95-74 |
| Petitioner | : | A.C. No. 12-02033-03653 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |
| | : | |
| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. LAKE 94-524-R |
| | : | Citation No. 4259235; 6/20/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 95-18-R |
| ADMINISTRATION (MSHA), | : | Citation No. 4262561; 9/26/94 |
| Respondent | : | |
| | : | Docket No. LAKE 95-19-R |
| | : | Citation No. 4262562; 9/264 |
| | : | |
| | : | Docket No. LAKE 95-22-R |
| | : | Citation No. 4056823; 9/29/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 95-87 |
| Petitioner | : | A.C. No. 12-02033-03654 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |
| | : | |
| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDING |
| Contestant | : | |
| v. | : | Docket No. LAKE 94-640-R |
| | : | Citation No. 3843970; 8/2/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | |
| Respondent | : | |
| | : | |

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. LAKE 95-94<br>A.C. No. 12-02033-036545 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., Respondent | : | |

**DEFAULT DECISION**

Before: Judge Hodgdon

These cases are before me on Notices of Contest filed by Buck Creek Coal, Inc., Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 32 violations of the Secretary's mandatory health and safety standards and seek penalties of $22,252.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $22,252.00.

These cases are several in a long line of proceedings involving Buck Creek.[1] At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

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[1] Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for filings in any of the cases. However, this decision identifies, in the caption, the specific docket numbers of the cases involved.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**"

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the disccvery requests or the Secretary's motion for default demonstrate that that conclusion was correct.

Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

**ORDER**

Based on the above, I find the Respondent, Buck Creek Coal, Inc., **IN DEFAULT** in these cases. Accordingly, Citation Nos. 3843973, 4260421, 4260422, 4260429, 4260430, 4386054, 4262495, 4261939, 4261940, 4262496, 4262497, 4262498, 3844463, 4260431 and 426175 in Docket Nos. LAKE 94-643-R, LAKE 94-673-R, LAKE 94-674-R, LAKE 94-697-R, LAKE 94-698-R, LAKE 94-701-R, LAKE 94-719-R, LAKE 94-720-R, LAKE 94-721-R, LAKE 94-722-R, LAKE 94-723-R, LAKE 94-724-R, LAKE 94-725-R, LAKE 94-726-R and LAKE 95-52; Citation Nos. 4262138, 4262140, 4260181, 4260050, 4260051, 4260052, 4260053, 4262541, 4262542, 4258524, 4258526 and 4386058 in Docket Nos. LAKE 95-4-R, LAKE 95-6-R, LAKE 95-7-R, LAKE 95-8-R, LAKE 95-9-R, LAKE 95-10-R, LAKE 95-11-R, LAKE 95-13-R, LAKE 95-14-R, LAKE 95-20-R, LAKE 95-21-R, LAKE 94-718-R and LAKE 95-74; Order No. 4259235 and Citation Nos. 4262561, 4262562, and 4056823 in Docket Nos. LAKE 94-524-R, LAKE 95-18-R, LAKE 95-19-R, LAKE 95-22-R and LAKE 95-87; and Order No. 3843970 in Docket Nos. LAKE 94-640-R and LAKE 95-94 are **AFFIRMED**. Buck Creek Coal Inc., or its successor,[2] is **ORDERED TO PAY** civil penalties of **$22,252.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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

Mr. Chuck Shultise, President, Buck Creek Coal Co., Inc., RR5, Box 203, Sullivan, IN 47882 (Certified Mail)

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[2] According to a July 19, 1996, news release, issued by the United States Attorney for the Southern District of Indiana, the company is now known as Indiana Coal Company.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 27 1996

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| BUCK CREEK COAL, INC., Contestant | : | CONTEST PROCEEDINGS |
| v. | : | Docket No. LAKE 95-27-R |
| | : | Citation No. 4260201; 10/3/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 95-28-R |
| ADMINISTRATION (MSHA), | : | Citation No. 4260202; 10/3/94 |
| Respondent | : | |
| | : | Docket No. LAKE 95-29-R |
| | : | Citation No. 4260203; 10/3/94 |
| | : | |
| | : | Docket No. LAKE 95-30-R |
| | : | Citation No. 4260204; 10/3/94 |
| | : | |
| | : | Docket No. LAKE 95-31-R |
| | : | Citation No. 4262563; 10/4/94 |
| | : | |
| | : | Docket No. LAKE 95-32-R |
| | : | Citation No. 4362564; 10/4/94 |
| | : | |
| | : | Docket No. LAKE 95-35-R |
| | : | Citation No. 4262567; 10/6/94 |
| | : | |
| | : | Docket No. LAKE 95-57-R |
| | : | Citation No. 4260194; 10/17/94 |
| | : | |
| | : | Docket No. LAKE 95-67-R |
| | : | Citation No. 4260267; 10/11/94 |
| | : | |
| | : | Docket No. LAKE 95-68-R |
| | : | Citation No. 4260268; 10/11/94 |
| | : | |
| | : | Docket No. LAKE 95-69-R |
| | : | Citation No. 4260269; 10/11/94 |
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| | : | Docket No. LAKE 95-70-R |
| | : | Citation No. 4262569; 10/11/94 |
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| | : | Docket No. LAKE 95-71-R |
| | : | Citation No. 4262570; 10/11/94 |
| | : | |
| | : | Docket No. LAKE 95-73-R |
| | : | Citation No. 4262572; 10/12/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 95-111 |
| Petitioner | : | A.C. No. 12-02033-03656 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |
| | : | |
| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDING |
| Contestant | : | |
| v. | : | Docket No. LAKE 95-58-R |
| | : | Citation No. 4260195; 10/18/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | |
| Respondent | : | |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 95-112 |
| Petitioner | : | A.C. No. 12-02033-03657 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |
| | : | |
| BUCK CREEK COAL, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| v. | : | Docket No. LAKE 95-12-R |
| | : | Citation No. 4260054; 9/21/94 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. LAKE 95-59-R |
| ADMINISTRATION (MSHA), | : | Citation No. 3844474; 10/18/94 |
| Respondent | : | |
| | : | Docket No. LAKE 95-60-R |
| | : | Citation No. 3844475; 10/20/94 |
| | : | |
| | : | Docket No. LAKE 95-61-R |
| | : | Citation No. 3844476; 10/20/94 |
| | : | |
| | : | Docket No. LAKE 95-75-R |
| | : | Citation No. 3844480; 10/11/94 |
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| | : | Docket No. LAKE 95-76-R |
| | : | Citation No. 4260212; 10/25/94 |
| | : | |
| | : | Docket No. LAKE 95-77-R |
| | : | Citation No. 4260214; 10/25/94 |
| | : | |
| | : | Docket No. LAKE 95-85-R |
| | : | Citation No. 4260197; 10/31/94 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 95-154 |
| Petitioner | : | A.C. No. 12-02033-03658 |
| v. | : | |
| | : | Buck Creek Mine |
| BUCK CREEK COAL, INC., | : | |
| Respondent | : | |
| | : | |

**DEFAULT DECISION**

Before: Judge Hodgdon

These cases are before me on Notices of Contest filed by Buck Creek Coal, Inc., Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 27 violations of the Secretary's mandatory health and safety standards and seek penalties of $8,474.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $8,474.00.

These cases are several in a long line of proceedings involving Buck Creek.[1] At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

[1] Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for filings in any of the cases. However, this decision identifies, in the caption, the specific docket numbers of the cases involved.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**"

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate . . . ." Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

## ORDER

Based on the above, I find the Respondent, Buck Creek Coal, Inc., **IN DEFAULT** in these cases. Accordingly, Citation Nos. 4260201, 4260202, 4260203, 4260204, 4262563, 4262564, 4262567, 4260194, 4260267, 4260268, 4260269, 4262569, 4262570, 4262572 and 4260192 in Docket Nos. LAKE 95-27-R, LAKE 95-28-R, LAKE 95-29-R, LAKE 95-30-R, LAKE 95-31-R, LAKE 95-32-R, LAKE 95-35-R, LAKE 95-57-R, LAKE 95-67-R, LAKE 95-68-R, LAKE 95-69-R, LAKE 95-70-R, LAKE 95-71-R, LAKE 95-73-R and LAKE 95-111; Citation No. 4260195 in Docket Nos. LAKE 95-58-R and LAKE 95-112; and Citation Nos. 4260054, 3844474, 3844475, 3844476, 3844480, 4260212, 4260214, 4260197, 3844477, 3844478, and 3844479 in Docket Nos. LAKE 95-12-R, LAKE 95-59-R, LAKE 95-60-R, LAKE 95-61-R, LAKE 95-75-R, LAKE 95-76-R, LAKE 95-77-R, LAKE 95-85-R and LAKE 95-154 are **AFFIRMED**. Buck Creek Coal Inc., or its successor,[2] is **ORDERED TO PAY** civil penalties of **$8,474.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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[2] According to a July 19, 1996, news release, issued by the United States Attorney for the Southern District of Indiana, the company is now known as Indiana Coal Company.

# ADMINISTRATIVE LAW JUDGE ORDERS

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

December 2, 1996

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 95-434-M |
| Petitioner | : | A.C. No. 26-00500-05542 |
| | : | |
| v. | : | Docket No. WEST 95-467-M |
| | : | A.C. No. 26-00500-05543 |
| NEWMONT GOLD COMPANY, | : | |
| Respondent | : | South Area - Gold Quarry |

**ORDER DENYING RESPONDENT'S MOTION TO EXCLUDE "UNLAWFULLY SEIZED" EVIDENCE**

Newmont Gold Company ("Newmont") filed a motion, pursuant to the Fourth Amendment to the United States Constitution, to exclude "all evidence derived from the unlawful search of Newmont's offices, and seizure of Newmont's property, by the Secretary's informants." Newmont argues that I should exclude "all evidence, including tangible physical evidence such as memorandums, records, reports, or correspondence, intangible evidence such as computer disks, printouts, or tape recordings, and testimonial evidence derived from such unlawful searches and seizures." The Secretary opposes Newmont's motion. Based on my review of Newmont's motion and memorandum in support of the motion, and the arguments presented in our conference call of November 27, 1996, I find that Newmont's motion should be denied.

In the memorandum, Newmont states that it has reason to believe that certain evidence was stolen by one or more of its employees, perhaps with the knowledge and encouragement of agents for the Secretary of Labor, and that the Secretary intends to use such stolen evidence against Newmont in these cases. It contends that because these employee-informants acted as an instrument or agent of the Secretary, the unlawful entry and removal of documents constitutes an unreasonable search and seizure that violates the Fourth Amendment. Newmont maintains that "the Commission should exclude from this case and all other Commission proceedings all of the unlawfully seized evidence, as well as all 'fruits' of the illegal search." (Memorandum at 1). The Secretary states that his attorneys did not participate in or acquiesce in the theft of documents from Newmont. He maintains that there is no basis to exclude the subject documents from the evidence in this case.

In general, the Fourth Amendment's exclusionary rule is not used in civil proceedings. "In the complex and turbulent history of the [exclusionary] rule, the Court has never applied it to exclude evidence from a civil proceeding, federal or state." *United States v. Janis*, 428 U.S. 433, 447 (1976) (footnote omitted). In some types of "quasi-criminal" proceedings, courts have applied the rule to exclude evidence obtained in violation of the Fourth Amendment. *See United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051, 1068-69 (9th Cir. 1994)(civil forfeiture proceeding). In that case, the court held that forfeiture is "a harsh and oppressive procedure which is not favored by the courts." *Id.* at 1069 (citation omitted). Some courts apply the exclusionary rule to suits involving assessments for unpaid taxes on money illegally seized by the government. *See Pizzarello v. United States*, 408 F.2d 579 (2nd Cir. 1969). Contrary to the assertion of Newmont, the exclusionary rule does not apply in deportation proceedings. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (reversing Ninth Circuit decision cited by Newmont).

There is no direct proof that documents were illegally taken from Newmont. Newmont states that the documents in question, which the Secretary sent to Newmont's attorney during discovery, are company records and that no employee was given permission to copy or remove these documents from the company's files. It states that the mine's managers have never seen some of the documents and believe that they were taken from Newmont files without permission at some time in the past. There is no allegation that MSHA employees took the documents. The Secretary states that his employees did not ask anyone to take Newmont documents and did not consent to the theft of documents.

I accept Newmont's representation that the documents in question are company records and that it did not give its employees permission to copy them or remove them from the mine. Apparently, these documents were sent to the local MSHA office or given to local MSHA officials by someone who had access to them. The issue is whether the Secretary should be prohibited from introducing them as exhibits at the hearing. For purposes of this motion, I will assume that the documents were taken from the South Area Gold Mine without the express permission of mine management.

In considering whether the exclusionary rule applies to a noncriminal case, the Supreme Court balances the competing interests. The primary purpose, if not the only purpose, of the exclusionary rule is "to deter future unlawful police conduct." *Janis* at 446 (citation omitted). The rule does not exclude evidence because it is untrustworthy, but rather excludes it to deter future unlawful action by the government. "[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United*

*States v. Calandra*, 414 U.S. 338, 348 (1974). The disadvantage of the rule is the "loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs." *Lopez-Mendoza* at 1041. As a consequence, the exclusionary rule is "restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra* at 348.

I find that the deterrent value of applying the exclusionary rule to these civil penalty proceedings is not sufficiently high to warrant the exclusion of the documents at issue. There is no showing, nor could there be a showing, that MSHA officials conducted an unlawful search or seizure. MSHA officials did not conduct a warrantless search of Newmont's records and did not personally remove documents from the mine without management's permission. Excluding the subject documents in these cases is unlikely to deter unlawful MSHA conduct in the future.

Newmont alleges that one or more of its employees or former employees took or copied the documents. If that fact is true and the individuals did not have permission to take or copy the documents, Newmont may be able to bring an action against them or have criminal charges filed. Such remedies are generally not available when the police or other government officials conduct an unlawful search and seizure. Criminal charges and civil suits are the most effective remedy against future thefts at the mine.

I find that the exclusion of the documents would not act as an effective deterrent to thefts of documents in future cases. Miners at other mines who feel that their employer is responsible for creating an unsafe working environment will not be deterred from taking what they believe are incriminating documents from their employer simply because the documents might be excluded from a Mine Act civil penalty proceeding. Likewise, MSHA officials who receive documents from a miner that tend to show that a mine operator created unsafe conditions at a mine are not likely to refuse to review the documents out of a concern that they might not be admissible in a civil penalty proceeding. Exclusion from these proceedings of evidence that was taken from Newmont by one or more unknown individuals does not have "a sufficient likelihood of deterring the conduct of [other miners and MSHA officials] so that it outweighs the societal costs imposed by the exclusion." *Janus* at 454. As stated in *Calandra*, the exclusionary rule is not a "personal constitutional right of the party aggrieved," but is simply a deterrent. 414 U.S. at 348.

It is also important to remember that warrantless inspections of mines do not violate the Fourth Amendment. *Donovan v. Dewey*, 452 U.S. 594 (1981). The Sixth Circuit held that while it was improper for MSHA to have removed statutorily required records from a mine without the consent of the mine operator or an administrative warrant, such records should not be suppressed

through the exclusionary rule in light of the "statutory regulation which applies to the ... mining industry." *United States v. Blue Diamond Coal Co.*, 667 F.2d 510, 520 (1981); *See also Peabody Coal Co.*, 6 FMSHRC 183 (February 1984).

In the present cases, the disputed documents do not appear to be the type of records that are required to be kept by the Mine Act or made available to MSHA inspectors. Accordingly, the Secretary may have been required to obtain a search warrant to seize them during his initial investigation of the conditions at the mine. Nevertheless, to the extent that the documents are relevant to these proceedings, the Secretary could have obtained them through discovery once these proceedings were filed. 29 C.F.R. § 2700.56 & 2700.58. (Documents that are not relevant will be excluded from the record in these proceedings in any event. 29 C.F.R. § 2700.63(a)). I believe that the remedial objectives of the exclusionary rule are not "efficaciously served" if the Secretary could have required Newmont to produce the disputed documents during discovery. Given the protective purposes of the Mine Act and the minimal deterrent effect of suppressing the documents, I find that, in balancing the competing interests, the exclusionary rule should not be applied.

Newmont relies heavily on *Knoll Associates v. Federal Trade Commission*, 397 F.2d 530 (7th Cir. 1968) and other similar cases. In that case, the court ordered the FTC to exclude from the record documents stolen by a company employee and sent to an FTC attorney on the basis that the use of these documents in an administrative proceeding violated the company's Fourth Amendment protections. I believe that the holding in *Knoll* is not pertinent to the present proceedings for two reasons. First, the court did not balance the competing interests as required by the Supreme Court's subsequent decision in *Janis*. The Seventh Circuit stated that since the exclusionary rule is applied to criminal prosecutions under the Clayton Act, it should also "apply *a fortiori*" to civil proceedings under that act as well. *Knoll* at 534. Second, as recognized by the Sixth Circuit in *Blue Diamond*, a mine operator's expectation of privacy is not as great as that generally afforded other industries due to the Mine Act's statutory requirements and the provision for warrantless inspections. I believe that a mine operator's rights in a civil penalty proceeding brought under the Mine Act are not as great as such operator's rights under the Act's criminal provisions.

In *Lopez-Mendoza*, the Supreme Court stated that its "conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread." 468 U.S. at 1050. If MSHA officials, on a regular basis, actively encourage miners to steal documents from their employers, the application of the exclusionary rule may need to be reevaluated. I believe that it would be inappropriate for the Secretary to establish a practice

of asking miners to take documents from a mine as a means of furthering his investigation of potential violations or as a means of conducting discovery. I have no reason to believe that the Secretary has adopted such a practice.

For the reasons set forth above, Newmont's motion to exclude "unlawfully seized" evidence is **DENIED.**

Richard W. Manning
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

December 5, 1996

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. WEST 95-434-M<br>A.C. No. 26-00500-05542 |
| v. | : | Docket No. WEST 95-467-M<br>A.C. No. 26-00500-05543 |
| NEWMONT GOLD COMPANY, Respondent | : | South Area - Gold Quarry |

**ORDER DENYING RESPONDENT'S MOTION TO RECONSIDER**
**ORDER DENYING MOTION TO EXCLUDE "UNLAWFULLY SEIZED" EVIDENCE**

Newmont Gold Company ("Newmont") filed a motion, pursuant to the Fourth Amendment to the United States Constitution, to exclude "all evidence derived from the unlawful search of Newmont's offices, and seizure of Newmont's property, by the Secretary's informants." By order dated December 2, 1996, I denied Newmont's motion. Newmont has now filed a motion asking that I reconsider my conclusion that the Fourth Amendment's exclusionary rule should not apply to these cases.

My December 2nd order sets forth the facts and my reasons for denying Newmont's motion to apply the exclusionary rule, which I hereby incorporate by reference. In its motion for reconsideration, Newmont argues that the Supreme Court's decision in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) supports its position that the exclusionary rule should apply in these cases. It asserts that the Secretary's attorney, Ms. Colby, had actual knowledge that the documents were stolen from Newmont. Newmont argues that I should exclude from the record the documents that the Secretary knew were stolen because the fruits of that theft should not be used to bolster the government's case.

As I stated in my previous order, courts do no lightly apply the exclusionary rule in civil proceedings. In most cases, the cases involve quasi-criminal matters, such as forfeiture proceedings. Moreover, the exclusionary rule is not a "personal constitutional right of the party aggrieved," but is rather a remedy designed to deter future unlawful government conduct. *United States v. Calandra*, 414 U.S. 338, 348 (1974). There is no evidence that the Secretary has engaged in a pattern or practice of encouraging miners to steal documents from mining companies.

The fact that company documents are sometimes given to a government attorney by an individual who had access to them does not establish such a pattern. Indeed, it does not establish that such documents were stolen or that the government engaged in unlawful conduct.

Newmont relies on the fact that Mr. Chajet advised Ms. Colby that the documents were stolen and asked that they be returned. If I assume that the documents in question were stolen from Newmont, there is still no indication that the Secretary asked or otherwise encouraged the individuals to take the documents. The exclusionary rule is designed to deter unlawful government action not theft by employees or others individuals.

Inquiry into this issue by Newmont's attorneys at the hearing will not produce relevant evidence and therefore will not be permitted. Even if I assume that the documents were stolen, the Secretary could have obtained them, in any event, during the discovery process. 29 C.F.R. § 2700.56(b). Documents that are obtained through discovery and are relevant to the issues are admissible. 29 C.F.R. § 2700.63(a).

For the reasons set forth above, Newmont's motion for reconsideration is **DENIED**.

Richard W. Manning
Administrative Law Judge

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. WEST 95-434-M<br>A.C. No. 26-00500-05542 |
| v. | : | Docket No. WEST 95-467-M<br>A.C. No. 26-00500-05543 |
| NEWMONT GOLD COMPANY, Respondent | : | South Area - Gold Quarry |

**ORDER DENYING RESPONDENT'S SECOND MOTION FOR SUMMARY DECISION**

Newmont Gold Company ("Newmont") filed a second motion for summary decision and motion for declaratory relief in these cases. The Secretary of Labor opposes the motion. Under the Commission's procedural rules, summary decision shall be granted only if the entire record shows that: (1) there is no genuine issue of material fact; and (2) the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b). For the reasons set forth below, I deny Newmont's motion.

## I. THE CITATIONS AND ORDERS

On March 13 and 14, 1995, MSHA Inspector Michael Drussel issued two citations and two unwarrantable failure orders at Newmont's South Area Gold Quarry near Carlin, Nevada. The citations and orders allege violations of 30 C.F.R. §§ 56.20011 and 56.20014.

### A. Alleged Violations of Section 56.20014

Section 56.20014 provides:

> No person shall be allowed to consume or store food or beverages in a toilet room or in any area exposed to a toxic material.

Citation No. 4140245, issued under section 104(d)(1) of the Mine Act, alleges that:

> The office in the AARL building contained mercury vapor as measured with a Jerome mercury vapor analyzer. The average

reading was 23.3 $\mu g/m^3$. The company routinely takes 6 Jerome readings a day in this office as part of their mercury monitoring program. These readings show mercury has been present in this office. Visible mercury was found on the desk top on Feb. 28, 1995. The AARL operator was required to use this office for eating lunch. No person shall be allowed to consume food or beverages in any area exposed to a toxic material.

Order No. 4140246, issued under section 104(d)(1) of the Mine Act, alleges that:

> The lunchroom for the ZADRA employees contained mercury vapors as measured with a Jerome mercury vapor analyzer. The average reading was 22.2 $\mu g/m^3$. The company routinely takes 6 Jerome readings a day in this lunchroom as part of their mercury monitoring program. These readings showed mercury vapors have been present in this lunchroom. The ZADRA employees were required to use this lunchroom for eating their lunch. No person shall be allowed to consume food or beverages in any area exposed to a toxic material.

The issue is whether eating areas were exposed to a toxic material, as that term is used in the standard.

B. Alleged Violations of Section 56.20011

Section 56.20011 provides:

> Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and any protective action required.

Citation No. 4140248, issued under section 104(a) of the Mine Act, alleges that:

> The old screen removed from the ZADRA was placed near the containment area at the AARL Building, visible mercury was on the screen. No warning signs were posted warning of the hazard.

Order No. 4140247, issued under section 104(d)(1) of the Mine Act, alleges that:

> The old scrubber removed from the AARL was cleaned then tested for mercury contamination. This scrubber was stored at the boneyard. Mercury contamination test results received in Nov. 1994 showed mercury contamination. The scrubber was not removed from the boneyard or marked of the hazard. When the scrubber was inspected to show visible mercury, Jerome reading showed mercury vapors present.

The issue is whether a "health or safety hazard" existed at the boneyard and containment area so that barricades or signs were required to warn miners of the nature of the hazard.

## II. SUMMARY OF THE PARTIES' ARGUMENTS

### A. Newmont Gold Company

Newmont argues that the Secretary's evidence establishes that the Secretary improperly adopted new standards that were enforced against Newmont in these cases in violation of the Mine Act and the Administrative Procedure Act ("APA"). In particular, Newmont contends that the citation and order alleging violations of section 56.20014 (the ".20014 citations") are invalid because they are founded on MSHA's new policy of citing an operator whenever any mercury is detected, which Newmont calls a "zero tolerance policy." It maintains that this zero tolerance policy represents a major shift in MSHA practice and that this new policy was adopted without proper notice and comment, or compliance with the APA or the Mine Act. Newmont asserts that prior to the implementation of this new policy, MSHA cited operations for violations of this standard only when an inspector detected airborne mercury levels above the applicable Threshold Limit Value ("TLV") incorporated by reference in 30 C.F.R. § 56.5001.

Newmont further argues that even assuming that the zero tolerance policy was legally promulgated, the Secretary's evidence demonstrates that a reasonable mine operator would not have been put on notice that the level of mercury detected by MSHA in the eating areas posed a toxic hazard or health hazard to miners. Accordingly it contends that these citations cannot be upheld without violating due process principles and Commission precedent.

Newmont also argues that the citation and order alleging violations of section 56.20011 (the ".20011 citations") are invalid because they were based upon an improper MSHA inter-

pretation that the potential of a possible hazard is sufficient to establish a violation. Newmont maintains that MSHA must prove that an actual hazard exists to establish a violation.

B. Secretary of Labor

The Secretary maintains that summary decision is not appropriate because material facts are in dispute. The Secretary states that he will put on evidence to establish that Newmont was on notice that it was required to maintain lunch areas free of mercury exposure. The Secretary also states that Newmont's own records establish that liquid mercury was present in eating areas and that mercury vapor above the TLV was also frequently present.

In addition, the Secretary contends that Newmont failed to establish that it is entitled summary decision as a matter of law. He disputes Newmont's contention that additional rulemaking proceeding are required to enforce the cited standards. The Secretary maintains that his "application of elemental mercury as a toxic material irrespective of a specific risk level" is an interpretation of a pre-existing term and is therefore a valid interpretive rule that does not require further rulemaking. He states that elemental mercury is a universally recognized "toxic material." The Secretary maintains that his interpretation of that term is entitled to deference.

The Secretary also denies that his interpretation of the standards is inconsistent with his prior policies. He argues that the fact that some local MSHA inspectors were not familiar with or were not enforcing MSHA's mercury policies does not establish a past inconsistent practice. The Secretary contends that reasonably prudent mine operators were on notice that food could not be stored or consumed in areas exposed to mercury. Finally, with respect to the .20011 citations, the Secretary states that the violations are supported by the fact that liquid mercury was observed by the inspector at the cited locations. He argues that the conditions created a hazard.

## III. DISCUSSION AND ANALYSIS

A. Background Information

Inspector Drussel took readings with a Jerome Monitor. A Jerome Monitor is a hand-held device that can be used to obtain instantaneous readings of mercury vapor. The inspector obtained average readings for mercury vapor of 23.3 $\mu g/m^3$ in the AARL area and 22.2 $\mu g/m^3$ in the ZADRA area. The AARL and ZADRA areas are part of the carbon handling area where carbon is processed and regenerated when gold is removed from the carbon. It is not disputed that these readings are well below the TLV for mercury.

In its first motion for summary decision, Newmont argued that, as a matter of law, sections 56.20014 and 56.20011 are not violated unless the Secretary establishes that the TLV for mercury was exceeded under section 56.5001. I denied Newmont's motion by order dated May 31, 1996, and I hereby incorporate my analysis from that order by reference. *Newmont Gold Company*, 18 FMSHRC 832.

B. MSHA's Action Level for Mercury

Newmont argues that the citations are invalid because Inspector Drussel merely detected the "presence" of mercury. It argues that the Secretary failed to establish and cannot establish that the amount of mercury vapor detected by the inspector actually posed a toxic threat or hazard to miners. Newmont points to the deposition testimony of Inspector Drussel that he issued the citations because mercury was present in eating areas and that he would have issued the citation if he detected at least .005 mg/$m^3$ on a Jerome Monitor.[1] (Drussel Dep. at 323, 450-51; *see also* Alvarez Dep. at 153-55).

Newmont also refers to the deposition testimony of Margie Zalesak, Chief of MSHA's Metal/Nonmetal Health Division. She testified that MSHA does not consider whether a hazard is created when it determines if an area where food is stored or consumed is "exposed to a toxic material," but only considers whether mercury was present in the area. (Zalesak Dep. 260, 270; *see also* Alvarez Dep. at 212-15).

The Secretary believes that section 56.20014 requires that all mercury be removed from areas where food or beverages are consumed. The Secretary contends that the plain language of the standard requires operators to furnish miners with a place to eat and drink that is reasonably free of toxic materials. He states that mercury is universally recognized as a toxic material and that it is undisputed that mercury was present where miners consumed food and beverages. He relies, in part, on a report prepared by Ms. Zalesak that concludes that, based on the properties of mercury and the activities that occur in eating

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[1] A reading of .005 milligrams per cubic meter (.005 mg/$m^3$) is equivalent to 5 micrograms per cubic meter (5 $\mu g/m^3$). The 5 $\mu g/m^3$ level apparently represents the lowest amount of mercury that can be accurately detected by a Jerome Monitor. That figure is the detection limit of the monitor, 3 $\mu g/m^3$, plus a 2 $\mu g/m^3$ error factor assigned by MSHA. Newmont characterizes the 5 $\mu g/m^3$ threshold as a "zero tolerance policy" because MSHA will issue a citation if it can detect the presence of mercury.

areas, "elemental mercury should not remain in rooms where miners eat food, drink beverages, and store food and beverages." (Sec. Response, Attachment N, ¶ 2). In short, the Secretary takes the position that any measurable level of mercury is a toxic material when it is detected in an eating area and that section 56.20014 prohibits the consumption of food in any area exposed to a toxic material.

In considering a motion for summary decision, I cannot summarily try the facts. Instead, I must apply the law to the facts that have been established by the record at this point in the litigation. With this concept in mind and considering the uncontested facts, I conclude that Newmont has not established that it was unreasonable for the Secretary to determine that mercury should not be permitted in eating areas at any measurable level and that, if mercury is detected in an eating area, such eating area has been "exposed to a toxic material." I am not holding that the Secretary has established violations because there are factual disputes as to whether the conditions in the cited areas violated the safety standard. In addition, I limit my holding to the undisputed facts presented in the present record.

C. Requirement for Rulemaking

Newmont states that the Secretary's interpretation of the standard is a radical departure from past MSHA practice. It refers to the deposition testimony of local MSHA officials that, until they were advised of MSHA's new policy, they would not have issued a citation for a violation of section 56.20014 unless the TLV was exceeded. Newmont contends that MSHA changed its policy without notice to mine operators. It argues that MSHA cannot make such an abrupt policy change without following the protections of the APA and the Mine Act.

Newmont states that the Secretary proposed a new rule in 1989 to change its air quality regulations that would have adopted the precise rule that MSHA is trying to enforce against Newmont in this case. The Secretary has not completed this rulemaking. Newmont maintains that this rulemaking demonstrates that MSHA is attempting to change its current regulation in these cases without following the dictates of the APA. Newmont states that a rulemaking proceeding is the proper forum for resolving the scientific issues at issue in these proceedings.

The Secretary did not publish a rule or issue a program policy letter explaining that MSHA would cite operators whenever it detected the presence of mercury in an eating area. The Secretary asserts that its enforcement policy with respect to mercury does not represent a change from past practice. He points to the fact that Newmont was unable to cite a single prior written policy that is inconsistent with its current interpre-

tation of the standards. The Secretary states that it will establish that it has, on at least one occasion, cited an operator for violating the "lunchroom" standard where the level of mercury was below the TLV.

I find that it is not entirely clear whether the Secretary changed his enforcement policies, whether he began seriously enforcing the cited standards with respect to mercury in the last five years, or whether his enforcement has been uneven. There has not been a long history of enforcement with respect to mercury under section 56.20014. It is beyond dispute that a mine operator violates section 56.5001 if the TLV for mercury is exceeded in an eating area. As I stated in my order of May 31, that standard sets forth different requirements than the cited standard. Thus, the fact that local MSHA inspectors did not issue citations unless the level of mercury exceeded the TLV does not establish that MSHA changed its policies. Citations may not have been issued because these inspectors and their immediate supervisors had not applied section 56.20014 to mercury at Newmont's mine, but had relied solely on section 56.5001. It appears that there has been previous consistent enforcement of section 56.20014 for mercury as evidenced by the Alcoa and Coeur Rochester citations. Accordingly, I find that there exists a significant issue of material fact to be resolved.

In addition, Newmont is not entitled to summary decision as a matter of law on this issue. It is not clear that the Secretary was required to follow the notice and comment requirements of 5 U.S.C. § 553 prior to issuing the citations and orders in these cases. The Secretary argues that its interpretation of the phrase "an area exposed to a toxic material" is an interpretative rule not a legislative rule that requires notice and comment. The distinction between those agency pronouncements subject to APA rulemaking and those that are exempt is "enshrouded in considerable smog." *American Mining Congress v. MSHA*, 995 F.2d 1106, 1108 (D.C. Cir 1993)(citation omitted). The Secretary's action level for mercury as applied in these cases may well be interpretative rather than legislative. Given that the line between legislative and interpretative rules is "fuzzy" and factual issues need to be resolved, I am unable to rule on this issue at the present time. *Id.*

D. The Secretary's OSHA Standard

Newmont next maintains that even if MSHA's five microgram standard is not a substantive rule, the policy must be rejected because this new interpretation is inconsistent with Department of Labor precedent. The Department of Labor's Occupational Safety and Health Administration ("OSHA") has a similar prohibition concerning the storage of food and beverages in an area exposed to a toxic material. 29 C.F.R. § 1910.141(g)(4). OSHA defines "toxic material" as a material in a concentration that

exceeds the applicable limit established by OSHA or, in the absence of such a limit, "which is of such toxicity as to constitute a recognized hazard that is causing or likely to cause death of serious physical harm." 29 C.F.R. § 1910.141(a)(2)(viii). Newmont contends that the MSHA and OSHA standards should be construed consistently since they use the same language and have the same purpose. Thus, Newmont believes that an area is exposed to a toxic material only if the material is present in a quantity that exceeds the TLV or the Secretary establishes that the concentration is causing or is likely to cause death or serious injury. Newmont contends that the record makes clear that the Secretary will not be able to meet his burden of proof on this issue.

The Secretary contends that MSHA did not incorporate the OSHA definition of toxic material when it promulgated the lunchroom standard. He states that OSHA's definition existed at the time section 56.20014 was promulgated. He argues that, although MSHA had the option to incorporate that definition, it chose not to do so. Accordingly, the Secretary maintains that OSHA cases are of little value in interpreting the standard.

I hold that Newmont is not entitled to summary decision as a matter of law on this issue. The OSHA definition is not legally binding on MSHA. I agree with Newmont, however, that the OSHA definition is relevant to the issues in this proceeding. First, its raises deference issues. If the Secretary interprets the same regulation in his OSHA standards in a manner that is inconsistent with his interpretation here, how much deference is owed to the Secretary's interpretation? Second, the OSHA definition may have some relevance with respect to negligence issues.

E. Notice Issues

Newmont also maintains that a reasonably prudent person familiar with the mining industry would not have recognized that the cited safety standard applies to mercury in amounts less than the TLV. Newmont points to the deposition testimony of MSHA witnesses that mercury vapor levels in work areas below the TLV would not present a hazard to employees. (Koenning Dep. at 66-67; Trabant Dep. at 59-60, 73, 81-82; Alvarez Dep. at 212; Hansen Dep. at 34-35). Newmont argues that if the Secretary's own experts do not consider mercury to be a hazard unless it is present in a concentration that exceeds the TLV, a reasonably prudent person could not be expected to interpret the cited standards to prohibit mercury in concentrations below the TLV. In the alternative, Newmont asks that I strike the inspector's negligence determinations in all of the citations and orders, and a find that all violations were the result of Newmont's low negligence.

The Secretary maintains that the deposition testimony upon which Newmont relies does not support its arguments because the questions were generalized and abstractly worded. In addition, he argues that such statements are not binding on MSHA and do not constitute undisputed material fact. It contends that a motion for summary decision is an inappropriate vehicle to determine whether the Secretary's enforcement actions meet the reasonably prudent person test. He states that he will establish at the hearing that mine operators were given notice that food could not be consumed in areas exposed to mercury and he attached exhibits to his response to Newmont's motion that discuss the hazards associated with mercury in eating areas. With respect to the negligence issue, the Secretary contends that Newmont was on notice for five years that the cited areas contained mercury and it took insufficient steps to correct the problem.

The Commission has held that a safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess as its meaning and differ as to its application." *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982)(citation omitted). The Commission determined that adequate notice of the requirements of a broadly worded standard is provided if 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. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990); *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991). In order to establish a violation of a broadly worded standard, the Secretary must show that a reasonably prudent person would have recognized that a specific requirement of the standard applied to the cited condition. *Lanham*, 13 FMSHRC at 1343, 13 FMSHRC 1710, 1712 (October 1991)(ALJ)(on remand).

These principles may be applicable to the present cases. The application of the reasonably prudent person test to a particular situation is necessarily factually dependent. I find that there are genuine issues of fact with respect to notice questions. The issue as to whether MSHA changed its policies with respect to mercury is necessarily interrelated with the notice issue. In addition, the Secretary has presented some evidence that a reasonably prudent person would have recognized the specific requirement of the standard with respect to eating in areas exposed to even small amounts of mercury. Likewise, factual disputes remain as to the level of negligence that should be attributed to any violations.

F. Alleged Violations of §56.20011

With respect to the .20011 citations, Newmont contends that the Secretary failed to establish a necessary predicate to a violation: that a health or safety hazard existed. Newmont relies, in part, on the testimony of Inspector Drussel that he

issued the citations because there was "a likelihood that a hazard could be present." (Drussel Dep. at 199-200). Ms. Zalesak testified that a hazard need not be present to issue a valid citation under section 56.20011. (Zalesak Dep. at 271). She inferred that a citation is proper if the substance "could present a hazard to some individuals." *Id.* Newmont argues that the Secretary must establish that an actual recognizable hazard exists to establish a violation of section 56.20011. Because the citation was issued for a potential hazard that might exist in the future, Newmont states that the .20011 citations must be vacated.

The Secretary states that liquid mercury was found on the cited equipment and that the hazard created thereby was not immediately obvious to persons who may be in the area. The Secretary contends that visible mercury creates a health hazard. He argues that it is not necessary for MSHA to establish that the cited condition is likely to cause death or serious injury in order to show that a health hazard was present that required posting.

I find that there are factual issues remaining with respect to whether the cited mercury in the boneyard and containment area created a health hazard that was not immediately obvious. At what level and in what form does mercury create a health hazard that would require a warning sign under the standard? Newmont's deposition evidence does not present sufficient uncontested facts to decide this issue. The record does not contain sufficient information for me to apply the language of the standard to the allegations in the citations.

## IV. ORDER

For the reasons set forth above, Newmont's second motion for summary decision is **DENIED**.

Richard W. Manning
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 24, 1996

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. LAKE 96-6-M |
| | : | A.C. No. 47-02846-05509 |
| v. | : | |
| | : | Mine Unit No. 4 |
| YAHARA MATERIALS INC., Respondent | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. LAKE 97-4-M |
| | : | A.C. No. 47-02846-05510 A |
| v. | : | |
| | : | Mine Unit No. 4 |
| JAMES B. HOPPMAN, Respondent | : | |

## ORDER DISAPPROVING SETTLEMENT AGREEMENT

These cases are before me on Petitions for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary, by counsel, has filed a motion to approve a settlement agreement. Reductions in penalty from $2,500.00 to $1,250.00, for the operator, and from $600.00 to $250.00, for Hoppman, are proposed.

The citation alleges a violation of section 56.11001 of the Regulations, 30 C.F.R. § 56.11001, because:

> The foreman was observed on the red Portec stacker conveyor gaining access to the head pulley so he could grease the bearings. The conveyor was not equipped with a walkway or handrails on both sides of the belt. A tagline was not available to tie a safety belt or line. The company has not provided a safe access for persons greasing the head pulley. A fall of about 12' existed to the limestone floor. The foreman traveled the belt for a distance of about 50'. The conveyor belt was about 30" wide. A fatality could occur from a 12' fall. The wind was gusting at the time the violation occurred.

The citation, issued under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), was found to result from the operator's "unwarrantable failure" to comply with the regulation. The petition against the foreman under section 110(c) of the Act, 30 U.S.C. § 820(c), requires a finding that the foreman "knowingly" violated the regulation.

As justification for the settlement, the agreement provides that:

> A reduction from the original assessment is warranted based on a review of the complete history of the mine, the fact that there is no legal issue involved in this citation/order, the size of the operator, and the fact that the Respondent YAHARA MATERIALS INC. accepts the underlying citation/order (number 4310784). MSHA reduces the penalty for the underlying citation/order from the original assessment of $2500 to $1250 based upon the operator's good faith in abating the cited condition immediately and its strong commitment to enforcing compliance more strenuously in the future. Further, the operator furnished the Secretary with information regarding its policies and practices related to safety procedures around conveyors at Unit No. 4.
>
> . . . .
>
> Respondent JAMES R. HOPPMAN, employed by Yahara Materials Inc. accepts the citation/order issued against him under §110(c). MSHA reduces the penalty for the underlying citation/order from the original assessment to $600 to $250 based on the reasons stated above.

The Mine Act was passed with the intention that the Commission "assure that the public interest is adequately protected before approval of any reduction in penalties." S. Rep. No. 95-181, 95th Cong., 1st Sess. 45 (1977), *reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977*, at 633 (1978). In this connection, it is the judge's independent responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set out in Section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481 (April 1996).

For this reason, Commission Rule 31(b)(3), 29 C.F.R. § 2700.31(b)(3), requires that a motion to approve a settlement include "[f]acts in support of the penalty agreed to by the parties" so that the judge can verify that the reduced penalty is appropriate. No such facts are provided with this agreement.

A "complete history of the mine" was not furnished with the agreement. Nor was there any explanation of what precisely in the history justifies the reduction in penalty. It is unclear what "no legal issue involved" in the citation means, nor why this should redound to the benefit of the Respondents. Nothing is offered concerning how the size of the operator supports a further reduction in penalty. Finally, no reason is given for why the Respondents' "acceptance" of the citation is a justification for reducing the penalty.

Furthermore, the Respondents' history of violations, the company's size and it's abatement efforts were presumably considered, as required by section 100.3 of the Regulations, 30 C.F.R. § 100.3, when the penalty was originally assessed. Therefore, absent extraordinary circumstances, which should be thoroughly detailed in a settlement agreement, these factors provide no basis for an additional reduction in penalty. Likewise, a commitment to comply with the law in the future is expected of everyone. Reinforcing that commitment is one of the anticipated results of a citation. It is not a reason for reducing a penalty.[1]

The petitions in these cases allege that the foreman acted knowingly and that the company's failure to adhere to the regulation resulted from an unwarrantable failure. More than the normal case, sufficient justification must be provided before penalties can be reduced. Moreover, the deficiencies present in these cases have previously resulted in settlement agreements being disapproved. *Fox River Stone Company*, 18 FMSHRC 1312 (July 1996); *Peabody Coal Company*, 18 FMSHRC 1309 (July 1996); *Coal Miners Incorporated*, 18 FMSHRC 827 (May 1996).

The Secretary has failed to include *any* facts to support the penalty agreed on in either of these cases. Consequently, having considered the representations and documentation submitted, I am unable to approve the proffered settlement.

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[1] Providing "the Secretary with information regarding its policies and practices related to safety procedures around conveyors at Unit No. 4" is not a reason for reducing a penalty. This is so obvious it does not require further discussion.

**ORDER**

Accordingly, it is **ORDERED** that the motion for approval of settlement is **DENIED**. The parties have **15 days** from the date of this order to submit additional information to support the motion for settlement. Failure to submit additional information, or to resubmit a new agreement, within the time provided will result in the cases being scheduled for hearing.

T. Todd Hodgdon
Administrative Law Judge
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