

DECEMBER 1997

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

Secretary of Labor, MSHA v. Windsor Coal Company, Docket No. WEVA 97-95.
(Judge Koutras, October 27, 1997)

Secretary of Labor, MSHA v. Newmont Gold Company, Docket Nos. WEST 95-434-M,
WEST 95-467-M. (Judge Manning, October 28, 1997)

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

Secretary of Labor, MSHA v. Bob Bak Construction, Docket No. CENT 97-61-M.
(Judge Weisberger, November 3, 1997)

Stillwater Mining Company v. Secretary of Labor, MSHA, Docket No.
WEST 96-281-RM. (Judge Manning, November 18, 1997)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 16, 1997

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. CENT 96-124-M
	:	CENT 96-158-M
WILLIAMS NATURAL GAS COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley and Verheggen, Commissioners¹

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether Williams Natural Gas Company ("WNG"), an operator of an interstate natural gas pipeline system with facilities located on mine property, is an "operator" within the meaning of section 3(d) of the Mine Act, 30 U.S.C. § 802(d),² and whether the Department of Transportation ("DOT") has preempted the jurisdiction of the Department of Labor's Mine Safety and Health Administration ("MSHA") over natural gas pipeline facilities located on mine premises. Administrative Law Judge Jerold Feldman concluded that WNG is an operator under the Mine Act and that the DOT

¹ Commissioner Beatty assumed office after this case had been considered and decided. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Beatty has elected not to participate in this matter.

² Section 3(d) of the Mine Act provides:

"operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine[.]

30 U.S.C. § 802(d).

regulations do not preempt MSHA jurisdiction. 19 FMSHRC 287 (February 1997) (ALJ). WNG filed a petition for discretionary review, which the Commission granted. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

WNG operates an interstate pipeline for transmission of natural gas and owns pipeline facilities and meter buildings, also referred to as sheds, located on the property of the Independence Quarry and Mill and the Monarch Cement Company, both located in Kansas. 19 FMSHRC at 287, 291; S. Cross Mot. for Summ. Dec., Ex. B, Timmons Aff. at 1-2 ("Timmons Aff."). The Independence Quarry and Mill and Monarch Cement Company are mines subject to MSHA jurisdiction.³ 19 FMSHRC at 288. WNG transports natural gas purchased by the mines, which it considers to be its customers. *Id.* at 287. WNG exclusively controls the pipelines and buildings, which are kept locked and to which only WNG has access. *Id.* at 288; Timmons Aff. ¶4. WNG performs all maintenance activities at the sheds, the areas surrounding the sheds, and on the pipelines. Timmons Aff. ¶6. A pipeline carrying hazardous waste operated by a third party is located about 20 feet above the sheds at the Independence Quarry and Mill. Jt. Stip. ¶9; Timmons Aff. ¶7. WNG employees visit the meter buildings weekly and "must be ready to access its pipeline facilities at any time to respond to emergencies." WNG. Mot. for Summ. Dec. at 5 n.2, 10. The gas WNG transports to the mines arrives under high pressure. Timmons Aff. ¶9. At the WNG meter buildings, the gas is monitored and transformed into quantities and pressures that are useful in the production process. *Id.* The mines use the natural gas transported by WNG to start large kilns that are necessary to produce cement. *Id.* at ¶8.

On January 23, 1996, MSHA Inspector James W. Timmons visited the Independence Quarry and Mill and issued Citation No. 4363655 to WNG alleging a violation of 30 C.F.R. § 56.4101⁴ for failing to post signs prohibiting smoking or open flames at its meter buildings located on mine property.⁵ Jt. Stip. 6. The citation charged that "[t]here was dryed [sic]

³ The judge rendered his decision based on cross motions for summary decision. 19 FMSHRC at 287. Stipulations of fact were received in Docket No. CENT 96-124-M, relating to the Independence Quarry and Mill. However, as the judge noted, the facts of the captioned dockets are similar, and the parties therefore agreed that "in the absence of specific factual distinctions raised by either party, the arguments made in CENT 96-124-M shall also apply to CENT 96-158-M [relating to the Monarch Cement Company]." *Id.*

⁴ Section 56.4101 provides:

Readily visible signs prohibiting smoking and open flames
shall be posted where a fire or explosion hazard exists.

30 C.F.R. § 56.4101.

⁵ The citation alleges the existence of four WNG buildings, but the parties later stipulated that the violation relates to two natural gas pipeline meter buildings. Jt. Stip. 6.

vegetation and other combustables [sic] in and around the buildings” and that “[t]he meter houses were approximately 10 feet from a walkway and a roadway.” S. Pet. for Assessment of Civil Penalty, July 15, 1996, Ex. A. The citation as originally issued alleged that the violation was not significant and substantial (“S&S”).⁶ MSHA later proposed a civil penalty of \$69. *Id.*

On April 8, 1996, Inspector Timmons visited the Monarch Cement plant and issued Citation No. 4357036 to WNG alleging a similar violation of section 56.4101. Timmons Aff. ¶10. The citation charged that “[t]here was a person observed smoking in the area at the time of inspection” and that “employee cars and trucks [are] parked . . . approximately [five feet] from [the pipeline].” S. Pet. for Assessment of Civil Penalty, Sept. 12, 1996, Ex. A. The Secretary proposed a penalty of \$50 for this violation. *Id.*

In its answers, WNG admitted the absence of warning signs at all four buildings at both mines. WNG Ans., Aug. 12, 1996, at 2; WNG Ans., Sept. 30, 1996, at 2. WNG disputed that a fire or explosion hazard existed. *Id.*

The judge framed the dispositive issue as “whether WNG’s provision of natural gas through its meter buildings and pipeline facilities located on mine property constitutes the requisite ‘performance of services’ at a mine by an independent contractor[,]” thereby subjecting the contractor to MSHA jurisdiction under section 3(d) of the Mine Act.⁷ 19 FMSHRC at 289. The judge stated that the federal courts of appeals are split as to the correct interpretation of the independent contractor-operator language contained in section 3(d). 19 FMSHRC at 289. He contrasted the ostensibly narrow interpretive approach taken by the Fourth Circuit in *Old Dominion Power Co. v. Secretary of Labor*, 772 F.2d 92 (1985), with the broad, plain language approach of the courts of appeals in *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285 (D.C. Cir. 1990), *aff’g* 11 FMSHRC 1896 (October 1989) (“*Otis I*”) and 11 FMSHRC 1918 (October 1989) (“*Otis II*”), and *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991 (10th Cir. 1996), *aff’g* 17 FMSHRC 1303 (August 1995), *cert. denied*, ___ U.S. ___, 137 L.Ed.2d 818, 117 S.Ct. 1691 (1997). *Id.* at 289-91. Noting that “the mine sites in these proceedings are located . . . within the appellate jurisdiction of the Tenth Circuit[,]” the judge viewed *Joy Technologies*, rather than *Old Dominion*, as “the controlling case law[.]” *Id.* at 291. Based on

⁶ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

⁷ The judge erroneously found that “[t]he likelihood of explosion is not in issue because the violations in question have been designated as nonsignificant and substantial.” 19 FMSHRC at 288 n.1. In fact, MSHA modified Citation No. 4363655 on February 15, 1996, to allege an S&S violation based on results of a test indicating an explosive atmosphere in and around one of the WNG buildings. S. Pet. for Assessment of Civil Penalty, July 15, 1996, Ex. A. However, the Secretary has not appealed the non-S&S finding to the Commission; accordingly, we do not address the likelihood of explosion.

the stipulations that WNG “maintains meter buildings and pipeline facilities on mine property through which it provides natural gas energy to mine operators[,]” and WNG’s admission that it is an independent contractor, the judge concluded that, under *Joy Technologies*, WNG is an operator subject to Mine Act jurisdiction. *Id.* In addition, he rejected WNG’s argument that it did not provide “significant services” to the mines, characterizing WNG’s provision of natural gas for mining operations as “significant, if not indispensable, services that are fundamental to the extraction process.” *Id.* at 291-92.

The judge rejected WNG’s claim that DOT regulation of WNG’s interstate natural gas pipelines preempted MSHA jurisdiction over WNG. 19 FMSHRC at 292. He assessed civil penalties of \$119 for both violations. *Id.* at 293.

II.

Disposition

A. Whether WNG is an Operator

Relying on *Old Dominion*, WNG argues that it is not an operator under the Mine Act. PDR. at 2-4.⁸ WNG contends that the Secretary failed to satisfy the *Old Dominion* criteria. *Id.* at 2-3. WNG criticizes the judge’s reliance on the appellate court decisions in *Otis Elevator* and *Joy Technologies*. *Id.* at 3-4. In the alternative, WNG argues that, even under *Joy Technologies*, it does not provide significant services required for a finding of operator status. *Id.* at 4-5.

The Secretary responds that the judge correctly found WNG to be an operator under the courts of appeals’ *Otis/Joy* rationale. S. Br. at 8-9. The Secretary points out that the only two circuits to which an appeal from this case can be taken, the Tenth and D.C. circuits, have both held that section 3(d) includes within its ambit “any independent contractor performing services . . . at [a] mine.” *Id.* at 8, 9 n.6, citing *Joy*, 99 F.3d at 999-1000. She urges the Commission to adopt the *Otis/Joy* framework. *Id.* at 8-9. The Secretary also contends that the judge properly rejected WNG’s argument that it does not perform “significant services” at the mines. *Id.* at 10-12. In the alternative, the Secretary argues that WNG satisfies the requirements for operator status under the tests used by both the Commission and the Fourth Circuit. *Id.* at 13-17.

Section 3(d) of the Mine Act expanded the definition of “operator” contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977), to include “any independent contractor performing services or construction at such mine.” We conclude that WNG falls within the broad scope of the term “operator” under the analysis

⁸ Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. § 2700.75(a), WNG designated its petition for discretionary review as its brief.

adopted by the courts of appeals for the D.C. and Tenth Circuits, which have appellate jurisdiction in this matter.⁹

In its opinion affirming in result the Commission's decision in the *Otis Elevator Co.* cases, the D.C. Circuit based its analysis on a strict reading of section 3(d). Referencing that section's definition of "operator" as "any independent contractor performing services or construction at [a] mine[.]" the court stated: "We think that . . . phrase . . . means just that — *any* independent contractor performing services at a mine." 921 F.2d at 1290 (footnote omitted); *see* 30 U.S.C. § 802(d). The court explicitly rejected the *Old Dominion* approach limiting section 3(d) to contractors involved in the extraction process who have a "continuing presence" at the mine. 921 F.2d at 1290. The court found these limitations contrary to the express terms of section 3(d), and was not persuaded by the legislative history relied upon by *Old Dominion*. 921 F.2d at 1290-91. For the same reasons, the D.C. Circuit also rejected what it termed "the Commission's diluted version of the *Old Dominion* criteria," i.e., the limitation that "section 3(d) extends to an independent contractor only if it provides a service sufficiently related to the extraction process and only if it maintains a presence in a mine that is neither rare nor infrequent." *Id.* at 1290. In its decision on appeal in *Joy*, the Tenth Circuit adopted the D.C. Circuit's approach and rejected both the *Old Dominion* framework and the Commission's *Otis* test. *Joy Technologies*, 99 F.3d at 999.¹⁰

Application of the approach of the Tenth and D.C. Circuits supports the judge's determination that WNG is an operator. WNG does not dispute that it is an independent contractor. *See* 19 FMSHRC at 291. WNG was clearly performing a service on mine property — assuring the delivery of natural gas to the mines and transforming the natural gas into quantities and pressures required to start large kilns necessary to produce cement at the mines. We therefore affirm the

⁹ *See* 30 U.S.C. § 816(a)(1).

¹⁰ As set forth in his concurring opinion in *Joy*, 17 FMSHRC at 1311, Commissioner Marks believes that the D.C. Circuit approach in *Otis*, that has been followed by the Tenth Circuit in *Joy*, is the most reasoned approach to interpreting the term "operator" under section 3(d) of the Mine Act, and would adopt that approach in all cases before the Commission. Like those courts of appeals, Commissioner Marks rejects both the *Old Dominion* framework and the Commission's *Otis* test. Commissioner Marks also disagrees with the concern of Commissioners Riley and Verheggen (at n.11) that the Tenth and D.C. Circuit approach does not include a *de minimis* limitation on independent contractor liability. As discussed in his *Joy* opinion, 17 FMSHRC at 1311, the D.C. and Tenth Circuits expressly provide for and leave open the question of whether there may be a point at which an independent contractor's "contact with a mine is so infrequent or *de minimis* that it would be difficult to conclude that services were being performed." *Otis*, 921 F.2d at 1290 n.3 (citation omitted); *see also Joy*, 99 F.3d at 1000.

judge's conclusion that WNG is an operator based on the rationale of the Tenth and D.C. circuits only insofar as this matter arises within the appellate jurisdiction of those circuits.¹¹

We reject WNG's argument that the Tenth Circuit decision in *Joy* is distinguishable because in that case the contractor was performing "significant services." First, the Tenth's Circuit's "operator" test does not require proof that "significant" services were performed. As the Secretary points out, S. Br. at 10 n.7, the Tenth Circuit discussed "significant services" only in the context of addressing Joy's contention that it was not an independent contractor, a status WNG does not dispute. The court made clear that it found Joy to be an operator because its representative "performed services at the mine." 99 F.3d at 1000. In any case, substantial evidence supports the judge's finding that WNG's services are "significant, if not indispensable," in that production of cement apparently cannot take place without them.

¹¹ Commissioners Riley and Verheggen are unwilling to accept the approach of the Tenth and D.C. circuits any further than their *Otis* and *Joy* decisions control the outcome of this particular case, arising as it does within the appellate jurisdiction of those circuits. They choose not to abandon the Commission's *Otis* cases, which set forth a two-pronged test for determining whether an independent contractor is an operator under section 3(d). First, the Commission examines the independent contractor's "proximity" to the mining process and whether its work is "sufficiently related" to that process. *Otis I*, 11 FMSHRC at 1902. Second, the Commission examines "the extent of [the contractor's] presence at the mine." *Id.* Commissioners Riley and Verheggen are particularly unwilling to abandon the holding in *Otis I* that "there may be a point . . . at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed." *Id.* at 1900-01 (quoting *National Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 701 (3d Cir. 1979)). Such a de minimis limitation on independent contractor liability is difficult to reconcile with the *Otis* and *Joy* decisions of the Tenth and D.C. circuits. See *Otis*, 921 F.2d at 1290 & n.3; *Joy*, 99 F.3d at 1000.

As to whether WNG's presence at the quarries was sufficient to satisfy the Commission's *Otis* test, Commissioners Riley and Verheggen agree with the judge's characterization of WNG's provision of natural gas to the quarries as a "significant, if not indispensable, service[] that [is] fundamental to the extraction process." See 19 FMSHRC at 291. They also find that, in light of the weekly visits by WNG employees to the meter buildings located on mine property, WNG's presence at the quarries was both frequent and highly significant. They thus conclude that WNG's presence at the quarries satisfies both prongs of the Commission's *Otis* test.

B. Preemption

We reject WNG's argument that MSHA regulations are preempted by DOT regulation of interstate natural gas pipelines. WNG provides no statutory or case law support for this proposition. *United Gas Pipeline Co. v. Terrebonne Parish Police Jury*, 319 F.Supp. 1138, 1140 (E.D. La. 1970), and *Tenneco Inc. v. Public Serv. Comm'n*, 489 F.2d 334, 336 (4th Cir. 1973), both cited by WNG, held that the Natural Gas Pipeline Safety Act of 1968 preempted *state* establishment and enforcement of safety standards related to interstate transmission of gas by pipeline. Neither case stands for the proposition that DOT regulations preempt regulations of other *federal* agencies that may affect interstate gas pipelines in some way. Moreover, the Mine Act contains no language akin to section 4(b)(1) of the Occupational Safety and Health ("OSH") Act, 29 U.S.C. § 653(b)(1), which expressly preempts regulations issued under the OSH Act where "other Federal agencies" have "exercise[d] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." And WNG has not cited language in the federal pipeline safety laws preempting regulations issued by other federal agencies. In this connection, we note that the specific preemption provision contained in the existing federal pipeline safety statute, 49 U.S.C. § 60104(c) (1994), preempts only state safety standards "for interstate pipeline facilities or interstate pipeline transportation." It does not preempt federal safety standards applicable to mines.¹²

¹² Also, as the Secretary points out (S. Br. at 21), DOT's regulations governing prevention of accidental ignition do not appear to conflict with MSHA's regulations. Title 49 C.F.R. § 192.751(c) requires the operator to "[p]ost warning signs, where appropriate," in order to "minimize the danger of accidental ignition of gas in any structure or area where the presence of gas constitutes a hazard of fire or explosion." See *Panhandle Eastern Pipe Line Co. v. Madison County Drainage Bd.*, 898 F. Supp. 1302, 1315 (S.D. Ind. 1995) (federal pipeline safety law did not preempt state statute authorizing relocation of pipeline where operator could comply with both state and federal requirements).

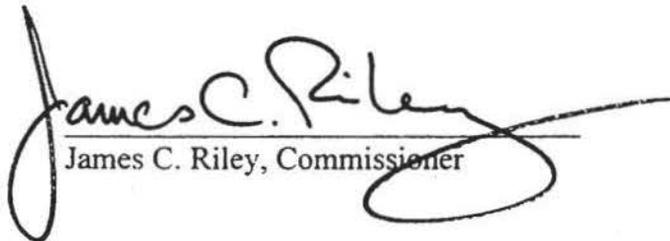
III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.


Mary Lu Jordan, Chairman


Marc Lincoln Marks, Commissioner


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

Distribution

Jerald S. Feingold, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd, Suite 400
Arlington, VA 22203

Stephen Schroeder, Esq.
Jay V. Allen, Esq.
The Williams Companies, Inc.
P.O. Box 2400
4100 One William Center
Tulsa, OK 74102

Administrative Law Judge Jerold Feldman
Federal Mine Safety and Health Review Commission
Office of the Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, VA 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 2 1997

MATTHEW J. MATICS, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEVA 97-144-D
: MSHA Case No. HOPE CD 97-07
COALFIELD SERVICES, INC., :
Respondent : Mine ID No. 46-08436
: Upper Big Branch South Mine

DECISION

Appearances: Matthew J. Matics, Handley, West Virginia, pro se;
E. Forrest Jones, Jr., Esq., Albertson & Jones, Charleston,
West Virginia, on behalf of Respondent.

Before: Judge Bulluck

This case concerns a discrimination proceeding filed pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (c)(3). Matthew J. Matics alleges that he was unlawfully laid off by Coalfield Services in October 1996, and seeks reinstatement to his job and backpay.

A hearing on the merits was convened on October 28, 1997, in Charleston, West Virginia. At the hearing, the parties entered into a settlement agreement whereby Coalfield Services agreed to pay to Matics the sum of \$4,000.00, and Matics agreed to withdraw his discrimination complaint. The settlement was accepted at hearing. That determination is hereby confirmed. Coalfield Services has provided documentation that, in accordance with the settlement agreement, it has paid Matics \$4,000.00.

ORDER

The settlement is appropriate and is in the public interest. **WHEREFORE**, the approval of settlement and withdrawal of discrimination complaint are **GRANTED**, and Coalfield Services having fully complied with the terms of the settlement, this proceedings is **DISMISSED**.


Jacqueline R. Bulluck
Administrative Law Judge

Distribution:

Mr. Matthew Matics, P.O. Box 74, Handley, WV 25102 (Certified Mail)

E. Forrest Jones, Jr., Esq., Albertson & Jones, Number 13, Kanawha Blvd., W., Suite 200,
P.O. Box 1989, Charleston, WV 25327 (Certified Mail)

Mr. Chris Aker, Superintendent, Coalfield Services, Inc., Rt. 2, P.O. Box 365, Wytheville, VA
24382 (Certified Mail)

\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 4 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner v.	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. CENT 97-60-M
	:	A. C. No. 41-03717-05511
	:	
ARROW CRUSHED STONE, INC., Respondent	:	Docket No. CENT 97-128-M
	:	A. C. No. 41-03717-05512
	:	
	:	Blum Quarry

DECISION

Appearances: Thomas A. Paige, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, and Ronald M. Mesa, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
John Whitehorn, Vice President, Arrow Crushed Stone, Inc., Cleburne, Texas, for the Respondent.

Before: Judge Feldman

These proceedings concern petitions for assessment of civil penalties filed by the Secretary of Labor against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). The petitions seek to impose a total civil penalty of \$651.00 for eight alleged violations of the mandatory safety standards in 30 C.F.R. Part 56 of the regulations. Six of the eight alleged violations were designated as non-significant and substantial (non-S&S) violations. These matters were heard on November 5, 1997, in Cleburne, Texas. John Whitehorn, Vice President of Arrow Crushed Stone, Inc., (ACS), appeared on behalf of the respondent corporation. The parties stipulated that ACS is a mine operator subject to the jurisdiction of the Act.

At the hearing, ACS withdrew its contest of the \$50.00 civil penalty proposed for Citation Nos. 785293 and 785294 in Docket No. CENT 97-128-M. Thus, six citations remained for disposition. At the hearing, the parties were advised that I would defer my ruling on these citations pending post-hearing briefs, or, issue a bench decision if the parties waived their rights to file post-hearing briefs. The parties waived the filing of briefs. (Tr. 52-53). Accordingly, this decision formalizes the bench decision issued with respect to each of the contested citations. The bench decision vacated one citation, affirmed three non-S&S citations, and modified two citations characterized as significant and substantial by deleting the S&S designation. The total

civil penalty assessed in these matters for the eight citations, including the two citations for which the contest was withdrawn, is \$380.00.

I. Pertinent Case Law and Penalty Criteria

The bench decision applied the Commission's standards with respect to what constitutes an S&S violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The bench decision also applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. Section 110(i) provides, in pertinent part, in assessing civil penalties:

the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

For penalty assessment purposes, the evidence reflects mitigating factors in that the respondent is a small to moderately sized operator that does not have a significant history of violations. (Gov. Ex. 1). The proposed civil penalties will not effect the respondent's ability to remain in business, and the respondent rapidly abated the cited violations.

II. Findings and Conclusions

ACS's Blum Quarry mine is a limestone facility located in Hill County, Texas, where limestone materials are extracted through the drilling and blasting process. The extracted is then loaded and hauled to the crusher and screening area where the material is cleaned, crushed and sized. There are approximately nine people employed at the Blum Quarry.

A. Docket No. Cent 97-60-M

1. Citation No. 4448274

Mine Safety and Health Administration (MSHA) Inspector Melvin H. Robertson conducted a regular inspection of the Blum Quarry on April 11, 1996. Robertson was accompanied by Whitehorn. Robertson proceeded to inspect the electrical installations located in the crusher area. He observed the crusher was powered by a generator. There was a main disconnect switch at the generator that could be used to de-energize the crusher. The generator supplied power to an electrical enclosure mounted on stands located approximately 15 feet from the screening plant. The enclosure consisted of a large box containing starter controls for motors in the crusher and screening areas and a separate, smaller disconnect box, mounted on the east end side of the starter control box. The disconnect box was an alternative to using the generator disconnect switch as a means of de-energizing the crusher and screen motors. The doors on the starter box and disconnect box were closed. There were unlocked padlocks hanging on the doors that could be used to lock out the boxes.

Robertson determined that the disconnect box contained fuses energizing 480 volt current. Although there were no exposed electrical conductors in the starter box, the fuses in the disconnect box were connected to exposed power conductors (wires) in that there was neither protective insulation nor a face plate installed. Robertson noted the disconnect box did not contain a switch that automatically de-energized the box when the disconnect box door was opened. Robertson was concerned that an employee could accidentally contact the exposed energized wires in the disconnect box when attempting to operate the starter controls, or when attempting to access the disconnect box.

As a result of his observations, Robertson issued Citation No. 4448274 citing an alleged violation of the mandatory safety standard contained in section 56.1240, 30 C.F.R. § 56.1240. This mandatory standard specifies that, "operating controls shall be installed so that they can be operated without danger of contact with energized conductors." Robertson opined that the violation was S&S because of the likelihood of serious or fatal injury in the event an individual came in contact with this 480 volt current.

The bench decision in Citation No 4448274 focused on the language and intent of the cited mandatory standard in section 56.1240. This mandatory standard primarily deals with the exposure of operating controls to energized conductors. Although Robertson was unable to

clearly recall the contents of the larger starter control box, Robertson did not dispute Whitehorn's testimony that this box contained shielded on-off switches and circuit breaker switches that were protected by a face plate. Each of the doors on the starter control box and disconnect box were closed. Given the separate location of the disconnect box on the side of the starter control box, it is unlikely that anyone opening the door of the starter box to access the operating controls would be exposed to the exposed conductors in the closed disconnect box. In fact, Robertson apparently conceded that there was little likelihood of injury in the context of section 56.1240 stating, "I should have used a different standard number and wrote (sic) him two citations (a separate citation for the fuse disconnect box)." (Tr. 47).

Although there was minimal likelihood of injury, the fact that the disconnect box was not padlocked, nor protected by an automatic shut-off switch engaged when the door was opened, provides a basis for concluding that contact with the exposed electrical conductors, while remote, could occur during the operation of the starter control switches. Accordingly, Citation No. 4448274 is affirmed. However, the citation is modified to delete the S&S designation. Given the reduced gravity of the cited condition, and, in consideration of the other penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), the \$147.00 civil penalty proposed by the Secretary shall be reduced to \$50.00. (Tr. 53-55).

2. Citation No. 4448277

After examining the electrical installations, Robertson inspected the quarry area of the mine. At the time of his inspection there was no quarry activity in progress. Robertson described the mine as a single-bench quarry where vertical holes are drilled, filled with explosives, and blasted to loosen the rock. The material is then loaded into haulage trucks by a front-end loader and transported to the crushing area for processing.

The vertical holes are drilled by a rotary drill. The rotary drill has a large mast with a drill stem that contains a rotary bit that drills into the earth. The drill is designed with three hydraulic jacks to stabilize the drill. There is a hydraulic jack located in the front and two hydraulic jacks in the rear on each side of the drill mast. The jacks are constructed with an upper cylinder that travels vertically up and down a lower ram. The ram on each hydraulic jack is designed to sit on a rectangular, flat jack plate that ordinarily provides maximum stability. The subject drill is depicted in a diagram admitted as Joint Exhibit 2.

Robertson observed the rotary drill parked on the bench. The drill was resting on the hydraulic jack rams with no rectangular jack plates at the feet of the jacks. Robertson opined that the lack of jack plates affected the drill's stability and created a tipping hazard that exposed the drill operator to injury. Whitehorn testified that the jack rams, that have narrow contoured bottoms, provided greater stability than the flat, rectangular jack pads, because the rams dig into the bench and are superior to jack plates given the unevenness of the quarry floor. As a result of his observations, Robertson issued Citation No. 4448277 citing a non-S&S violation of section

56.14100(b), 30 C.F.R. § 56.14100(b). This mandatory safety standard requires defects in equipment to be corrected in order to prevent personnel from exposure to hazards.

The bench decision in this citation noted mitigating circumstances, *i.e.*, uneven terrain that, in the operator's judgement, made the jack plates unnecessary. While I am sensitive to ACS's assertion that it was exercising its judgement in this instance, on balance, an operator's unilateral removal of safety equipment is done at the operator's risk and constitutes a violation of the cited mandatory standard. The secretary has proposed a \$50.00 civil penalty. Given the mitigating circumstances and low gravity of the cited condition, a civil penalty of \$30.00 shall be imposed. (Tr. 73-75).

In view of the above, the total proposed civil penalty in Docket No. CENT 97-60-M is reduced from \$197.00 to \$80.00.

B. Docket No. CENT 97-128-M

1. Citation No. 4453270

Robertson, accompanied by Whitehorn, once again inspected the Blum Quarry facility on September 24, 1996. Robertson observed a water tank mounted on a Ford F-600 flatbed truck. The truck was parked in the maintenance yard in the general vicinity of the shop building. The truck is used for dust control of the roadway haulage areas. The truck was not tagged out of service. Upon inspecting the truck, Robertson determined the manually operated horn had been removed. He also concluded the parking brake was broken in that it could not be engaged.

With respect to the horn, Robertson issued Citation No. 4453270 citing a violation of the mandatory standard in section 56.14132(a) that requires manually operated horns on mobile equipment. Robertson concluded the cited condition was non-S&S.

Whitehorn does not dispute that the horn was inoperable. He stated the truck was recently purchased and was not in service. Whitehorn, however, admitted the truck was not tagged out of service. Robertson testified that, during the inspection, Whitehorn did not contend the truck was not in service.

Although Whitehorn maintains the truck was not in service, it was not tagged out of service. Moreover, Whitehorn failed to inform Robertson that the truck was not operational during Robertson's inspection. Although Whitehorn now argues the truck was not being used, exculpatory statements initially made at trial, and not communicated to the inspector during the inspection, are afforded little evidentiary weight. Consequently, the bench decision in this matter affirmed Citation No. 4453270 as well as the \$50.00 civil penalty proposed by the Secretary. (Tr. 94-95).

2. Citation No. 4453271

As noted above, Robertson also determined the water truck's parking brake could not be engaged. Whitehorn does not allege the parking brake was operational. As a consequence, Robertson issued Citation No. 4453271 citing a non-S&S violation of section 56.14101(a)(2), 30 C.F.R. § 14101(a)(2). This mandatory standard requires parking brakes capable of holding mobile equipment with its typical load on the maximum grade it travels. Robertson characterized the condition as non-S&S because the vehicle typically operated on level ground, and, because the vehicle could be steered into a bank or berm in the event the parking brake was applied and failed.

The bench decision noted the importance of a parking brake, commonly referred to as an "emergency brake." As an emergency brake, a parking brake on a multi-ton vehicle is the method of last resort if the service brake fails. Defective parking brakes have been contributing factors in fatal accidents. *See, e.g., Fluor Daniel, Incorporated* 16 FMSHRC 2049 (October 1994) (ALJ), *rev'd on other grounds*, 18 FMSHRC 1143 (July 1996). While I do not agree with the non-S&S characterization of this condition, an administrative law judge cannot charge an operator with an S&S violation if the charge has not been brought by the Secretary. Accordingly, Citation No. 4453271 is affirmed as a non-S&S citation.

With respect to the appropriate penalty to be imposed, the Mine Act requires this Commission to make independent penalty determinations based upon the statutory penalty criteria in section 110(i) of the Act, despite the civil penalty proposed by the Secretary. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 291-92 (March 1983), *aff'd*, 763 F.2d 1147 (7th Cir. 1984). The Secretary has proposed a \$50.00 civil penalty. Taking into consideration the serious gravity of the defective parking brake condition, a civil penalty of \$75.00 shall be imposed for Citation No. 4453271. Although I have exercised restraint in this negligible increase in penalty, the gravity of an inoperable emergency brake must not be understated. (Tr. 95-98).

3. Citation No. 7852921

MSHA Inspector Michael A. Davis inspected the Blum Quarry facility on February 19, 1997. Davis was accompanied by Darrell Hacker, ACS's loader operator. Davis began his inspection in the shop area where he observed a Terex 7221B front-end loader that was undergoing engine repair. Davis inspected the seatbelt inside of the loader's cab. Davis testified the seatbelt was designed to attach to the floor on each side of the operator's seat by means of a plate and I-bolt. The seatbelt portions attached to the floor were then attached to the pedestal base of the seat through a clevis where these ends were met by, and attached to, a lapbelt. (See Gov. Ex. 6B, pg. 1 of 2). Davis surmised this method of seatbelt installation provided the optimum operator protection.

Davis observed the seatbelts were not attached to the seat as originally designed by the manufacturer. Rather, Davis noted that the seatbelts had been bolted down to the metal frame of the console floor in the cab's compartment and they were not tethered to the seat. (See Gov. Ex. 7). Davis testified that this front-end loader normally traveled at speeds between 10 and 15 miles per hour.

Whitehorn testified that he had purchased the front-end loader with the seatbelts in the condition seen by Davis. Whitehorn maintained the seatbelts were securely bolted to the metal frame of the floor. He also stated the seatbelts had been installed in this way for several years and had never been previously cited by MSHA.

As a result of his observations, Davis issued Citation No. 7852921 citing a non-S&S violation of section 56.14130(i), 30 C.F.R. § 56.14130(I). This mandatory standard provides, "Seat belts shall be *maintained in functional condition*, and replaced when necessary to assure proper performance." (Emphasis added). Davis characterized the cited condition as non-S&S because he believed it was unlikely that a disabling injury would occur. (Tr. 136). In essence, Davis conceded that the seatbelts bolted to the floor would provide protection, although he believed the protection to be less effective than that provided by the manufacturer's method of seatbelt installation.

The bench decision noted that MSHA is not estopped from citing a violative condition simply because the condition was not cited during previous inspections. However, here the issue is whether a seatbelt securely bolted to a metal frame on the cab floor constitutes a seatbelt "in functional condition." As a threshold matter, even Davis concluded the seatbelt was functional in that he concluded it was unlikely to fail. An operator's modification of equipment is not a *per se* violation of the Secretary's mandatory safety standards. Thus, an operator is permitted to modify equipment provided that the modification is reasonable and not hazardous. For example, an operator can replace a manufacturer installed guard at a pinch point with a substitute screen provided that the screen is securely in place and, that the screen guard serves its intended protective purpose. So too, an operator can alter the bolting location of a seatbelt, particularly in a vehicle that routinely does not exceed approximately 15 miles per hour, as long as the seatbelt continues to provide effective protection.

The Secretary has the burden of proof with respect to the fact of occurrence of a violation. The seatbelt was securely bolted in place to a metal frame on the floor. There is no adequate basis for concluding that the seatbelt, as installed, did not provide adequate protection or was not otherwise "functional" as contemplated by section 56.14130(2)(i). Accordingly, Citation No. 7852921 shall be vacated. (Tr. 156-60).

4. Citation No. 7852922

During the course of Davis' February 19, 1997, inspection of the shop area, Davis observed an employee working in the plant area who was "sweeping around tables" and "doing a

lot of clean-up in the shop." (Tr. 166). As Davis approached, Davis concluded the individual was not wearing hard-toed boots because the front of the shoes were flat. Davis asked him about his footwear and confirmed he was not wearing protective boots.

Davis noted unsecured, heavy objects on a work table in the vicinity where this person was sweeping. Davis opined these heavy objects could fall off the table onto this individual's feet. The objects on the work table and other areas in the shop are depicted in three photographs admitted in evidence. (See Gov. Ex. 10). Davis was also concerned because he concluded, in addition to sweeping, this employee's job duties also included carrying heavy tools and objects.

Davis issued Citation No. 7852922 citing a violation of the mandatory safety standard in section 56.15003, 30 C.F.R. § 56.15003. This safety standard requires miners to wear protective footwear when in an area of a mine or plant "where a hazard exists which could cause injury to the feet." Davis characterized the cited condition as S&S because he conclude it was reasonably likely that an object would fall off the table, or be dropped, on this employee's foot.

ACS does not dispute the fact of occurrence of the violation. However, ACS contests the S&S designation. (Tr. 172-73).

The bench decision noted that, with respect to protective footwear, the likelihood of a significant injury causing event, *i.e.*, an object falling on a foot, must be evaluated in the context of the job duties performed by the cited employee. Here, the individual was sweeping the shop. The photographs in Gov. Ex. 3 depict heavy objects placed securely on a well supported work bench. There is no basis for concluding that it was likely that an object would fall off the work bench and strike this employee's foot while he was sweeping. The Secretary has also failed to establish that this individual routinely lifted heavy objects, or, that he did not wear protective footwear when doing so.

Accordingly the S&S designation in Citation No. 7852922 shall be deleted. The Secretary has proposed a civil penalty of \$204.00 for this citation. In view of the deletion of the S&S designation and the resultant reduction in the gravity of the cited condition, a civil penalty of \$75.00 is imposed. (Tr. 173-76).

5. Citation Nos. 7852923 and 7852924

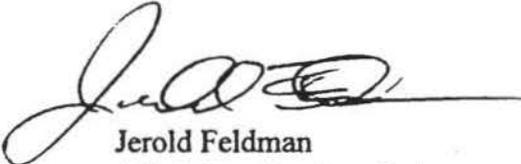
At the hearing, ACS withdrew its contest of non-S&S Citation Nos. 7852923 and 7852924. Consequently, ACS has agreed to pay the \$50.00 civil penalty proposed by the Secretary for each of these citations.

In summary, the total proposed civil penalty in Docket No. CENT 97-128-M is reduced from \$454.00 to \$300.00.

ORDER

In view of the above, **IT IS ORDERED THAT:**

1. Citation No. 4448274 in Docket No. CENT 97-60-M, and Citation No. 7852922 in Docket No. CENT 97-128-M, **ARE MODIFIED** to delete the significant and substantial designations.
2. Citation No. 7852921 in Docket No. CENT 97-128-M **IS VACATED**.
3. Arrow Crushed Stone, Inc., **SHALL PAY** to the Mine Safety and Health Administration, within 30 days of the date of this decision, **a total civil penalty of \$380.00** satisfaction of the citations in issue, and, upon timely receipt of payment, Docket Nos. CENT 97-60-M and CENT 97-128-M **ARE DISMISSED**.


Jerold Feldman
Administrative Law Judge

Distribution:

Thomas A. Paige, Esq, Office of the Solicitor, U.S. Department of Labor, 525 S. Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail).

Ronald M. Mesa, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, 1110 Commerce Street, Room 4C50, Dallas, TX 75242 (Certified Mail)

John Whitehorn, Vice President, Arrow Crushed Stone, Inc., Rt. 7, Box 108, Cleburne, TX 76031 (Certified Mail)

/mh

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, 1997

SECRETARY OF LABOR, MSHA,	:	TEMPORARY REINSTATEMENT
On behalf of	:	PROCEEDING
JERRY MICHAEL CAUDILL	:	
Complainant	:	Docket No. KENT 98-48-D
v.	:	BARB CD 98-04
	:	BARB CD 98-05
LEECO, INC.,	:	BARB CD 98-06
Respondent	:	BARB CD 98-09
	:	
	:	Mine No. 68
	:	Mine ID 15-17497

ORDER GRANTING TEMPORARY REINSTATEMENT

On November 14, 1997, the Secretary of Labor filed an application for an order requiring Leeco, Inc. (Leeco) to reinstate temporarily Jerry Michael Caudill to his former position as a maintenance foreman at Leeco's Mine No. 68, or to a similar position at the same rate of pay. The application was supported by the declaration of Ronnie L. Brock, Supervisory Special Investigator for the Secretary's Mine Safety and Health Administration (MSHA), and by copies of the complaints of discrimination filed by Caudill with MSHA. In the application, the Secretary alleged that Caudill, who was employed by Leeco as an electrician/repairman, was suspended and subsequently discharged as a result of being designated as a miners' representative and carrying out duties pursuant to that designation.

Leeco responded that Caudill in fact was a maintenance foreman at the mine but, jurisdictional matters aside, Leeco denied the rest of the Secretary's allegations. Leeco's response was supported by the affidavit of Amon Tracey, general superintendent of Mine No. 68. Leeco requested that no hearing be held on the Secretary's application.

Commission Rule 45(c) states, "If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement" (29 C.F.R. § 2700.45(c)).

**THE MINE ACT, THE SECRETARY'S APPLICATION, CAUDILL'S COMPLAINTS
AND LEECO'S RESPONSE**

The Mine Act specifically protects any miner or representative of miners from discharge or other discrimination because the miner or representative has exercised any statutory right under the Act (30 U.S.C. § 815(c)). The Commission long has held that a miner seeking to establish a prima facie case of discrimination must prove he or she engaged in protected activity — that is, in a right protected under the Act — and suffered adverse action as a result (Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); and Secretary on behalf of Robinette v. United Coal Co., 3 FMSRHC 803, 817-18 (April 1981)).

The Secretary alleges that Caudill was designated as a miners' representative on October 3, 1997. The Secretary also charges between October 3 and October 24, 1997, Caudill was subjected to threats, harassments, demotion and a cut in pay because of his designation, and that on October 29, he was discharged for the same reason.

Brock's declaration amplifies the Secretary's allegations. He states his review of the investigative file of Caudill's complaints revealed, among other things, that on or about October 7, Caudill's designation as miners' representative was posted on the mine bulletin board; that around October 7, Caudill's pay was cut from \$17.55 per hour to \$17.30 per hour with no explanation; that on or about the same time Caudill was impliedly threatened with retaliation against his son (who also worked for Leeco) and that Caudill's son subsequently was laid off; that on October 18, another miner, Tom Brown, was brought to the mine and given Caudill's job title (second shift maintenance foreman); that on October 20, Brown began acting as though he were supervisor instead of Caudill, and on October 20, Caudill was told Brown was his supervisor; that on October 20, Leeco officials presented Caudill with forms to sign to give up his rights as miners' representative; that on October 23, Caudill was warned in writing he had failed to check in before going underground and that the company had received a citation as a result, an allegation Caudill denied; that on October 24, Caudill was suspended for five days and then was discharged on October 29, allegedly for failing to conduct a required methane check and for cursing an employee who inquired why the test was not conducted.¹

¹ Brock's declaration is based on MSHA's investigation of a series of four discrimination complaints filed by Caudill between October 23, 1997, and November 5, 1997. In the first complaint Caudill specifically alleged he was threatened, harassed, and demoted "because of [his] designation as the representative of miners" (Exh. B 2 (Complaint filed October 23, 1997)). In the second complaint he alleged that on October 23, he was given a warning for a violation he did not commit — a violation of the federal regulation requiring miners to sign in before going underground — and that in a separate incident he was the subject of oral harassment by Leeco's safety director (Exh. B 4 (complaint filed October 24, 1997)). In the

Leeco's response relies on Tracey's affidavit in which he insisted he discharged Caudill because he failed to take a required methane test prior to lighting an acetylene torch underground, that he orally abused and threatened a miner who questioned him about his failure, and that Tracey "did not want to risk the health and safety of miners . . . by continuing to employ a foreman who had blatantly disregarded the safety of the miners working under him by refusing to take methane examinations required by law" (Response, Affidavit 2).

Tracey also stated he attended over 20 interviews of Leeco employees conducted by MSHA during its investigation of Caudill's complaints. During these interviews there was no testimony about a foreman making threatening comments about Caudill's son, or about any superintendent circulating a petition asking Caudill be removed as a miners' representative. In addition, according to Tracey, there was no testimony that Caudill was demoted for anything related to his status as a miners' representative, or that Caudill was coerced in any way to sign a form relinquishing his rights as a miners' representative. Further, no one stated Caudill was denied access to methane detection equipment or exempted from complying with the regulations requiring methane examinations. Finally, Tracy maintained the cut in Caudill's pay was an "inadvertent error" unrelated to Caudill's designation as a miners' representative (Response, Affidavit 2-4).

RULING

The Act states that a complainant shall be immediately reinstated if it is determined the complaint "is not frivolously brought" (30 U.S.C. § 815(c)). Echoing the Act, Commission rule 45(c) directs a judge to order a complainant's immediate reinstatement if the judge concludes the miner's complaint was "not frivolously brought" (29 C.F.R. § 2700.45(c)). As I have noted, where no hearing is requested, the same rule requires the judge to review the Secretary's application and to make a determination as to whether the complaint was not frivolously brought "based on the contents of the application" (29 C.F.R. § 2700.45(c)).

The applicable standard for the review requires the Secretary's legal theory, as well as the Secretary's factual assertions, to be not frivolous. This means the judge must conclude the Secretary's assertions could, if found to be true, support a violation of section 105(c), and that there is a "reasonable cause to believe the assertions" or, to put it another way, that the assertions are "not clearly without merit" (see Jim Walter Resources, Inc. v. FMSHRC, 920 F2d 738, 747 (11th Cir. 1990)).

third complaint he alleged he was suspended on October 24, because he was a miners' representative and because he had filed two previous discrimination complaints (Exh. B 6 (Complaint filed October 27, 1997)). In the fourth complaint, he alleged his pay was cut from \$17.55 per hour to \$17.30 per hour because of complaints he made about the company's failure to make safety repairs on equipment (Exh B 8 (Complaint filed November 5, 1997)).

Certainly, a miners' representative has a right under the Act to exercise his or her duties as a representative free from harassment or intimidation of any kind. Indeed, the Act places so much importance on the contributions a representative can make to the improvement of the safety and health of the working environment, it specifically protects the representative from retaliation for his or her participation (30 U.S.C. § 815(c)(2)). The Secretary's theory of discrimination is that Caudill was threatened, harassed, received a cut in pay, was demoted, and then terminated because of his status as a miners' representative and because of the exercise of his responsibilities as a representative. While the theory ultimately may or may not be sustained, it is far from frivolous. Proof of any such treatment because of any such causes would constitute a prima facie case of discrimination.

Further, a review of the Secretary's application easily establishes the complaint was not frivolously brought. When a hearing is waived, such a review must accept and treat as fact the events alleged in the application. In other words, for the purpose of this ruling, I must assume Caudill was designated the miners' representative on October 3, 1997, a designation of which Leeco certainly was aware, and that within the next 26 days, his pay was reduced, he was demoted, suspended, and terminated. The Commission has observed that although direct evidence of discriminatory motivation is rarely encountered, circumstantial evidence of such intent may be considered. Among the indicia of intent are knowledge of the protected activity and coincidence of time between the protected activity and the adverse action (see 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 869 D.C. Cir. 1983)). Leeco's knowledge of Caudill's designation and the subsequent chronology of adverse action is sufficient to establish reasonable cause to believe the Secretary's assertion of discrimination and to conclude the assertion is not clearly without merit. Accordingly, the application is **GRANTED**.

It is worth emphasizing that granting the application has no bearing upon the ultimate sufficiency and credibility of the Secretary's and Leeco's assertions and defenses if the Secretary or Caudill subsequently bring a complaint of discrimination. Then, the assertions and defenses will be subject to the tests of trial at which the burden will be upon the complainant to prove her or his case by a preponderance of the evidence and at which the full range of procedural protections will be available to Leeco. Proof by a preponderance of the evidence is not now required because the statutory provision for temporary reinstatement represents Congress's judgment that in situations where miners have lost jobs for alleged discriminatory reasons, a different, and lower, standard of proof is needed to facilitate reinstatement.

However, Congress also has recognized that an operator should not bear indefinitely the burden of reinstatement without having the merits upon which it is based subjected to the traditional standard of proof as determined through the full administrative hearing process. For this reason, the Act and the Commission's implementing regulations set forth time limits within which complaints of discrimination must be investigated and filed (30 U.S.C. § 815(c)(2), § 815(c)(3); 29 C.F.R. § 2700.40, § 2700.41). When temporary reinstatement is awarded, fairness requires these limits be strictly observed.

ORDER

For the reasons set forth above, the parties are **ORDERED** as follows:

Leeco **WILL** immediately reinstate Caudill to the position he held at the time of his designation as miners' representative on October 3, 1997, and at the correct rate of pay for that position, or to a similar position at the same rate of pay and with the same or equivalent duties.

The Secretary **WILL**, pursuant to the Act and the Commission's regulations, on or before Tuesday, February 3, 1998, make a written determination whether or not a violation of section 105(c) of the Act has occurred, and if she determines a violation has occurred, file a complaint within 30 days of the written determination. If she determines a violation has not occurred, and Caudill wishes to pursue a complaint under section 105(c)(3) of the Act (30 U.S.C. § 815(c)(3)), Caudill **WILL** file a complaint within 30 days of receipt of the Secretary's notification.

If a complaint is not filed within 30 days of the Secretary's written notification or its receipt, Caudill's temporary reinstatement will **TERMINATE**


David Barbour
Administrative Law Judge

Distribution:

MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215 (Certified Mail)

Marco M. Rajkovich, Jr., Esq., Wyatt, Tarrant & Combs, Lexington Financial Center, Suite 1700, 250 W. Main St., Lexington, KY 40507 (Certified Mail)

Mr. Jerry M. Caudill, General Delivery, Daisy, KY 41733 (Certified Mail)

Tony Oppgard, Esq., Mine Safety Project/ARDF of Kentucky, Inc., 630 Maxwellton Court, Lexington, KY 40508 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

DEC 17 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 97-293-M
Petitioner	:	A.C. No. 26-00062-05543
	:	
v.	:	
	:	Genesis
NEWMONT GOLD COMPANY,	:	
Respondent	:	

ORDER OF DISMISSAL
ORDER DENYING PETITIONER'S MOTION FOR STAY ORDER

The above-captioned penalty proceeding consists of a petition for assessment of civil penalties for four vacated citations. These four citations were vacated and dismissed by the presiding Administrative Law Judge in his October 14, 1997, decision in the consolidated contest proceeding, 19 FMSHRC 1640 (Oct. 1997). All four citations were vacated after a full two day contested evidentiary hearing on the merits in Docket Nos. WEST 97-164-RM, WEST 97-165-RM, WEST 97-166-RM and WEST 97-167-RM, 19 FMSHRC 1640 (Oct. 1997).

A few days after the ALJ's October 14, 1997, decision vacating and dismissing the citations, the Solicitor on October 20, 1997, filed this Petition for civil penalty for each of the four vacated citations. On October 24, 1997, Respondent filed an answer and a motion to Dismiss the Secretary's petition of civil penalties for the four vacated citations. Respondent's motion for dismissal was based on the ALJ's October 14, 1997, decision in the consolidated contest proceedings WEST 97-164-RM through WEST 97-167-RM, 19 FMSHRC 1640 (Oct. 1997).

In November 1997, the Solicitor filed a written request for additional time to respond to Respondent's Motion to Dismiss the present civil penalty proceeding and on December 1, 1997, filed a "Motion For Stay of Proceedings" in this case stating that the ALJ's October 14, 1997, decision which vacated the four citations in question is now subject of a Petition for Discretionary Review.

On consideration of this matter I find no justification in the record before me to grant Petitioner's extraordinary motion for a stay of the present proceedings *cf.* W.S. Frey Co., Docket Nos. VA 93-59-M *et al.*, 16 FMSHRC 1591 (Aug. 5, 1994), 1 MSHN 409 (Aug. 12, 1994). The Petitioner's motion is denied and the Solicitor's petition for assessment of civil penalty for each of four vacated citations in Docket No. WEST 97-293-M is denied. There being no enforcement document in this docket other than the four vacated citations, this case is **DISMISSED**.



August F. Cetti
Administrative Law Judge

Distribution:

Steven R. DeSmith, Esq., Jan M. Coplick, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson St., Suite 1110, San Francisco, CA 94105

David Farber, Esq., PATTON BOGGS, LLP, 2550 M Street, NW, Washington, DC 20037

/sh

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 1997

LAUREL RUN MINING COMPANY,	:	CONTEST PROCEEDINGS
Contestants	:	
	:	Docket No. WEVA 94-347-R
v.	:	Citation No. 3964761; 8/1/94
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 94-348-R
MINE SAFETY AND HEALTH	:	Order No. 3964762; 8/1/94
ADMINISTRATION, (MSHA),	:	
Respondent	:	Docket No. WEVA 94-349-R
	:	Order No. 3964763; 8/1/94
	:	
	:	Docket No. WEVA 94-350-R
	:	Order No. 3964764; 8/1/94
	:	
	:	Holden 20-DB Mine
	:	Mine ID No. 46-07770
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 96-177
Petitioner	:	A. C. No. 46-07770-03575
	:	
v.	:	Holden 20-DB Mine
	:	
LAUREL RUN MINING COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 96-176
Petitioner	:	A. C. No. 46-07770-03576A
	:	
v.	:	Holden 20-DB Mine
	:	
ERNIE WOODS, Employed by	:	
Laurel Run Mining Co.,	:	
Respondent	:	

DECISION

Appearances: Robert S. Wilson, Esq., Caryl L. Casden, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
David J. Hardy, Esq., William Miller, Esq., Jackson & Kelly, Charleston,
West Virginia, for the Respondents.

Before: Judge Feldman

These consolidated civil penalty and contest proceedings concern a petition for assessment of civil penalties filed by the Secretary of Labor against Laurel Run Mining Company (Laurel Run) pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). In these matters, the Secretary also sought, pursuant to section 110(c) of the Act, 30 U.S.C. § 820(c), to impose personal liability on Ernie Woods, Laurel Run's foreman, alleging that Woods, by his conduct, "knowingly authorized, ordered or carried out" a violation of Laurel Run's approved roof control plan.

The hearing in these matters was conducted in Charleston, West Virginia in June and September 1997. The hearing was scheduled to reconvene on December 9, 1997. Shortly before reconvening, the parties informed me they had agreed to settle all matters in issue. At the time of their settlement, the Secretary had not completed presentation of her direct case. Consistent with their agreement, before me for consideration is the Secretary's December 11, 1997, Motion for Approval of Settlement.

I. Background

Briefly stated, these proceedings involve citations issued as a consequence of MSHA's investigation following a fatal roof fall that occurred at Laurel Run's Holden 20-DB Mine on Monday, July 25, 1995. The 20-DB site is a hilltop, or outcrop, mine. Hilltop mines are underground mines that are located relatively close to the surface. The roof of a hilltop mine is prone to surface cracks, also called mud seams. Surface cracks are geological phenomenon in rock formations that run from the earth's surface through the rock to the mine roof below. As a general rule, surface cracks are exposed in the mine roof as the coal seam is removed. Surface cracks are commonly identified by their orange-rust color. This discoloration is caused by mineral deposits that, over the course of time, have filtered through the surface cracks in water originating on the earth's surface.

Unlike surface cracks, which are longstanding geological formations, stress cracks are acute cracks caused by pressure brought to bear on the mine roof during the mining process. Stress cracks can normally be distinguished from surface cracks by their lack of mineral deposit color. Although any crack in a mine roof can be hazardous, surface cracks are particularly hazardous because they run down from the earth's surface.

Surface cracks are random and can run in any direction in the mine roof. Surface cracks that travel across entries or crosscuts (perpendicular to ribs) in the same direction as the roof bolted straps are less hazardous than surface cracks that run in the same direction as entries and crosscuts (parallel to entries or crosscuts). This is because a perpendicular surface crack only compromises the roof area between the surface crack and the closest roof strap. By contrast a parallel surface crack, running in an entry parallel to a rib, removes that rib as a means of roof support. Two parallel surface cracks, running parallel to each other in the direction of an entry, are extremely hazardous because they separate the ribs on each side of that entry from the roof of that entry, leaving the roof essentially unsupported. Under the roof control plan in effect at the time of the fatality, two or more surface cracks, running parallel to each other in the direction of an entry, required supplemental roof supports through cribbing or metal beams.

The thrust of MSHA's case is that its investigation following the fatal accident revealed sets of two or more parallel surface cracks running in the same direction as entries and crosscuts in the vicinity of the fatality and in outby areas, that were not supported by supplemental roof supports. Essentially, in their defense, the respondents assert the cracks observed after the fatal roof fall were not visible prior to the accident, arguing these cracks were stress cracks rather than surface cracks. The respondents also dispute the direction of the cited cracks contending the cracks were running across entries rather than in the same direction as entries. Thus, the respondents argue that, even if the cracks were properly characterized as surface cracks and visible prior to the fatal roof fall, supplemental support was not required under the operable roof control plan provisions.

II. Settlement Terms

A. Civil Penalty Liability

1. Citation No. 3964761, issued pursuant to section 104(d)(1) of the Act, alleges a violation of 30 C.F.R. § 75.220(a), because the respondents failed to comply with the approved roof control plan with respect to installation of supplemental support in instances of two or more parallel surface cracks running in the direction of entries or crosscuts. It was determined that the cited condition contributed to the fatal accident. Thus, the violation was designated as significant and substantial (S&S). Based on MSHA's initial investigation findings, it concluded the cited condition was the result of the Laurel Run's reckless disregard of the perceived hazard and, thus, constituted aggravated conduct. Consequently, MSHA initially proposed a maximum civil penalty of \$50,000.

In support of their settlement agreement, the Secretary now agrees there are mitigating circumstances that reduce the degree of Laurel Run's negligence. In this regard, the Secretary notes that Laurel Run's witnesses would testify that surface cracks were not visible prior to the fatal roof fall. Moreover, although the Secretary continues to believe there were at least two parallel surface cracks in the vicinity of the fatality that required additional support under the roof control plan, the Secretary acknowledges that her own witness characterized one of the

surface cracks as "hairline." Thus, the Secretary concedes there was a basis for Laurel Run's mistaken belief that the surface crack was a stress induced crack that did not invoke the cited roof control provision.

Although the settlement terms provide that Citation No. 3964761 shall remain as a 104(d)(1) citation involving an unwarrantable failure, the parties have agreed to a reduction in the degree of negligence, from reckless disregard to high, that is attributable to Laurel Run. Consequently, the parties have agreed to a reduced civil penalty of \$25,000.00 for Citation No. 3964761.

2. 104(d)(1) Order No. 3964762 alleges a violation of 30 C.F.R. § 75.360(a) because Laurel Run failed to conduct an adequate preshift examination, in that it failed to detect and correct the hazardous roof conditions cited in Citation No. 3964761. MSHA initially determined the violation was S&S and attributable to Laurel Run's unwarrantable failure. A civil penalty of \$25,000 was proposed.

As discussed above, the uncertainty surrounding the nature and extent of the hazardous roof conditions prior to the massive fatal roof fall precludes the Secretary's continued assertion of aggravated conduct indicative of an unwarrantable failure. Accordingly, the Secretary has agreed to modify 104(d)(1) Order No. 3964762 to a 104(a) citation. The parties have agreed to a reduced civil penalty of \$6,000 for this citation.

3. 104(d)(1) Order No. 3964763 alleges a violation of 30 C.F.R. § 75.362(a)(1) due to Laurel Run's failure to perform an adequate onshift examination. Consistent with the discussion above concerning the preshift violation, MSHA concluded the violation was S&S and attributable to Laurel Run's unwarrantable failure. However, in view of the uncertainty concerning the degree of visibility of the underlying hazardous roof condition, the parties have agreed to remove the unwarrantable failure charge and, thus, modify 104(d)(1) Order No. 3964763 to a 104(a) citation. Consequently, the parties have agreed to a reduced civil penalty of \$6,000 for this citation.

4. 104(d)(2) Order No. 3964764 alleges a violation of 30 C.F.R. § 75.202(a) because Laurel Run failed to adequately support coal ribs at various locations in the No. 2 section that were sloughing and not firmly attached to the roof. The Order alleged the cited condition was S&S and attributable to Laurel Run's unwarrantable failure. A civil penalty of \$8,000 was initially proposed.

The Secretary anticipates that Laurel Run's witnesses would testify that poor rib conditions were not observable prior to the fatal roof control fall. Since the Secretary cannot present evidence concerning the rib conditions prior to the accident, the Secretary has agreed to reduce Laurel Run's degree of negligence to low, thus removing the unwarrantable failure allegation.

Accordingly, 104(d)(2) Order No. 3964764 is modified to a 104(a) citation. In view of the significant reduction in the degree of Laurel Run's negligence, the parties have agreed to a reduced civil penalty of \$500 for this citation.

B. Section 110(c) Liability

Section 110(c) of the Act provides that, whenever a corporate operator violates a mandatory safety standard, an agent of the corporate operator who knowingly authorized, ordered, or carried out such violation shall be subject to individual liability. In Docket No. WEVA 96-176, the Secretary sought to impose personal liability on Ernie Woods for "knowingly" failing to comply with Laurel Run's approved roof control plan in violation of the mandatory regulatory safety standard in section 75.220(a). Specifically, the Secretary charged Woods with failing to ensure that supplemental support was installed for hazardous surface cracks as required by the roof control plan provisions.

The Commission, in *Fort Scott Fertilizer*, 19 FMSHRC 1511 (September 1997), recently summarized the standard of proof in a 110(c) proceeding. The Commission stated:

To establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). An individual acts knowingly where he is "in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. *Section 110(c) liability is predicated on aggravated conduct* constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992) (emphasis added). 19 FMSHRC at 1517.

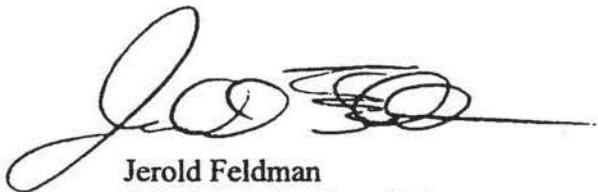
Woods was charged with knowingly violating the roof control plan provisions by failing to ensure that hazardous surface cracks were properly supported. This violative condition was the subject of Citation No. 3964761. However, the settlement terms concerning this citation noted the unsupported surface cracks were not obvious enough to warrant a finding of aggravated conduct. Consequently, the settlement terms fail to state a 110(c) cause of action against Woods. As a result, as part of the settlement agreement, the Secretary moves to dismiss the 110(c) action brought against Woods in Docket No. WEVA 96-176.

ORDER

In view of the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED**, and **IT IS ORDERED** that Laurel Run Mining Company pay a total civil penalty of \$37,500 in satisfaction of the four citations in issue within 30 days of the date of this order, and, upon receipt of timely payment, the civil penalty case in Docket No. WEVA 96-177 **IS DISMISSED**.

IT IS FURTHER ORDERED that the related contest proceedings in Docket Nos. WEVA 94-347-R, WEVA 94-348-R, WEVA 94-349-R and WEVA 94-350-R, **ARE DISMISSED**.

IT IS ALSO ORDERED that the 110(c) proceeding concerning Ernie Woods in Docket No. WEVA 96-176 **IS DISMISSED** with prejudice.

A handwritten signature in black ink, appearing to read 'Jerold Feldman', with a long horizontal line extending to the right.

Jerold Feldman
Administrative Law Judge

Distribution:

David J. Hardy, Esq., William Miller, Esq., Jackson & Kelly, P.O. Box 553, Charleston, WV 25322 (Certified Mail)

Elizabeth Chamberlin, Esq., Laurel Run Mining Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Robert S. Wilson, Esq., Caryl L. Casden, Esq., Office of the Solicitor, U.S. Dept. of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203 (Certified Mail)

\t

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 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. LAKE 97-5
	:	A. C. No. 11-00601-04045
	:	
CONSOLIDATION COAL COMPANY, Respondent	:	Rend Lake Mine
	:	

DECISION

Appearances: Ruben R. Chapa, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for the Secretary;
Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Bulluck

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, through her Mine Safety and Health Administration (MSHA), against Consolidation Coal Company ("Consol"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition seeks civil penalties of \$50.00 and \$903.00, respectively, for alleged violations of a notice to provide safeguard issued pursuant to section 75.1043, 30 U.S.C. § 75.1403, and section 75.202(a), 30 U.S.C. § 75.202(a).

A hearing was held in Mt. Vernon, Illinois. The parties' post-hearing briefs are of record. For the reasons set forth below, the safeguard violation and the unsupported roof violation shall be affirmed.

I. Stipulations

The parties stipulated to the following facts:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

2. At all times relevant to these proceedings, respondent, Consolidation Coal Company (hereinafter, "respondent" or "Consolidation") and the Rend Lake Mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977 (hereinafter, the "Act").

3. At all times relevant to these proceedings, respondent owned and operated the Rend Lake Mine, a bituminous coal mine located in Jefferson County, Illinois.

4. The Administrative Law Judge has jurisdiction of this case pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.* (1994).

5. The respondent's mine produced approximately 3,269,017 tons of coal from January 1, 1995 through December 31, 1995.

6. All of the respondent's operations produced approximately 65,431,842 tons of coal from January 1, 1995 through December 31, 1995.

7. The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Consolidation on the date indicated therein.

8. The proposed civil penalties in this proceeding will not affect the operator's ability to continue in business.

II. Safeguard Notice No. 3041481/Citation No. 3839842

A. Factual Background

Consol owns and operates the Rend Lake bituminous coal mine in Jefferson County, Illinois. On March 2, 1987, MSHA Inspector Frank Garavalia (deceased at the time of hearing) issued Safeguard No. 3041481, pursuant to 30 C.F.R. § 75.1403, citing the following condition:

A Memco mantrip was parked approximately 3 feet from a line curtain (brattice) in the crosscut left off the belt entry at survey Tag No. 7196. Both miners and mining equipment could travel through this location. Neither a workman, nor a warning sign was stationed on the curtain's blind side indicating that the equipment was parked behind the curtain. The mantrip was not visible through the curtain. This was observed in the 2nd east, 2nd left working section. This is a notice to provide safeguards requiring that mining equipment be visible through a curtain, a workman be stationed on the curtain's blind sign [sic], or a warning sign be conspicuously posted on the opposite side of the curtain from the parked equipment. This safeguard includes all underground areas of this coal mine

(Ex. P-1). Section 75.1403 authorizes an MSHA inspector to issue safeguards that, in the inspector's judgment, are necessary to minimize hazards with respect to transportation and materials.

The facts surrounding the issuance of the contested citation and the alleged violative condition cited therein are not in dispute. On July 26, 1996, at 10:55 a.m., MSHA Inspector Michael Rennie, accompanied by mine safety representative Rick Shockly and safety committeeman Danny Brown, conducted a Triple A inspection of the Rend Lake Mine (Tr. 76, 100-105). While inspecting the 2G longwall section of the mine, Inspector Rennie walked through a brattice curtain positioned in an adjacent crosscut and came upon the No. 41 scoop parked two feet away from the curtain on its blind side (Tr. 76, 81, 106; Ex. J-3).¹ No sign or workman was posted to warn of the equipment stationed behind the curtain (Tr. 77-78, 152). Inspector Rennie issued the following 104(a) non-significant and substantial citation, for violation of section 75.1403, based on the above-cited Safeguard No. 3041481:

The No. 41 battery-powered Simmonds Rand scoop was parked approximately 2 feet from a ventilation curtain (brattice) in the crosscut right off the 2G travelway at survey station 12+80. Neither a workman or a warning sign was posted on the travelway side of the curtain. Safeguard Notice No. 3041481 requires that mining equipment be visible through a curtain, a workman stationed on the curtain's blind side, or a warning sign be conspicuously posted on the opposite side of the curtain from the parked equipment. This safeguard includes all areas of the underground coal mine

(Ex. P-8).

B. Findings of Fact and Conclusions of Law

1. Validity of Safeguard

The seminal issue for resolution is whether Safeguard No.3041481, issued by Inspector Frank Garavalia on March 2, 1987, is valid. The Commission has noted that through section 314(b) of the Act, 30 U.S.C. § 874(b), the Secretary, through MSHA inspectors, is accorded broad discretion to issue safeguards, without operator consultation, in order "to guard against all hazards attendant upon haulage and transport[ation] in coal mining." *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (January 1992) ("SOCCO II"); *Jim Walter Resources, Inc.*, 7 FMSHRC 493, 496 (April 1985). Safe and unobstructed travel by miners on foot has been recognized as falling within the purview of the haulage and transportation hazards that safeguards seek to prevent. See *Southern Ohio Coal Co.*, 7 FMSHRC 509, 513 (April 1985) (SOCCO I).

¹A "brattice curtain" is a means of ventilation control in a mine, primarily used to direct air to the working face areas, by fastening the curtain across the roof of an entry, and for maximum direction of airflow, to the adjacent ribs (Tr. 29-31, 71).

A notice to provide safeguards is mine-specific, in that an inspector must determine: 1) that there exists at a mine an actual transportation hazard that is not covered by a mandatory standard; 2) that a safeguard is necessary to correct the hazardous condition; and 3) the corrective measures that the safeguard should require. 14 FMSHRC at 8. As long as a safeguard is premised upon an inspector's evaluation of the specific conditions at a particular mine, that similar unsafe conditions and similar safeguards to address them are present at other mines does not invalidate it. *Id.* at 8, 10.

Recognizing the need for an appropriate balance between the Secretary's authority to require safeguards additional to mandatory standards and the operator's right to notice of the conduct required of him, the Commission has required that a safeguard notice identify with specificity the hazard at which it is directed and the conduct required to remedy such hazard. 7 FMSHRC 512. Therefore, where an operator challenges a safeguard's validity, the Secretary bears the burden of proving that the safeguard provided the operator with sufficient notice of the nature of the targeted hazard and the remedial conduct required, so as to enable the operator to secure prompt and complete abatement. *Id.*; 14 FMSHRC 13. In interpreting a contested safeguard, the Commission has mandated a narrow construction of its terms and intended reach, while noting that this approach does not give license to challenges based on purely semantical arguments. 7 FMSHRC 512; *Bethenergy Mines, Inc.*, 15 FMSHRC 981, 985 (June 1993).

Consol takes the position that the underlying safeguard is impermissibly vague, in that it fails to adequately identify the hazard addressed and, therefore, permits *ad hoc* discretion in interpretation, inspector-by-inspector. Furthermore, Consol argues that the safeguard inappropriately encompasses all mining equipment, rather than mobile equipment (such as the parked mantrip cited in the safeguard), it fails to specify the range of distance within the curtain that triggers the "warning" requirements, and it does not specify whether it is protecting miners traveling on mobile equipment or on foot (R. br. 5-9). In support of this position, Consol references MSHA bulletins and accident reports dealing with injuries resulting from moving equipment running into parked equipment (Exs. P-2, P-3 and P-4), and other safeguards within District 8 mines, many of which specify permissible distances between parked transportation equipment and brattice curtains (generally, twenty-five feet) (Ex. R-9).²

Arguing the validity of the safeguard at issue, the Secretary takes the position that, on its face, the safeguard demonstrates the existence of a condition at the Rend Lake Mine that created a transportation hazard, and that it is specific in identifying both the hazard and the conduct necessary to remedy such hazard. Moreover, the Secretary asserts that the targeted transportation hazard applies to mining equipment traveling through curtains that could collide with any parked equipment, as well as miners traveling through curtains by foot who could bump into parked equipment and sustain injury (P. br. at 7-16).

^{2/} The Secretary's Motion to Strike Respondent's Attachment to Post-Hearing Brief (17 similar safeguards issued to other District 8 mines) was denied during teleconference with the parties on October 31, 1997, and the record was reopened for admission of the documents.

As inspection supervisor in the Benton, Illinois field office, MSHA Inspector Steven Kattenbraker testified that he normally reviewed safeguards issued from his office to ensure that they accurately described the behavior that is expected of the operators (Tr. 15-18). Although he was unable to recall whether he had specifically discussed the safeguard at issue with Inspector Garavalia, Inspector Kattenbraker testified that due to a 1980 fatality, MSHA had placed emphasis on eliminating injuries caused by the transportation hazard of parking vehicles behind curtains (Tr. 19-24, 47-49; see Ex. P-2, January 23, 1980, notice by MSHA District 8 Manager to District 8 mine operators, alerting them to a recent fatality caused by the collision of a shuttle car traveling through a curtain with a continuous mining machine parked behind the curtain; see also Ex. P-3, MSHA Program Informational Bulletin No. 84-16C addressing underground haulage accidents). The record establishes that this fatality occurred at Consol's Hillsboro Mine, located in Coffeen, Montgomery County, Illinois, part of MSHA's District 8 (Ex. P-4; Tr. 41-42). Inspector Kattenbraker offered his opinion that all mining equipment parked behind a curtain poses the hazard targeted by the safeguard, that twenty-five feet is standard in most other safeguards as a safe distance between parked equipment and brattice curtain, and that while he would prefer that the instant safeguard specify a safe distance, it, nevertheless, puts the operator on notice that the equipment should be parked at a distance from a curtain that allows clear visibility of the equipment to the vehicle or person traveling through the curtain (Tr. 51-55, 59-60).

Inspector Michael Rennie testified that the instant safeguard gives the operator adequate notice of how far to station mine equipment behind curtains, because the mine operator is imputed to have a working knowledge of his equipment, including size and length, and is held responsible for making appropriate judgments as to the distance necessary for safe clearance of mine equipment traveling through its curtains (Tr. 139, 142, 144, 147). He explained that, due to the equipment size and the operator's location on the equipment, several feet of the equipment may travel through a curtain before the operator passes through and is able to see the parked equipment on the other side (Tr. 131). Therefore, Inspector Rennie is of the opinion that, while MSHA regards twenty to twenty-five feet as a safe parking distance, based on the size and length of most mining equipment, some discretion is required of the mine operator, as well as the inspector who evaluates the condition (Tr. 139-140).

The condition at the mine for which the underlying citation was issued is not a matter in controversy. Based on MSHA's emphasis on eliminating accidents caused by mining equipment parked behind brattice curtain, and on Inspector Garavalia's observation that the mantrip was not visible through the curtain and was parked three feet behind it, it was within his discretion to conclude that a transportation hazard existed at the Rend Lake mine, and that a safeguard notice was necessary to correct the hazard. A narrow reading of the safeguard provides the operator with sufficient notice of the hazardous condition to be prevented: parking mining equipment behind a curtain through which such equipment cannot be seen from the blind side, without posting a workman or a warning sign. Implicit in its language, based upon the cited condition, is that both miners traveling on foot and on equipment could travel through a curtain, and where the hazardous condition exists, sustain injuries. Although the instant safeguard is silent as to a

specific distance that equipment may be stationed safely behind a curtain, the Commission has held that an operator was given fair notice of the requirements of a safeguard where its language included interpretive terms. *U. S. Steel Mining Co., Inc.*, 15 FMSHRC 2445, 2448 (December 1993). In this case, the word "parked" is used in a context that puts the operator on notice that any distance between a non see-through curtain and stationary mining equipment that does not permit safe travel through the curtain's blind side (a clear view of equipment on the back side) by miners on foot and operating mining equipment, shall require corrective measures. Therefore, I reject Consol's arguments that the safeguard is vague, find that Consol was given adequate notice of the targeted hazard and the corrective measures required, and, therefore, conclude that the safeguard was validly issued.

2. Fact of Violation

The subject safeguard requires that parked mining equipment be visible through a curtain, or where it is not visible, a workman be stationed on the curtain's blind side or a warning sign be conspicuously posted on the opposite side from the parked equipment. Because it is clearly reasonable to consider equipment stationed a distance of two feet from a curtain to be "parked," it is curious that Consol uses the instant citation to challenge the validity of the underlying safeguard.

In applying the requirements of the safeguard to the uncontroverted facts of this case, the evidence establishes that only cap lighting was available in the cited passageway, visibility was not possible through the solid curtain, no workman or sign was posted, and as the inspection party walked through the curtain, Inspector Rennie and Dan Brown almost bumped into the scoop parked two feet from the curtain (Tr. 77-79, 81, 106, 108, 151-153; Exs. P-8, P-9, J-2). Accordingly, the Secretary has met her burden of proving that the safeguard was violated by the cited conditions.

3. Civil Penalty

While the Secretary has proposed a civil penalty of \$50.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). See *Sellersburg Stone Co.*, 5 FMSHRC 287, 291-292 (March 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984).

Consol is a large operator, with an insignificant history of prior violations, including two prior violations of the subject safeguard within three months of the instant citation (Ex. P-5).³ The Secretary did not allege, nor does the record reflect, that its violations history is an aggravating factor that provides a basis for raising the penalty. As stipulated, the proposed civil penalty will not affect Consol's ability to continue in business.

³/ Inasmuch as the Secretary has failed to provided the most current data of violations (July 1992 to June 1994 provided, rather than July 1994 to July 1996), Consol's history of previous violations is construed in the light most favorable to the operator (See Ex. P-7).

The remaining criteria involve consideration of the gravity of the violation and the negligence of Consol in causing it. I find the gravity of the violation to be serious, since the potential for grave injuries to miners, including death, caused by collisions of equipment and of persons and equipment, is well documented by the record. Consideration that Consol had been cited for similar violations within three months of the instant citation persuades me that Consol appreciated the nature of the hazard and, consequently, leads me to ascribe moderate negligence to Consol. Therefore, having considered Consol's large size, insignificant history of prior violations, seriousness of the violation, good faith abatement and moderate degree of negligence, I find that the \$50.00 penalty proposed by the Secretary is appropriate.

III. Citation No. 4265333

A. Factual Background

On July 18, 1996, at approximately 12:15 a.m. during the midnight shift, MSHA Inspector Michael Pike, accompanied by foreman Victor Sauerhage and walkaround representative/safety committeeman Melvin Filkins, entered the mine by the Nason portal in order to conduct a CCA inspection (6 month roof control review), which would entail checking entries, intersection widths, bolt spacing, observing bolt installation, and ensuring compliance with the roof control plan (Tr. 161-162). The inspection party began travel by scooter (personnel carrier) on the main east travelway to the opposite side of the mine, fifty to one hundred feet behind a scooter transporting pumpers Robert Carpenter and Dewey O'Daniel to the location of their tools (Tr. 167, 241-243).⁴ As the pumpers approached the No. 96-97 crosscut, they observed on the roadway "some rock and top coal" that had fallen out from around a roof bolt, causing them to stop in the middle of the travelway about twenty-five feet from the fallen rock and observe the roof (Tr. 164, 223, 241, 243-244, 246, 257-258). Inspector Pike, foreman Sauerhage and walkaround representative Filkins stopped moments later behind the pumpers, who informed Pike and Filkins of the roof condition (Tr. 164, 241, 243). Inspector Pike, accompanied by Filkins, examined the roof in the area identified by the pumpers (Tr. 164, 213-214, 218-219), then informed Sauerhage that "the road was going to be closed and the rock cleaned up until they got it all bolted" (Tr. 241, 246-247, 258). Sauerhage rerouted the pumpers by directing them to walk along the belt line (a parallel entry) to collect their tools (Tr. 241-242, 249), called for midnight shift foreman Robert Pigg to come to the area (Tr. 258-259, 286), and sent for the diesel roof bolter to come immediately from the west (Sesser) side of the mine (Tr. 261, 287). While Sauerhage was calling for the midnight shift foreman and the roof bolter, Inspector Pike stationed himself in the travelway and prevented all persons, including workers on overtime, from entering the area between the 96-97 crosscut, by detouring them around the area to the belt line (Tr. 164-165, 259, 293). Shift foreman Pigg flagged-off the area with orange reflector tape, and had supplemental roof bolts installed in accordance with legal requirements (Tr. 166, 293-294). No persons other than the roof bolters were permitted to work or travel in the affected area until the supplemental roof support was installed (Tr. 311).

⁴/ A "pumper" pumps water out of a mine by use of a stationary pump (Tr. 167).

Inspector Pike issued section 104(a), non-significant and substantial Citation No. 4265533, describing the violation of section 75.202(a) as follows:

An area of inadequate supported mine roof app. 45 feet in length and 20 feet wide was present between the No. 96 and 97 crosscut on the main east travelway. People are required to work and travel this area

(Ex. P-10).⁵

B. Findings of Fact and Conclusions of Law

1. Fact of Violation

Section 75.202(a) is a broadly written standard, designed to protect miners from “any roof, face or rib hazards, as well as hazards associated with coal or rocks bursts, in areas where they may travel, by supporting or controlling the roof, face or ribs.” *Jim Walter Resources, Inc.*, 16 FMSHRC 456 at 477, 478 (February 1994) (ALJ). The Commission has required liability under the standard to be subjected to the consideration of whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that the roof or ribs were not adequately supported or otherwise controlled. *Id.* at 479. By application of the reasonably prudent person test, the Commission has held an operator in violation of the standard, notwithstanding the operator’s compliance with its approved roof control plan. *Id.* at 478-479. Moreover, as required by the very language of the standard, the Commission has required the Secretary to prove that the cited area was one “where persons work or travel,” under normal circumstances. *Cyprus Empire Corp.*, 12 FMSHRC 911, 917 (May 1990).

It is well recognized, as the Secretary points out, that roof falls pose one of the most serious hazards in the coal mining industry. *United Mine Workers of America v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989). The Commission has noted the inherently dangerous nature of mine roofs, and attributed the leading cause of death in underground mines to roof falls. *Consolidation Coal Co.*, 6 FMSHRC 34, 37 (January 1984); *Eastover Mining Co.*, 4 FMSHRC 1207, 1211 and n.8 (July 1982); *Halfway Incorporated*, 8 FMSHRC 8, 13 (January 1986).

Consol argues that the Secretary has not proven a violation of section 75.202(a) since the cited area had been supported in accordance with the approved roof control plan, a pre-shift examination had assessed the area as safe for travel, and upon discovery of the unstable roof, the area was flagged-off and miners were prevented from travel or work therein, until additional roof support was installed (R. br. at 12, 13).

⁵/ 30 C.F.R. § 75.202(a) provides that: The roof, face, and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

The Secretary contends that the evidence supports Inspector Pike's conclusion that the roof was failing, that the Rend Lake Mine has a history of roof falls and problems with inadequately supported roof areas, and that miners worked and/or traveled in the cited area (P. br. at 16-18).

Inspector Michael Pike, employed by MSHA for approximately 11 years, has been a roof control specialist since 1993 (Tr. 158-159, 161). He testified that he reviewed the mine's violation history prior to conducting the inspection, went down into the mine with the midnight shift, began travel with the inspection team to the other side of the mine, and shortly thereafter came upon the pumpers at the cited area (Tr. 162, 164). Inspector Pike discussed the roof condition which he observed in the following testimony:

Q. Now, please describe the condition which led--led you to issue the citation.

A. The mine roof had fallen from around the roof bolt that had been installed. I checked it. While we was sitting there, I noticed on both ribs the thing had been working and was flaking out....Mr. Filkins and Mr. Sauerhage was there with me. I inspected the top. The top started working and bumping. I told Victor [Sauerhage] they needed to get somebody up there and start doing something with it--the mine roof would probably fall. Victor informed me that he would go back, call Mr. Pigg, get somebody up there to look at the condition. While we was sitting there, a crack appeared in the mine roof, which ran from one corner to the other. It started working in the crosscuts off the side of the intersection. That this area was closed up, due to the hazard that it presented to people traveling in the area (Tr. 164-165).

Q. Let's talk about "working." When you say the word, what do you mean by that?

A. What the top was doing was flaking out between the ribs and the roof on both rib lines (Tr. 169).

Q. When you talk about ribs, you mean the sides?

A. Yes, sir, just like this room. This--the walls here would be a rib. The ceiling would be your roof. And it would come approximately a foot from your rib out into the mine roof, and it was working. The coal was working. It would come out to approximately ten feet from the corner of the crosscut, back into the main line

entry on both sides. The top, when I say it was bumping, it thumped where the mine roof was cracking. And there was a crack that went from one corner to the other corner of the rib on it (Tr. 169).

The Court: Is [sic] working and bumping the same? Working's flaking?

A. Working is the flaking part of it. Bumping is where your mine roof, itself, is cracking, and you can hear it. It didn't do it all the time, but it--it bumped three or four times there.

Q. Is that a sign of anything?

A. Yes, sir. It's a sign of roof failure.

The Court: When a roof fails, is there always bumping and working before it fails?

A. No, ma'am, not all the time.

The Court: So one would hope that they get this warning.

A. Yes, sir--yes, ma'am (Tr. 170).

Q. Let's go back now to--you said there was--there was a roof bolt that was loose when you observed it?

A. There was a roof bolt on the right-hand side going in where the mine roof had fell from around it. A rock had fallen down there, and that's what stopped the pumpers from going in.

Q. What do you mean by the bolt was loose?

A. You--you take a roof bolt, and you bolt it tight to the roof. And what had happened: the mine roof had fallen from around the bolt hanging there. Approximately a foot, a foot and a half of it was hanging where there was no mine roof, and the bolt was not intact with the surface. So the bolt was not--had its bearing surface to support the mine roof there. And just like I told Mr. Pigg, if I had come up there and just the bolt by itself was the only indication that I seen that it was just hanging there, I would inform them to put-- install a bolt. And a citation would not have been issued. But in this instance where the mine roof was flaking, and working, and while we was there, fell around another bolt, in my opinion, through mining. This warranted a violation. And the top needed to be

adequately supported. I investigated the roof, and there was approximately 45 feet in length of the area that was working and where it had flaked. I had went plumb through the intersection all the way across and was flaking over there on that side. And the entry width was approximately 20 feet wide, so this covered a pretty wide area, where if it was just the bolt, we could have flagged it, let the people went [sic] around the belt

(Tr. 173-175).

Walkaround representative Melvin Filkins, a rock dust motorman, has worked at the Rend Lake Mine in excess of twenty-six years (Tr. 212). Filkins described the roof condition which he had observed in the following testimony:

Q. Please describe the condition you observed, which was the cause for that citation.

A. There was two or three roof bolts hanging down more than the other ones was, and there was some flaking off of the roof. And it was wet bottoms there, hitting the bottoms, and working on the rib line.

Q. Are these typical conditions you see at the Rend Lake mine?

A. No, sir (Tr. 213-214).

Q. Was the roof working, based on your observation?

A. It was flaking off and working along--along the rib line (Tr. 219).

The Court: Mr. Filkins, were you alarmed by what you saw?

A. Yeah. It wasn't a good situation. Needed to be corrected (Tr. 238).

Pumper Robert Carpenter, who has been employed at the Rend Lake Mine in excess of eighteen years (Tr. 240), testified that he and fellow pumper Dewey O'Daniel had stopped their scooter twenty-five feet or so of where some rock and top coal had already "fallen out" onto the main east travelway (Tr. 241, 243, 244).

Foreman Victor Sauerhage, involved in the mining industry since 1974 and employed at the Rend Lake Mine since 1987 (Tr. 255), testified to observing "a small amount of rock in the roadway," but that he did not go to the area and examine the roof condition himself (Tr. 262-263).

Shift foreman Robert Pigg testified that around 12:20 to 12:30 a.m., while at the Nason bottom, he was summoned by foreman Sauerhage to the cited area (Tr. 286). He testified that upon his immediate arrival at the area, he observed a loose bolt on the north rib and a pile of rock over a three to four foot area, and Inspector Pike informed him of the roof conditions that he had observed (Tr. 287, 289). Foreman Pigg then explained that he conducted his own inspection of the area from the front and behind from the belt entry, since Inspector Pike would not permit him to travel through the area, but that he failed to hear any bumping, see any cracking or flaking, or any other signs of the intersection working (Tr. 288-289, 291, 293-294, 314). While he stated that he did notice some stress cracks, he concluded that they were common to the mine and did not appear to be indicative of recent working; it was his opinion that the condition did not indicate that the roof was about to fall (Tr. 293, 295).

It is clear from the record that only Inspector Pike and walkaround representative Filkins actually went under the area and investigated the roof condition (Tr. 218). Filkins, a long time miner at Rend Lake and familiar with the history and conditions in the mine, corroborated Inspector Pike's testimony, and therefore, I credit their statements as an accurate depiction of the cited roof condition. Accordingly, I find that the roof was unstable, in that it was working and bumping to a degree that signaled roof failure.

In applying the reasonably prudent person test to the facts of this case, it is necessary to resolve the length of time that the unstable roof condition existed. I credit Inspector Pike as knowledgeable in the field of roof control, having conducted hundreds of roof inspections during his tenure with MSHA (Tr. 158-161). He testified that, based on the cracks and the size of the rock pile stacked along the ribs, the condition had not just occurred (Tr. 206). The record establishes that the pre-shift examination was conducted by Fred Baker between the hours of 9:00 and 11:00 p.m., and that he probably traveled through the main east travelway and proceeded to the Nason bottom to record his entries in the examiner's book somewhere between 10:30 and 11:00 p.m. (Tr. 282-283, 286, 312-313). Shift foreman Pigg testified that examiner Baker only reported the main east travelway to be rough and muddy in a couple of places (Tr. 277). While not calling into question the qualifications of examiner Baker, based on Inspector Pike's expertise and observations, I credit the inspector's opinion that the roof had been working for some time in advance of the pumpers discovering the fallen rock, and conclude, therefore, that a reasonably prudent person would have detected signs of the failing roof during the pre-shift examination. I note that the best evidence of the roof condition at the time of the pre-shift examination would have come from Fred Baker, himself, but that he was not called to testify.

The record is equally clear that the cited area is one in which miners routinely worked and traveled. Walkaround representative Filkins testified that the main east travelway was frequently traveled on a daily basis by men and equipment (Tr. 214-216). Foreman Sauerhage testified that, since another side of the mine had opened up, the main east travelway was just a way of getting from one side of the mine to the other (Tr. 265-268). Shift foreman Pigg testified

area, parts runners from the Sesser side delivering parts to Nason sections, examiners on their routes, the general underground foremen, as well as he, himself, would be traveling the main east travelway (Tr. 298-299). Pumper Carpenter testified that the main east travelway is a busy thoroughfare (Tr. 242). As the Secretary has correctly pointed out in her brief, the precedent relied upon by Consol, *Energy West Mining Co.*, 18 FMSHRC 1628 (September 1996) (ALJ); *Cyprus Empire Corp.*, 12 FMSHRC 911 (May 1990); and *Utah Fuel Co.*, 18 FMSHRC 1469 (August 1996) (ALJ), is distinguishable from the instant case, as those cases involve circumstances in which operators had taken prior measures to address dangerous roof conditions, and in *Cyprus* and *Utah Fuel*, no persons were found to have worked or traveled in the affected areas (R. br. At 9-11; P. br. at 19-20). While in this case, it is undisputed that, upon discovery of the condition, Inspector Pike prohibited work and travel through the affected area and had it flagged-off until supplemental roof support was installed, it has also been established that the pumpers and overtime workers were on their way into the area (Tr. 164, 204-205). The pumpers had no official warning, and but for the good fortune of having encountered the fallen rock, they might have suffered serious injury. Consol's argument that the pumpers were in a position to warn others of the danger does not address the operator's affirmative duty to have provided warning to the pumpers, as well as to the persons who were, subsequently, to travel to the area. Any such interpretation of the duty required by the standard would leave the envisioned protection to the discretion of individuals who do not necessarily bear that responsibility. Accordingly, having found that the roof was unstable, that a reasonably prudent person should have detected these signs of roof failure during the pre-shift inspection, and that miners traveled and worked in the area, I conclude that Consol violated section 75.202(a) by failure to take adequate measures to protect persons from hazards related to roof fall.

2. Significant and Substantial

Section 104(d)(1) of the Mine Act designates a violation S&S when it is "of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 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).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth the four criteria the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 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 *Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Power, Inc., v. Secretary*, 861 F. 2d 99, 103-104 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the

context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988).

Inspector Pike testified on behalf of the Secretary that he determined the reasonable likelihood of someone getting injured or killed based upon "the mine roof working, and the crack in it had already filled out from around some bolts and cutting down the ribline," as well as the fact that most fatalities are caused by roof falls (Tr. 177-179). He also gave unrefuted testimony that the roof had required use of ten-foot bolts for supplemental support, due to breaks found in the roof strata as high as seven feet (Tr. 178-179). In his opinion, then, his conclusion that someone would have been killed if the roof had fallen had been a reasonable one, despite the fact that most vehicles that traveled the roadway had canopies (See Tr. 171-172, 192-197).

The Secretary is not required to prove that miners were actually exposed to the roof hazard at the time of the inspection, as long as it is shown that a miner could be at risk during the course of normal mining operations. See *Consolidation Coal Co.*, 15 FMSHRC 214 (February 1993) (ALJ) (citing 8 FMSHRC 12). In that context, the evidence indicates that rock was falling during the inspection, at least the pumpers and overtime workers would have traveled through the affected area, and the pumpers conceivably could have worked in the wet travelway where a permanent pump was located (Tr. 164-165, 172-173, 175, 195-196, 260). Consequently, based on the evidence, I find that there was a reasonable likelihood that a roof fall contributed to by the unstable roof would result in serious injury, including death, to the pumpers and/or the overtime workers. Accordingly, I find that the violation was S&S.

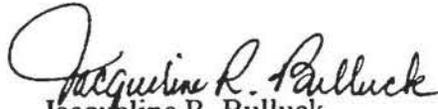
3. Civil Penalty

Addressing the six penalty criteria set forth in section 110(i), as discussed above, Consol is a large operator, with an insignificant history of prior violations, and the parties have stipulated that the proposed civil penalty of \$903.00 will not affect Consol's ability to continue in business.

Respecting consideration of the gravity criteria, I find the violation to be serious, in that the potential injury to a miner traveling or working in the area ranges from cuts, bruises, broken bones to death. Shift foreman Pigg's assessment as to the "normalcy" of the cited roof condition (Tr. 165-166, 295), despite the Rend Lake Mine's prior history of unstable roof and roof falls (Tr. 191-192, 217, 221, 225-226, 227-228, 230-232), when combined with the indication, based on the totality of the evidence, that tangible signs of the unstable roof existed at the time of the pre-shift inspection, suggests a certain degree of complacency on the part of Consol. However, based upon Consol's immediate and appropriate abatement of the condition, I attribute moderate negligence to Consol. Consequently, having considered Consol's large size, insignificant history of prior violations, seriousness of the violation, good faith abatement and moderate degree of negligence, I find that a civil penalty of \$903.00 is appropriate.

ORDER

Accordingly, Citations No. 3839842 and 4265333 are **AFFIRMED**, and Consol is **ORDERED TO PAY** civil penalties of **\$953.00** within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED**.


Jacqueline R. Bulluck
Administrative Law Judge

Distribution:

Ruben R. Chapa, Esq., Office of the Solicitor, U. S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, Il 60604 (Certified Mail)

Elizabeth Chamberlin, Esq., CONSOL, Inc., Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241-1421 (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 29 1997

EMPIRE IRON MINING PARTNERSHIP, : CONTEST PROCEEDINGS
Contestant :
: Docket No. LAKE 97-37-RM
SECRETARY OF LABOR, : Order No. 4537189; 1/21/97
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 97-38-RM
Respondent : Order No. 4537190; 1/21/97
:
: Docket No. LAKE 97-39-RM
: Order No. 4537216; 2/12/97
:
: Docket No. LAKE 97-53-RM
: Order No. 4537285; 3/10/97
:
: Mine ID 20-01012
: Empire Mine
:
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 97-41-M
Petitioner : A.C. No. 20-01012-05618
v. :
: Docket No. LAKE 97-47-M
EMPIRE IRON MINING PARTNERSHIP, : A.C. No. 20-01012-05616
Respondent :
: Docket No. LAKE 97-50-M
: A.C. No. 20-01012-05620
:
: Docket No. LAKE 97-51-M
: A.C. No. 20-01012-05621
:
: Docket No. LAKE 97-69-M
: A.C. No. 20-01012-05625
:
: Empire Mine

DECISION

Appearances: Christine M. Kassak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, and Thomas J. Pavlat, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Peru, Illinois. for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Notices of Contest and Petitions for Assessment of Civil Penalty filed by Empire Iron Mining Partnership against the Secretary of Labor, and by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Empire, respectively, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company contests the issuance to it of two orders and two citations. The Secretary's petitions allege nine violations of the Secretary's mandatory health and safety standards and seek penalties of \$10,054.00. For the reasons set forth below, I approve the parties' settlement agreement, affirm one contested order, vacate three contested citations and assess penalties of \$5,122.00.

A hearing was held on September 3 and 4, 1997, in Marquette, Michigan. The parties also submitted post-hearing briefs in the cases.

Settled orders and citations

At the beginning of the hearing, counsel for the Secretary announced that the parties had settled all but four of the violations. As part of the agreement, the Secretary moved to vacate Citation No. 4537051 in Docket No. LAKE 97-47-M and Citation No. 4537206 in Docket No. LAKE 97-51-M and the motion was granted. (TrI. 14-15.)¹ The parties agreed to reduce the penalty for Citation Nos. 4537187 and 4537188 and Order Nos. 4537189 and 4537190 in Docket No. LAKE 97-50-M, which orders were contested in Docket Nos. LAKE 97-37-RM and LAKE 97-38-RM, from \$7,448.00 to \$3,724.00. (TrI. 15-16.) The parties also agreed to modify Order No. 4537047 in Docket No. LAKE 97-47-M by deleting the "significant and substantial" designation and to reduce the penalty from \$382.00 to \$100.00. (TrI. 16.)

¹ A separate transcript, beginning with page 1, was prepared for each day of the hearing. In this decision, the transcript for September 3 will be referred to as "TrI." and the transcript for September 4 will be referred to as "TrII."

After considering the parties' representations, I concluded that the settlements were appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i), and informed the parties that I would approve the agreement. (Trl. 17.) The provisions of the agreement will be carried out in the order at the end of this decision.

Citation No. 4537093 in Docket No. LAKE 97-41-M, Order No. 4537055 in Docket No. LAKE 97-47-M and Citation Nos. 4537216 and 4537285 in Docket Nos. LAKE 97-39-RM, LAKE 97-53-RM and LAKE 97-69-M were contested at the hearing. The order and citations were tried at the hearing and will be discussed in this decision in the following order: Order No. 4537055, Citation No. 4537216, Citation No. 4537093 and Citation No. 4537285.

Contested Matters

Order No. 4537055, Docket No. LAKE 97-47-M

Order No. 4537055 alleges a violation of section 56.14100(b), 30 C.F.R. § 56.14100(b), of the Secretary's regulations. That regulation requires that: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The machinery at issue in this order is a metal shear used to cut metal plate of various sizes. The parties stipulated that Larry Smith incurred a lost time back injury in an accident that occurred while operating a Pacific metal shear in the fabricating shop on September 10, 1996, and that Marvin Swanson had previously reported back soreness on August 29, 1996, resulting from an incident with the same machine on August 28, 1996. (Trl. 30-31.)

An injury report for the September 10 injury was filed with MSHA on September 23, 1997. Inspector Dominic Vilona conducted an investigation of the incident during a regular inspection of the mine on December 12, 1997. As a result of his investigation, he issued Order No. 4537055. He found that:

The restricted duty back injury that occurred on 9-10-96 was directly related to a defect on the Pacific Metal Shear, serial S10902, located in the fabricating shop. The table of the shear is provided with 17 air operated balls which assist the machine operator when pushing steel in the shear. Larry Smith was trying to feed a 12 foot long, 6 foot wide by 3/4 inch thick plate into the shear with the help of his partner, Gary Waterman. This is when Larry injured his back. At least 8 out of 17 balls were reported inoperative on 8-28-96 when another employee strained his back performing the same work. Foreman Rich Hill engaged in aggravated conduct constituting more than ordinary negligence in that he was aware that their [*sic*] was a problem with the feed assist balls and that employees were operating this machine.

(Govt. Ex. 3.)

In discussing the predecessor to this regulation,² the Commission held that "it is appropriate to evaluate the evidence in light of what a 'reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard.' See, e.g., *Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987); *Quinland Coal, Inc.*, 9 FMSHRC 1614, 1617-18 (September 1987)." *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (September 1990) (*Ideal I*). Applying this test, I find that Empire violated the regulation.

To establish a violation of this regulation, the Secretary must show: (1) that there was a defect in the metal shear; (2) that the defect affected safety; and (3) that the defect was not corrected in a timely manner to prevent the creation of a hazard. It is the Secretary's position that the defect in this case was the failure of 8 of the 17 air lift transfer balls used to assist in positioning steel on the shear to function;³ that the defect affected safety because the non-functioning balls made it hard to move the steel on the shear resulting in the two back injuries; and that the defect was not corrected in a timely manner because the operator was put on notice by the first back injury, if not before, that the defect created a hazard and had not corrected the defect before the second injury occurred. On the other hand, while the Respondent concedes that some of the balls were not functioning, it argues that the defect did not affect safety and that, even if it did, it was corrected in a timely manner.

While there may be some dispute as to exactly how many of the transfer balls were not functioning, there is no dispute that some were not functioning. The Commission has previously held that: "In both ordinary and mining industry usage, a 'defect' is a fault, a deficiency, or a condition impairing the usefulness of an object or a part. *Webster's Third New International Dictionary (Unabridged)* 591 (1971); U.S. Department of Interior, Bureau of Mines, *A Dictionary of Mining, Mineral, and Related Terms* 307 (1968)." *Allied Chemical Corporation*, 6 FMSHRC 1854, 1857 (August 1984). I find that the failure of some of the transfer balls to function impaired the usefulness of the shear. Therefore, I conclude that there was a defect in the metal shear.

² 30 C.F.R. § 56.9002 (1987) provided: "Equipment defects affecting safety shall be corrected before the equipment is used."

³ There are recessed metal balls in two rows across the table of the shear. (Resp. Exs. 4 and 6.) When heavy metal plate is being positioned on the table to be sheared, the balls can be raised to table level by air pressure and as the plate is pushed onto the table, the balls rotate making it easier to move the metal.

Turning to the second element, whether the defect affected safety, I note that the Commission has stated that: "The phrase 'affecting safety' . . . has a wide reach and the 'safety effect of an uncorrected equipment defect need not be major or immediate to come within that reach.'" *Ideal Cement Co.*, 13 FMSHRC 1346, 1350 (September 1991) (citations omitted) (*Ideal II*). The transfer balls purpose was to make it easier to move large pieces of steel onto the shear. The harder it is to move heavy metal on the shear table, the more likely that a back strain or other type of injury could occur. Thus, while there may have been other factors that contributed to the back injuries in this case, such as the floor not being level, I conclude that the defect comes within the "wide reach" set out by the Commission, and was a defect affecting safety.⁴

That leaves the third element, whether the defect was corrected in a timely manner. Empire argues that "timely" does not mean immediately and that it corrected the defect in a timely fashion. The regulations do not define "timely," nor has the Commission had occasion to address this question. However, the dictionary defines "timely" as "done or occurring at a suitable time." *Webster's Third New International Dictionary (Unabridged)* 2395 (1986) (*Webster's*). And the Secretary has indicated that a suitable time depends on the defect:

If safety defects are detected on any equipment, machinery or tools, the required compliance measures vary with the degree of the hazard. The . . . rule requires that all safety defects be corrected in a timely manner and that, in instances where continued use would pose a risk of injury, the correction must be made immediately unless the defective equipment is removed from service and identified as defective. The defective condition must be corrected before the equipment is returned to service.

Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines, 53 Fed. Reg. 32,496, 32,504 (1988) (*Safety Standards*).

Although there is evidence that management was put on notice in the spring of 1996 that some of the transfer balls were not working, the fabrication shop had been moved from town out to the mine during that period and all the equipment had to be erected again. Consequently, it was only shortly before Swanson's injury on August 28, that the shear had resumed operation. Accordingly, I find for the purpose of this decision, that Rich Hill, the fabrication shop foreman, was put on notice on August 29 that there was a defect affecting safety on the metal shear.

⁴ In connection with this conclusion, I find the testimony of Richard Bradley, who had never used the shear, and Ed Tressedder, that the transfer balls were merely a "convenience" inapposite. Likewise, I find the testimony that there may have been other means of getting the plate onto the shear, such as a crane or forklift, not relevant to this determination. The important point is that the balls were part of the machine, and their failure to function could, and did, result in injuries.

Hill initiated an investigation of the incident which was completed on September 4, 1996. The Safety System Final Investigation Report, (Govt. Ex. 5), found that the immediate causes of the injury were "improper handling/loading/placement, improper position for task," that the basic causes were "inadequate capability, inadequate maintenance" and that "Marvin was probably trying to push harder than he is physically capable. Some of the transfer balls which aid the movement of the plate were not working properly which caused more friction, requiring more bull work to move the plate." As preventive action the report indicated that the equipment should be repaired by "repair[ing] transfer balls which are not working."

Hill had only been the foreman of the fabrication shop since March 1996. Prior to that he had never worked in the fabrication shop and he had no training in running the fabrication shop. Although he had determined that the transfer balls had to be repaired, he did not know how to do it. He checked the manual for the shear, but it provided no help. He called the shear manufacturer who in turn told him to call the transfer ball manufacturer. He did not, however, ask any of the shop employees for their input.

Consequently, nothing had been done when Smith's back injury occurred on September 10, 1996. Fortunately, Byron Tosseva, foreman of the welding shop, happened to overhear some of the employees discussing Smith's injury, inquired what had happened, and told the men to "shut the machine down, lock it out and we'll get it fixed." (Tr. 202-03.) Gary Waterman, a fabrication shop employee, figured out how to remove the balls, clean and replace them and the machine was ready to operate the next day. Hill, who still had not received any guidance from either manufacturer,⁵ initiated a work order to account for the machine's down time, describing the work as: "repair transfer balls on Pacific shear. Clean, adjust or replace all the transfer balls." (Resp. Ex. 1.)

Empire asserts that Hill's actions in contacting the manufacturers was reasonable and that he was trying to correct the problem in a timely manner. I do not agree. What he should have done was what Tosseva, who knew no more about the machine than he, did, *i.e.* shut down the machine and repair it. I find Hill's response to the problem simply unreasonable. Not knowing anymore on September 10 than he knew on August 29 he still was able, after Tosseva had acted, to direct that the transfer balls be "cleaned, adjusted or replaced." He could have done the same thing on August 29 or September 4. Accordingly, I find that the defect was not corrected in a timely manner.

Section 56.1 of the regulations, 30 C.F.R. § 56.1, states: "The purpose of these standards is the protection of life, the promotion of health and safety, and the prevention of accidents." I find that a reasonably prudent person familiar with the mining industry and this purpose would have repaired the shear immediately after Swanson reported his injury and the reasons for it on August 29, to prevent a similar injury, and would not have permitted work to continue while he

⁵ He finally received something in January 1997.

waited for guidance from the manufacturer. Therefore, I conclude that Empire violated section 56.14100(b) of the regulations.

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon 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 set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

The inspector found the violation to be S&S because two back injuries had occurred before the shear was repaired. The Respondent argues that the violation is not S&S because the Secretary did not show that the transfer balls were the cause of either injury. While it is true that the evidence does not establish that the failure of the transfer balls to operate was the only cause of the injuries, it does show that it was a contributing cause. Furthermore, since there is no evidence that similar back injuries occurred after the balls were fixed, it appears that they were a significant part of the injuries.

I find that the failure of the transfer balls to operate properly made it reasonably likely that an injury would occur. The parties stipulated Smith suffered lost time due to his injury. Therefore, it is apparent that the injury was reasonably serious. Accordingly, I conclude that the violation was "significant and substantial."

Unwarrantable Failure

The inspector also found that this violation resulted from Empire's "unwarrantable failure" to comply with the regulation. The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable

failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [Emery] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

Empire argues that the violation did not result from an unwarrantable failure because "[g]iven the minor nature of the condition reported by Mr. Swanson, it was appropriate for Mr. Hill to proceed as he did to investigate the proper way to repair the air-assisted balls." (Resp. Br. at 14.) Surprisingly, the Secretary did not question the inspector as to why he found the violation to be an unwarrantable failure, nor did she discuss unwarrantable failure in her brief. Nevertheless, I conclude that this violation resulted from the Company's unwarrantable failure to comply with the regulation.

The nature of the injury makes no difference on this issue. It would be unreasonable to assume that because Swanson's back injury did not require any lost time, that any future back injuries would also be minor. It is the fact of injury that is significant in this case. Swanson's injury put Hill on notice that the defective transfer balls created a hazard for his employees. Because the defect created a hazard, he should have shut the shear down and tagged it out immediately. His nonchalance in not doing so demonstrated an indifference that raises the violation to the level of an unwarrantable failure.

Citation No. 4537216, Docket Nos. LAKE 97-39-RM and LAKE 97-69-M

The No. 2 ore crusher belt is about 2,100 feet long. The belt itself is 60 inches wide and is 43 inches above the surrounding floor. Up near the head of the belt, there are I-beams on either side of the belt, the tops of which are also 43 inches above the floor, extending along the belt for about 30 feet. The top surface of each I-beam is 10 inches wide. The beams are part of the structural steel for the conveyor belt bed.

On February 12, 1997, as part of a regular mine inspection, Inspector Vilona was walking along the No. 2 belt. He observed footprints in the dust on top of one of the I-beams. Based on the footprints, the fact that he was told that repair work was occasionally performed on the belt in that area, and the fact that there were no handrails on the I-beams, he concluded that a violation of section 56.11027 of the regulations, 30 C.F.R. § 56.11027, had occurred. Consequently, he issued Citation No. 4537216, which states: "The belt repair area located at the head end of the 2 belt was not equipped with handrails. The area measures about 30' long 7' wide and 43" high. A 60" wide belt runs down the center. Footprints were observed along the 10" wide steel on each side of the belt. Work is done here a few times a year, 2 men on a crew. Fall hazard."

Section 56.11027 requires, in pertinent part, that: "Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition." The Secretary maintains that the I-beams are working platforms. The Respondent contends that they are not and that, even if they are now found to be, the company did not have adequate notice

that the regulation applied to this area. I find the Secretary has not established that the I-beam was a working platform.

Since the regulations do not define "working platform," the standard must be evaluated under the "reasonably prudent person" test. *Ideal I, supra*. The dictionary defines "platform" as "a horizontal flat surface usu[ually] higher than the adjoining area." *Webster's 1735*. The regulations define "working place" as "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. Therefore, it seems logical that a "working platform" is a "raised, horizontal, flat surface where work is being performed." Applying that definition to this case, it is apparent that the issue is not whether the I-beams were a raised, horizontal, flat surface, but whether work was being performed on them.

Both of the company's witnesses, Gordon Nelson, Maintenance Coordinator, and William Hansard, Safety Coordinator, testified that the I-beam was only used to step onto the belt when belt repairs were performed. They claimed that no work was done while standing or kneeling on the I-beam. The Secretary's witness, Ray Ball, a former plant repairman, was more equivocal. When pressed on the issue, he testified as follows:

Q. Did you ever do work while you were on the I-beam?

A. I think --- like I said earlier, wherever you spotted the belt you might have had to stand on the end of the beam to guide your cooker in underneath the belt.

Q. I thought that when you used the cooker you spotted it ahead of the I-beam?

A. You had the I-beam here and it stopped and then you had an opening where you put your cooker underneath. So if you got it hanging by the crane and you're trying to get underneath here, somebody's standing here trying to wiggle it underneath the crane.

Q. Would that be on the I-beam or in front of the I-beam?

A. Sometimes you're on the I-beam and sometimes you're in front of the I-beam.

(Trl. 322.)

The testimony showed that the cooker to which Ball was referring is used only two or three times a year. Thus, at best, the evidence demonstrates that an employee may or may not stand on the platform two or three times a year to guide the cooker onto the area of the belt being

repaired. In addition, the evidence is that when the cooker is used now, the handrails, installed by the company to abate this violation, have to be removed.

I find that so little, if any, work is done on the I-beam that the I-beam is not a "working platform" within a reasonable interpretation of the regulation. To find that this *de minimis* use of the I-beam makes it a working platform, results in the paradoxical circumstance of the required handrails having to be removed to perform the very function that makes them required. Accordingly, I conclude that Empire did not violate section 56.11027 and will vacate the citation.

Citation No. 4537093, Docket No. LAKE 97-41-M

On Thursday, January 2, 1997, Glenn Wing, a surveyor at the Empire Mine, was coming to work at about 6:30 a.m. While traveling on a two lane, blacktop, access road on mine property, the rear of his car slid while exiting a curve and he collided with a pickup truck driven by an employee at the Tilden Mine. Wing received a few small cuts and a sore back as a result of the accident.

The week previously, the road had been closed because a pipeline had been leaking causing ice to form on the road in the area where the accident occurred. The leak was repaired before the road was reopened and the pipeline was not leaking on January 2.

The night before the accident, it snowed two to three inches. That morning it snowed another ½ inch. Wing described the road conditions as follows: "Basically looked like there had been a fresh snowfall with approximately a half to an inch of snow on the road, and the lanes where the cars had been driving, where the tires had been running was mostly wet with slush on the rest of the roadway." (TrII. 68.)

Inspector Stephen Field was conducting an inspection of the Tilden Mine when he learned of the accident and was instructed by his supervisor to investigate it. He arrived at the accident scene six or seven hours after it had occurred. Based on his investigation, he issued Citation No. 4537093 because:

An employee on his way to work could not maintain control of his vehicle while rounding a corner on the mine access roadway near the Empire pipeline crossing. The employee vehicle slid into the opposite lane colliding with a vehicle traveling in the opposite direction. Two patches of ice, cause by a pipeline leak during the previous week, extended across the roadway in 2 areas near the corner. An accident of this nature has the potential to cause serious injuries to persons involved. Reportedly, there was about 1" of snow, ice and slush on the roadway.

(Govt. Ex. 7.)

The citation initially alleged a violation of section 56.9101 of the regulations, 30 C.F.R. § 56.9101,⁶ but was amended to allege a violation of section 56.11016, 30 C.F.R. § 56.11016, on August 19, 1997.⁷ Section 56.11016 requires that: "Regularly used walkways and travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable." The Secretary argues that the Respondent violated this section because "the ice was not removed from the travelway as soon as was practicable." (Sec. Br. at 24.) However, that is not what the standard requires; the standard requires that if there is snow and ice on a walkway or travelway, the operator may sand it, salt it or clear it as soon as practicable.

In this case, the company elected to salt the road, although the evidence of this is not overwhelming. The inspector, who visited the scene some six or seven hours after the fact, stated, when asked if he could tell whether the roads had been salted, "the roads were bare." (TrII. 30.) Wing testified that: "It appeared because of the melt in the slush that there had been salt on the road. . . . The impression I had was they had salted and it snowed a little bit after."⁸ (TrII. 68, 70.) Steven Laine, the man whose truck Wing hit, had only this to say about salt:

Q. Had you seen a salt truck operating while you were ---

A. No.

Q. --- on the road? Did you see any evidence of salting or sanding?

A. No.

(Tr. 84.) The only other testimony on this issue was from Steven Roberts, Safety Coordinator at the mine, who related: "I believe [Inspector Field] had asked me whether the road had been salted, and I didn't know the answer, so I called our pit area to find out and they had indicated that it had been during the night shift." (TrII. 136-37.)

I find that a preponderance of the credible evidence demonstrates that the company had salted the access road prior to Wing's accident. In making this finding, I am giving no weight to the testimony of Laine on this issue because his "no" answer was not explained and it was

⁶ See discussion of Citation No. 4537285 *infra* for the requirements of this regulation.

⁷ The Respondent's objection to the amendment of the citation was overruled at the hearing. (TrI. 21-28.)

⁸ Wing was not able to verify that he slid on the ice caused by the pipeline leak, which is the theory of the Secretary's case, because he never went back to check on what he had slipped. No one else testified that he had slipped on the ice patch.

apparent from his testimony that he was shading it to support his lawsuit against Wing and the company for this accident. Accordingly, I conclude that instead of violating the regulation, the company complied with it. Consequently, I will vacate the citation.

Citation No. 453285, Docket Nos. LAKE 97-53-RM and LAKE 97-69-M

While driving home from work in his personal vehicle on February 21, 1997, James Beltrame attempted to pass a truck hauling material to the mine when he skidded on ice. His car hit a snow bank and rolled over resulting in his receiving a broken rib and being off work for five days. The road on which this occurred was on mine property. The attempted pass was in a marked no passing zone.

Inspector Field went to the mine to investigate this accident on February 25. After talking to Beltrame and viewing the accident scene, he issued Citation No. 4537286 alleging a violation of section 56.9101 because:

An accident occurred on February 21, 1997 when an employee on his way home from work failed to maintain control of his vehicle on the mine access road. The employee vehicle, while attempting to pass an over-the-road haulage truck, overturned after sliding on ice and striking the snow bank on the opposite side of the road. Consequently, the employee suffered a fractured rib resulting in 5 days lost time and restricted duty. The roadway speed was posted and this accident occurred in a no passing zone.

(Govt. Ex. 9.)

Section 56.9101 provides: "Operators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion. Operating speeds shall be consistent with conditions of roadways, tracks, grades, clearances, visibility, and traffic, and the type of equipment used." The Respondent asserts that this standard does not apply to the operation of personal automobiles used by miners to travel to and from work. I agree.

This is a case of first impression. The Secretary has not cited any cases where a miner has been charged with not maintaining control of his car going to and from work. It appears that there are none. While it seems obvious that this regulation was never intended to apply to a situation such as this, I will examine it under the "reasonably prudent person" test. *Ideal I supra.*

I note first that a personal automobile, by definition, is not owned by the mine operator. Nor was it being used by the miner in the performance of his duties at the mine. Secondly, the standard is found in Subpart H of the regulations, which is entitled "Loading, Hauling, and Dumping." The car was not being used to perform any of these functions. Third, there is no mention in the final rule of these standards that they apply to personal automobiles. *Safety*

Standards, 53 Fed. Reg. 32496 (1988). Finally, there is no evidence in the record that the Secretary has ever, either in her *Program Policy Manual* or by some other means of public notice, interpreted the regulation to include personal automobiles.

Furthermore, as suggested by the Respondent, if a personal automobile is mobile equipment within the meaning of the regulations, it would have to be inspected each shift, 30 C.F.R. § 56.14100(a); the mine operator would have to maintain a record of defects found, 30 C.F.R. § 56.14100(c); it would have to have a service brake system, 30 C.F.R. § 56.14101; it would have to have a backup alarm, 30 C.F.R. § 56.14132; and a warning would have to be sounded before it could be started, 30 C.F.R. § 56.14200. It apparently would not, however, have to have seat belts. Personal automobiles are not listed among the specific types of mobile equipment required to have seat belts installed in them. 30 C.F.R. § 56.14130(a). On the other hand, cars are also not listed among the specific types of mobile equipment exempted from the requirement. 30 C.F.R. § 56.14130(f). Plainly, there was never any intention to include personal automobiles as mobile equipment in the regulations.

Although the Commission has never had occasion to rule on this issue, there have been some cases involving personal automobiles. In *Energy West Mining Company*, 15 FMSHRC 586 (April 1993), the Commission held that an injury sustained in a personal automobile accident on mine property was a reportable injury under section 50.20 of the regulations, 30 C.F.R. § 50.20. The case turned, however, on the definition of reportable injury under the regulation, "any injury to a miner," and not on whether a personal automobile was covered by the regulations.

Two Commission judges have found violations of section 77.404(a), 30 C.F.R. § 77.404(a),⁹ when security guards were asphyxiated while on duty in their personal cars. *Extra Energy, Inc.*, 18 FMSHRC 1489 (Judge Melick August 1996); *Madison Branch Management*, 17 FMSHRC 1257 (Judge Feldman July 1995). In both cases the deaths were caused by defective exhaust systems. In neither case, however, was the issue of whether the regulation applied to personal automobiles addressed. Furthermore, the cases are distinguishable from the instant case in that the personal automobiles were being used by the miners to perform their duties at the mine.

I find that a reasonably prudent person, familiar with the mining industry and the protective purposes of the Act, would not have recognized that section 56.9101 applies to the operation of personal automobiles being driven home from work. Accordingly, I conclude that Empire did not violate section 56.9101 and will vacate the citation.

⁹ Section 77.404(a) provides: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Civil Penalty Assessment

The Secretary has proposed a civil penalty of \$1,298.00 for Order No. 4537055 and the parties have agreed on penalties of \$3,824.00 for the settled order and citations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act. *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483084 (April 1996).

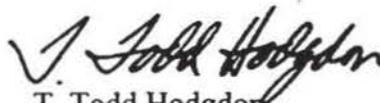
The parties stipulated that Empire worked approximately 1.9 million hours in 1995 and that payment of the proposed penalties will not affect Empire's ability to continue in business. (Trl. 29-30.) With respect to the remaining criteria, since no evidence was presented that the company did not demonstrate good faith in attempting to achieve rapid compliance after notification of the violations, I find that Empire demonstrated good faith in this area. The company's history of violations indicates an average number of prior violations. (Govt. Ex. 1.) Therefore, I find that the Respondent's history of prior violations is neither good nor bad. I find that the gravity of the violation in Order No. 4537055 was relatively serious in that moderately serious injuries occurred as a result of it. I also find the level of negligence for that violation to be high.

Taking all of this into consideration, I conclude that the penalty proposed by the Secretary for Order No. 4537055 and the penalties agreed to by the parties for the settled violations are appropriate. Accordingly, for Docket No. LAKE 97-47-M, I assess penalties of \$100.00 for Order No. 4537047 and \$1,298.00 for Order No. 4537055. For Docket No. LAKE 97-50-M, I assess penalties of \$1,862.00 each for Citation Nos. 4534187 and 4537188.

ORDER

Accordingly, Order No. 4537189 in Docket Nos. LAKE 97-37-RM and LAKE 97-50-M, Order No. 4537190 in Docket Nos. LAKE 97-38-RM and LAKE 97-50-M and Citation Nos 4537187 and 4537188 in Docket No. LAKE 97-50-M are **AFFIRMED**; Citation No. 4537216 in Docket No. LAKE 97-39-RM and Citation No. 4537285 in Docket No. LAKE 97-53-RM, which citations are also included in Docket No. LAKE 97-69-M, are **VACATED**; Order No. 4537047 in Docket No. LAKE 97-47-M is **MODIFIED** by deleting the "significant and substantial" designation and **AFFIRMED** as modified, Order No. 4537055 in Docket No. LAKE 97-47-M is **AFFIRMED** and Citation No. 4537051 in Docket No. LAKE 97-47-M is **VACATED**; Citation No. 4537093 in Docket No. LAKE 97-41-M is **VACATED**; and Citation No. 4537206 in Docket No. LAKE 97-51-M is **VACATED**.

Empire Iron Mining Partnership is **ORDERED TO PAY** civil penalties of **\$5,122.00** within 30 days of the date of this decision. On receipt of payment, these cases are **DISMISSED**.


T. Todd Hodgdon
Administrative Law Judge

Distribution:

R. Henry Moore, Esq., Buchanan Ingersoll, P.C., 301 Grant St., 20th Floor, Pittsburgh,
PA 15219-1410 (Certified Mail)

Christine M. Kassak Smith, Esq., Office of the Solicitor, U.S. Dept. of Labor, 230 S. Dearborn
St., 8th Floor, Chicago, IL 60604 (Certified Mail)

Thomas J. Pavlat Conference and Litigation Representative, MSHA, 2200 Marquette Rd., Suite
110, Peru, IL 61354 (Certified Mail)

/t

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W. 6TH FLOOR
WASHINGTON D.C. 20006-3868

November 18, 1997

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 97-198-M
Petitioner	:	A. C. No. 34-01273-05531
	:	
v.	:	
	:	Drumright Quarry
QUAPAW COMPANY,	:	
Respondent	:	

ORDER TO PETITIONER TO SHOW CAUSE
ORDER TO SUBMIT INFORMATION

This case is before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 815(d).

On September 11, 1997, the Secretary received the operator's notice of contest of civil penalties, a copy of which was filed with the Commission on September 18, 1997, and assigned the above-captioned docket number.

On November 6, 1997, the Solicitor on behalf of the Secretary mailed a petition for assessment of penalty for this case which was received at the Commission on November 10, 1997. There were no attached exhibits to the Solicitor's petition.

Commission rule 2700.28(a), 29 C.F.R. § 2700.28(a), requires the Secretary to file a penalty petition within 45 days of receipt of a contest of a penalty. Filing is effective upon mailing. 29 C.F.R. § 2700.5(d). The petition in this case should have been filed on October 27, 1997. Therefore, it is 10 days late and the Solicitor must explain why his petition was untimely.

Furthermore, Commission rule 2700.28(b) and (c), 29 C.F.R. § 2700.28(b) and (c), requires that the petition list the alleged violations and the proposed penalties, identify each violation by the number and date of the citation or order and the section of the Act or regulations alleged to be violated, and that a legible copy of each citation contested be attached. The penalty petition filed by the Solicitor does not contain this information. Therefore, the petition is incomplete and the Solicitor must provide the requisite information before this case can proceed.

This case is one of an increasing number of recent cases where the Secretary's representatives fail to attach required exhibits to the penalty petitions. These cases involve both Solicitors and CLR's. The Commission's filing requirements are easily understood and well known to the Secretary's representatives. However, the Commission's docket office is spending a great deal of time telephoning the Secretary's representatives to obtain the necessary documents. It is not the Commission's responsibility to continually remind the Secretary's representatives to furnish documentation necessary to perfect filing so that the cases can proceed. Henceforth, show cause orders will be issued in these cases.

In light of the foregoing, it is **ORDERED** that within 21 days the Solicitor show cause why this case should not be dismissed for untimely filing.

It is further **ORDERED** that within 21 days the Solicitor file the necessary information for his penalty petition to fulfill the requirements set forth in the Commission rules or show cause why this case should not be dismissed for inadequate filing.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

James E. White, Esq., Office of the Solicitor, U. S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202

Ed Clair, Esq., Associate Solicitor, Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Suite 420, Arlington, VA 22203

Mr. Robert L. Childress, President, Quapaw Company, P. O. Box 609, Stillwater, OK 74076

/gl