

DECEMBER 2000

COMMISSION DECISION

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

Secretary of Labor, MSHA on behalf of Terry McGill v. U.S. Steel Mining Company,
Docket No. SE 2000-39-DM. (Judge Weisberger, November 22, 2000)

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

Brian T. Christie v. Mountain Spring Coal Company, Docket No. PENN 2000-23-D.
(Judge Melick, November 17, 2000)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 22, 2000

PAMELA BRIDGE PERO :
 :
 v. : Docket No. WEST 97-154-D
 :
 CYPRUS PLATEAU MINING :
 CORPORATION :

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Jordan, Chairman; and Riley, Commissioner

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), Administrative Law Judge August F. Cetti determined that Cyprus Plateau Mining Corporation (“Cyprus”) did not violate section 105(c) of the Act,¹ 30 U.S.C. § 815(c), when it discharged Pamela Bridge Pero from her position as an assistant in its human resources department. 20 FMSHRC 1104, 1117 (Sept. 1998) (ALJ). The Commission granted Pero’s petition for discretionary review challenging the judge’s decision. For the following reasons, we vacate the judge’s decision and remand this matter for further consideration consistent with this decision.

I.

Factual and Procedural Background

Pero started working for Cyprus in 1985 at its mining facility in Price, Utah. Ex. 2 at 1. During the last several years of her employment, she worked as an assistant in its human

¹ Section 105(c)(1) provides in pertinent part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, [or] representative of miners . . . because of the exercise by such miner, [or] representative of miners . . . of any statutory right afforded by this Act.

resources department. 20 FMSHRC at 1107. Her duties included helping to fill out Utah workers' compensation forms and "7000-1" forms for reporting mine accidents, injuries, and illnesses to the Department of Labor's Mine Safety and Health Administration ("MSHA"). *Id.* From the time she was hired until she was terminated, Pero received satisfactory or better performance reviews and was even occasionally rewarded with dinner certificates. *Id.*; Tr. 142-43, 148-49.

Pero testified that she began to suspect Cyprus was falsifying work place injury and illness information on its reporting forms in order to reduce the number of lost days reported. 20 FMSHRC at 1107. She testified that her suspicion was confirmed when she talked about it with her brother who was the safety director of a rival mining company. *Id.* She also testified that Cyprus pressured injured miners to return to work as soon as possible to avoid lost days and that this practice endangered their safety. Tr. 60, 86-90, 109, 212.² Starting in approximately April 1996, Pero discussed her concerns about the forms with Lou Grako, her supervisor and manager of the human resources department, Alan Childs, the new vice president and general manager, and Bill Snyder, the safety director. 20 FMSHRC at 1109; Tr. 109-10, 135, 137.

Cyprus had a three-step disciplinary procedure set forth in its employee handbook. 20 FMSHRC at 1111; Ex. 22. In May 1996, Pero received step 1 discipline for allegedly forging Grako's name on two dinner certificates, one for herself and one for her husband. 20 FMSHRC at 1111. In July 1996, she received step 2 discipline for allegedly failing to inform Grako in a timely manner that she would be off work undergoing surgery for cancer. *Id.* at 1112-13. On September 11, 1996, the day she returned from a six week medical leave for that surgery, Pero received a termination letter from Childs, the third and final disciplinary step. *Id.* at 1113-15; Tr. 156-58. The letter, which relied exclusively on Pero's job performance prior to her medical leave, alleged that, after receiving several days of special training, Pero failed to implement a new reporting system at Cyprus. 20 FMSHRC at 1113-14. It also claimed that she failed to correctly complete I-9 immigration forms, which had been the subject of an Office of Federal Contract Compliance audit in early September 1996. *Id.* at 1114; Ex. 16. Finally, it alleged that Pero told various persons, both employees and non-employees of Cyprus, that Grako was committing illegal acts in his handling of workers' compensation claims. 20 FMSHRC at 1114-15.

Pero initially filed her discrimination complaint with MSHA's field office in Price, Utah, on September 12, 1996, alleging that she was discharged because she complained about "dishonest acts" by Grako. *Id.* at 1105. After conducting an investigation, MSHA concluded

² Injured miners who returned early were sometimes assigned light physical duties such as performing clerical work in the human resources department. Tr. 86-90. In addition, Cyprus offered incentives such as monthly and end-of-year bonuses to miners with no lost time. Tr. 60.

that a section 105(c) violation had not occurred. *Id.* Pero then filed a complaint on her own behalf with the Commission pursuant to section 105(c)(3).³ *Id.* at 1106.

The judge determined that Cyprus did not violate section 105(c) when it discharged Pero. *Id.* at 1117. He “assum[ed] arguendo” that Pero engaged in protected activity and concluded that even if her termination was motivated in part by her protected activity, Pero would have been discharged in any event for her unprotected activity, i.e., her poor work performance as described by Cyprus in the disciplinary action taken against her. *Id.* at 1116-17.

II.

Disposition

Pero argues that the judge erred by requiring that her complaints involve her own safety in order to be protected. P. Br. at 17-20.⁴ She further contends that the judge erroneously excluded relevant evidence of disparate treatment during discovery and at the hearing. *Id.* at 9-10, 14-17, 20. Pero also argues that the judge erred when he found that the reasons given by Cyprus for terminating her were not pretextual. *Id.* at 20-21; PDR at 2-3.

Cyprus responds that the judge did not require that Pero’s complaints involve her own safety in order to be protected. C. Br. at 16-17. It also argues that, because Pero’s complaints only concerned workers’ compensation issues which are not covered by the Act, the judge correctly concluded that her complaints were not protected. *Id.* at 17-32. Cyprus contends that the judge determined correctly that Pero’s termination was in no part motivated by her alleged protected complaints but rather was motivated by legitimate business reasons concerning her poor work performance. *Id.* at 32-40. It also argues that any procedural errors the judge may have made were harmless. *Id.* at 42-46.

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2

³ Section 105(c)(3) provides that “[i]f the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary’s determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).” 30 U.S.C. § 815(c)(3).

⁴ The judge noted that, in Pero’s original complaint filed with MSHA, she did not mention “any safety concerns for herself or anyone else.” 20 FMSHRC at 1116 (emphasis supplied). We therefore conclude that, contrary to Pero’s assertion, the judge did not require that Pero’s complaints involve her own safety in order to qualify as protected activity.

FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

Although the judge stated that he was “assuming arguendo that Pero engaged in protected activity” (20 FMSHRC at 1116), the evidence in the record as a whole supports that same conclusion. For example, Pero testified that she told Snyder, the safety manager, and Grako, her supervisor, that Cyprus was making illegal reports concerning lost days. Tr. 94-95, 188-90, 233. She testified that she told them that the company’s policy of giving injured miners a day to go to a doctor but not reporting it as a lost day violated MSHA requirements.⁵ Tr. 93-95, 188-90. She also testified that she told Childs, the new vice president and general manager, about safety issues relating to illegal reporting. Tr. 101, 231. No remand is necessary for a substantial evidence determination because company officials confirmed these reports. Snyder testified that Pero talked to him about “illegal MSHA reporting” and that he was aware of her concerns about the company’s use of a doctor’s day to avoid lost days. Tr. 498-99. Childs testified that Pero informed him about illegal reporting activities at the company involving MSHA and about “improper representation in the filing [of] MSHA . . . issues.” Tr. 388, 454, 458.

Section 105(c) of the Mine Act protects a miner who makes “a complaint under or related to [the] Act.” 30 U.S.C. § 815(c). Accurate reporting of lost days on MSHA 7000-1 forms relates to the reporting requirements of section 103(d) of the Act. 30 U.S.C. § 813(d). Section 103(d) requires operators to keep accident records and that such reports must “include man-hours worked.” *Id.* It is also important to note that one of the purposes of the reporting requirements under 30 C.F.R. Part 50 is to allow MSHA “to identify those aspects of mining which require intensified attention with respect to health and safety regulation.” 42 Fed. Reg. 55,568, 55,568 (1977). Falsification of information on MSHA 7000-1 forms concerning lost days could negatively impact the allocation of agency resources to protect the safety and health of miners.

⁵ Section 50.20-7 requires reporting mine accidents, injuries, and illnesses on MSHA 7000-1 forms and states in pertinent part:

(c) Item 30. Number of days away from work. Enter the number of working days, consecutive or not, on which the miner would have worked but could not because of occupational injury or occupational illness. The number of days away from work shall not include the day of injury or onset of illness or any days on which the miner would not have worked even though able to work. If an employee loses a day from work solely because of the unavailability of professional medical personnel for initial observation or treatment and not as a direct consequence of the injury or illness, the day should not be counted as a day away from work.

30 C.F.R. § 50.20-7.

Pero's allegations about falsification of lost days information on MSHA 7000-1 forms therefore relate to safety and health issues, as well as the requirements of section 103(d) of the Mine Act, and are thus protected under section 105(c).⁶

The record also indicates that Cyprus knew about Pero's protected activity and discharged her, at least in part, because of that activity. Snyder and Childs both testified that Pero told them about alleged illegal reporting activities involving MSHA. Tr. 388, 454, 498-99. The Commission noted in *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983), that the operator's knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case." There is also close temporal proximity between Pero's protected activity and her termination. Pero worked for Cyprus for eleven years and received satisfactory or better performance evaluations. 20 FMSHRC at 1107; Tr. 50-51. However, after starting to make protected complaints in April 1996, she received her first disciplinary warning in early May and was discharged within the next four months. 20 FMSHRC at 1111-13; Tr. 137. This uncontradicted record evidence of protected activity, employer knowledge of that activity, adverse action, and a close temporal proximity between protected activity and adverse action established a motivational nexus sufficient to make out a prima facie case of discrimination.

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also E. Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

In *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982), the Commission enunciated several indicia of legitimate non-discriminatory reasons for an employer's adverse action. These include evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question. *Id.* The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley*, 4 FMSHRC at 993.

⁶ We disagree with Cyprus' argument that Pero's complaints were not protected because she did not voice safety or health concerns when making complaints about false MSHA reporting. C. Br. at 22-32. There is no requirement that complaints must include explicit statements about specific safety or health hazards in order to be protected. So long as her complaints reasonably related to the safety and health of miners under the Act, they were protected. 30 U.S.C. § 815(c)(1).

The Commission has held that “pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator’s normal business practices.” *Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

Pero’s challenge to the judge’s acceptance of Cyprus’ business justification is based on his exclusion of certain evidence that is argued by Pero to illustrate disparate treatment. When reviewing a judge’s evidentiary ruling, the Commission applies an abuse of discretion standard. *See In Re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1873-75 (Nov. 1995) (applying an abuse of discretion standard to judge’s exclusion of testimony during trial), *aff’d on other grounds sub nom Sec’y of Labor v. Keystone Coal Mining Corp.* 151 F.3d 1096 (D.C. Cir. 1998). Abuse of discretion may be found when “there is no evidence to support the decision or if the decision is based on an improper understanding of the law.” *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (Feb. 1997) (citing *Utah Power & Light Co., Mining Div.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991)) (emphasis added).

During the hearing, Pero’s counsel attempted to offer evidence of Cyprus’ treatment of other employees who had violated company rules or caused costly errors. Tr. 196-99. Following an objection by Cyprus on relevancy grounds, the judge sustained the objection, thereby preventing that testimony from entering the record. Tr. 196, 201. In an offer of proof at the hearing as to what Pero wanted to testify to, her counsel described a number of violations and errors made by miners who were not discharged by Cyprus for their actions.⁷ Tr. 199-201. The judge sustained Cyprus’ relevancy objection based on his determination that the actions of the other employees were not sufficiently related to Pero’s case, which he characterized as involving “filling out forms.” Tr. 198-99, 201.

Commission Procedural Rule 63(a) states that “[r]elevant evidence . . . that is not unduly repetitious or cumulative is admissible.” 29 C.F.R. § 2700.63(a). Although the Commission has not defined “relevant evidence,” it is defined in Rule 401 of the Federal Rules of Evidence⁸ as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The federal courts have viewed Rule 401 as having “a low threshold of relevancy.”

⁷ These included: (1) tampering with a respirable dust sample which resulted in a section 110 MSHA investigation, an MSHA fine, lost production, and bad publicity; (2) making a major engineering error which cost Cyprus a large amount of money and later damaging a vehicle by driving too fast; (3) causing Cyprus to receive an MSHA fine for a roof control violation; (4) removing too much bottom and top coal that cost Cyprus thousands of dollars to correct; (5) using foul language and being abusive during a job interview; and (6) making numerous mistakes over a period of many years. Tr. 199-201.

⁸ “While the Federal Rules of Evidence may have value by analogy, they are not required to be applied to [Commission] hearings” by the Mine Act or Commission procedural rules. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1136 n.6 (May 1984).

In Re: Paoli R.R. Yard PCB Litig., 35 F.3d 717, 782-83 (3d Cir. 1994); *see also Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 109-10 (3rd Cir. 1999) (“Rule 401 does not raise a high standard.”).

By using an overly narrow relevancy standard that required the examples to be nearly identical to Pero’s alleged misconduct, the judge excluded evidence probative of whether Cyprus treated Pero differently from other similarly situated employees. Such evidence is relevant to the question of whether Cyprus’ business justification is valid or pretextual.⁹ *See Bradley*, 4 FMSHRC at 993; *Price*, 12 FMSHRC at 1534. For example, Pero’s termination letter stated that she was discharged in part because her accusations led to a costly investigation. 20 FMSHRC at 1115. Several of the excluded examples dealt with employees who allegedly made costly mistakes but who were not discharged.

Our dissenting colleague, Commissioner Verheggen, would uphold the judge’s ruling prohibiting Pero from introducing evidence she believes is relevant to the issue of disparate treatment, and cites *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995) as somehow supportive of the exclusion of such evidence. Slip op. at 22, 25. In *Neuren*, however, there was no question that the plaintiff’s evidence of disparate treatment was admissible. Rather, the question was whether the evidence was sufficient to *establish* disparate treatment. *See Neuren*, 43 F.3d at 1514 (reviewing evidence admitted at trial and agreeing that it “fails to demonstrate disparate treatment”). The question of whether Pero can establish disparate treatment can only be decided *after*, like the plaintiff in *Neuren*, she is permitted to put on evidence of disparate treatment. In the absence of authority to do so, we will not apply *Neuren* to an offer of proof, which is designed to provide only the general tenor of the evidence to be offered. 1 *McCormick on Evidence* § 51, at 218 (John W. Strong ed., 5th ed. 1999).¹⁰

⁹ We thus agree with Commissioner Beatty that the focus of this case should be on Cyprus’ affirmative defense and “whether or not the judge was correct in finding that Cyprus’ business justification was not pretextual.” Slip op. at 14-15.

¹⁰ Our dissenting colleague makes much of the lack of record evidence regarding the similarity between Pero’s job and those of the other employees. Slip op at 23-25. Because the judge prevented Pero from introducing such evidence, it is decidedly premature to hold such distinctions against her at this point. Nor is there merit to our dissenting colleague’s suggestion that Pero’s offer of proof was deficient because it failed to indicate “*why the evidence is logically relevant.*” Slip op. at 25 (quoting 1 *McCormick on Evidence* § 51, at 218) (emphasis added). Although the claimed relevance of the proffered evidence is readily apparent from the very excerpt of the offer of proof cited by Commissioner Verheggen (*id.* at 23-24), in that it refers to other employees who engaged in serious misconduct or committed costly errors and were not terminated, Pero’s counsel also expressly explained: “An employee can put on evidence of disparate treatment to show that the Company is singling him or her out in comparison to other employees. This goes to the issue of whether the Company would have fired him or her for nonprotected activity.” Tr. 196-97. He also indicated that Pero would testify about the actions of

A finding of disparate treatment, however, need not, as the dissent suggests, be restricted to only circumstances where other employees have engaged in the same improper conduct or combination of misdeeds as the alleged discriminatee and held a similar job (slip op. at 25-26). It has been recognized that, in analyzing a claim of disparate treatment under traditional employment discrimination law, “precise equivalence in culpability between employees” is not required. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976). Rather, the plaintiff must simply show that the employees were engaged in misconduct of “comparable seriousness.” *Id.* The dissent’s overly restrictive interpretation of what is required to establish disparate treatment, like the judge’s flawed analysis in evaluating Pero’s claim, would seriously constrain, if not eliminate, this important component of discrimination analysis. Consequently, we decline to adopt such a narrow approach to the admission of evidence proving disparate treatment, and would not require that such evidence involve the same type of misconduct, or misconduct by someone with a similar position as the complainant.

Furthermore, in *Chacon*, 3 FMSHRC at 2508 (relied on by the dissent), and subsequent cases, the Commission has repeatedly made clear that the misconduct being compared need not be identical. See *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 16 (Jan. 1984). We recently reaffirmed that “it is incumbent on the complainant to introduce evidence showing that another employee guilty of the same *or more serious* offenses escaped the disciplinary fate suffered by the complainant.” *Dreissen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 332 n.14 (Apr. 1998) (citing *Chacon*, 3 FMSHRC at 2512) (emphasis added).

The concept of permitting comparisons between different types of employee misconduct is consistent with analogous case law under the National Labor Relations Act (“NLRA”), 29 U.S.C. § 141 et seq.¹¹ For example, in *Ferland Management Co.*, 233 NLRB 467 (1977), when an employee complained that his discharge for failing to report that he was absent due to illness was actually motivated by his union activities, the National Labor Relations Board (“NLRB”) held that the asserted reasons for discharging the employee were pretextual. Its analysis of the employee’s pretext argument included a review of the employer’s records which revealed that offenses such as “loafing on the job, checking in early, sleeping on the job, nonreported absences, refusal to wear company uniforms, the use of abusive language to tenants, repeated horseplay on

other employees “that cost the Company hundreds of thousands of dollars, millions of dollars . . . and no disciplinary action [was] taken.” Tr. 197. Since the judge denied the admission of this evidence strictly because the misconduct of the other employees was not precisely the same as that attributed to Pero, i.e., “filling out forms” (Tr. 198), any other issues relating to the sufficiency of Pero’s offer of proof regarding the evidence of disparate treatment she sought to introduce are not properly before us.

¹¹ We have often looked to case law interpreting similar provisions of the NLRA in resolving questions about the proper construction of Mine Act provisions. *Berwind Natural Res. Corp.*, 21 FMSHRC 1284, 1309 (Dec. 1999); *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-43 (Dec. 1990).

the job, use of company property for personal gain, and drinking on the job, all occasioned only a warning for the employee concerned until a number of these occurrences accumulated.” *Id.* at 475. Clearly, the NLRB did not restrict its analysis to misconduct identical to that of the alleged discriminatee.

In *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998), the Sixth Circuit explained why it is advisable to eschew rigid categories in making these types of comparisons. There the court reversed a district court’s conclusion that the plaintiff failed to identify one or more similarly-situated employees outside the protected class who received more favorable treatment, because the individuals with whom he sought to compare his treatment did not perform the same job activities.¹² It emphasized that “[c]ourts . . . should make an independent determination as to the relevancy of a particular aspect of the plaintiff’s employment status and that of the non-protected employee. The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered ‘similarly-situated’” *Id.* at 352. The Sixth Circuit reasoned that a bright-line rule

that requires the plaintiff to demonstrate that he or she was similarly-situated in every aspect to an employee outside the protected class receiving more favorable treatment removes from the protective reach of the anti-discrimination laws employees occupying ‘unique’ positions, save in those rare cases where the plaintiff produces direct evidence of discrimination. . . . [I]f the non-protected employee to whom the plaintiff compares himself or herself must be identically situated to the plaintiff in every single aspect of their employment, a plaintiff whose job responsibilities are unique to his or her position will *never* successfully establish a prima facie case (absent direct evidence of discrimination). . . . Thus, under the district court’s narrow reading of *Mitchell*, an employer would be free to discriminate against those employees occupying “unique” positions. . . . A contrary approach would undermine the remedial purpose of the anti-discrimination statutes.

¹² In *Ercegovich*, the plaintiff (a quality systems coordinator who trained retail managers) claimed that, due to age discrimination, he, unlike two younger employees, was not offered a transfer when his job was eliminated. 154 F.3d at 348, 350. One of the other employees was the manager of human resources, to whom Ercegovich’s supervisor reported. *Id.* at 348-49. The Court found that he was similarly situated to Ercegovich, despite the fact that they clearly did not share the same supervisor. *Id.* at 353.

Id. at 353 (emphasis in original).¹³

The dissent's narrow view regarding the relevant aspects of a disparate treatment analysis (slip op. at 25-26) could conceivably lead to the consequences foreseen by the *Ercegovich* court. This is particularly true in a small mining operation, where comparison to identical acts of misconduct or to employees in similar job categories may be difficult if not impossible. It could even be problematic in a large mining operation, as demonstrated by this case, in which there were a limited number of clerical employees with whom to make comparisons to Pero.¹⁴

Moreover, the dissent's reference to the *Mitchell* "same supervisor" test (slip op. at 21-22)¹⁵ is particularly troublesome given that the entire workforce at Cyprus was subject to an established three-step disciplinary procedure. 20 FMSHRC at 1111; Ex. 22. See *Petsch-Schmid v. Boston Edison Co.*, 914 F. Supp. 697, 705 n.17 (D. Mass. 1996) (disagreeing with the *Mitchell* "same supervisor" test where corporation instituted company-wide standards of discipline intended to provide guidance to all supervisors).¹⁶

¹³ In *Ercegovich*, the Court held that the district court, by insisting on a "same job" requirement, applied an overly narrow reading of *Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992). 154 F.3d at 352. The Sixth Circuit emphasized that

[c]ourts should not assume . . . that the specific factors discussed in *Mitchell* are relevant factors in cases arising under different circumstances, but should make an independent determination as to the relevancy of a particular . . . status and that of the non-protected employee. The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered 'similarly-situated'

Id.

¹⁴ Commissioner Verheggen suggests that Shirley Tucker-Spears is the only employee "even remotely similarly situated to Pero." Slip op. at 25. His observation, however, that she is another clerical employee who was not discharged, despite raising similar concerns to Cyprus management, is only partly correct. Although Tucker-Spears testified that she communicated her concerns about Cyprus' policies regarding injured miners to management (Tr. 378), the record does not indicate that she voiced such concerns with the same intensity or frequency as did Pero.

¹⁵ The dissent quotes *Mitchell*, 964 F.2d at 583, which requires individuals to have "the same supervisor . . . same standards *and* . . . same conduct" in order to be similarly situated (emphasis added).

¹⁶ We note that the court in *Petsch-Schmid*, a case involving a state law discrimination claim based on the termination of a human resources administrator for poor job performance and a verbal threat, denied the employer's motion for summary judgement on the plaintiff's disparate

The dissent also appears to require that any example cited by Pero must include an employee who has engaged in a combination of actions identical to her own. Slip op. at 25. This prerequisite further limits the disparate treatment analysis, and would essentially deprive almost every complainant accused of more than one act of misconduct of a disparate treatment defense. This is because, as difficult as it may be to find an employee who has engaged in one identical act of misconduct (particularly at a small mining operation) the chances become even slimmer — and eventually non-existent — if the complainant is accused of two or more transgressions (which is quite likely to occur in mines, like this one, with progressive disciplinary policies). See *Busby v. City of Orlando*, 931 F.2d 764, 781 (11th Cir. 1991) (airport security officer fired for several cumulative acts was permitted to introduce evidence of disparate treatment regarding her individual acts of misconduct).¹⁷

Commissioner Verheggen expresses concern that if the evidence at issue is admitted, we will somehow be embarking on an “unworkable” approach in disparate treatment cases. Slip op. at 28. Of course, if one needs to compare the seriousness of two acts of employee misconduct, it is admittedly easier to do so if the two employees held similar jobs and performed the same misdeed. However, the varied size and nature of today’s workplace makes such a scenario more and more uncommon.

Unlike our dissenting colleague, we are confident in the ability of our judges to compare different offenses or those committed by employees in different jobs. For example, a judge could determine that a shop mechanic terminated for unintentionally damaging equipment was treated more severely than a roof bolter who smuggled smoking materials into an underground mine and was only given a written warning. As long as sufficient record evidence is presented providing adequate details concerning such incidents, our judges can certainly evaluate these types of claims in deciding whether the rationale for firing a miner was pretextual. See *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1261 (10th Cir. 1988) (“The fact that these other employees did not commit the exact same offense as [the plaintiff] does not prohibit consideration of their testimony.”).

treatment claim. 914 F. Supp. at 702, 704. The workers with whom the plaintiff compared herself did not have the same supervisor and had not threatened their supervisors. *Id.* at 704. The court permitted a comparison between the plaintiff and other employees with work problems “at least as severe” as those attributed to the plaintiff, including one held accountable for a serious power outage. *Id.* at 704-05.

¹⁷ Our dissenting colleague relies on a statement in Justice Scalia’s dissenting opinion in *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 601 (1997), to support his unduly narrow view of disparate treatment analysis. See slip op. at 21 n.5. We fail to see the relevance here of the opinion of a single dissenting Justice in a case involving not employment discrimination (for which there is copious law to apply), but the wholly unrelated subject of the validity of a state property tax exemption.

Applying the concept of “comparable seriousness” to the allegations contained within Pero’s offer of proof, we find the offer includes allegations that other employees had engaged in misconduct at least as serious as that of Pero. For example, in response to Cyprus’ evidence that Pero made a number of work errors, she offered to show that at least two other employees were not terminated by Cyprus even though they made repetitive and serious mistakes that were costly to the company. Tr. 199-201. More importantly, Pero intended to show that a Cyprus employee was not discharged despite tampering with a respirable dust sample in plain view of other miners (Tr. 199), certainly a serious infraction. See 30 C.F.R. §§ 70.209(b), 71.209(b) (MSHA regulations prohibiting dust sample tampering).¹⁸ Because the judge failed to admit evidence regarding the details of these other incidents, we cannot agree with our dissenting colleague that none of the examples Pero cited “came even close to approximating” the conduct purportedly relied upon to discharge Pero. Slip op. at 25.

Accordingly, we conclude that the excluded evidence is probative of the plausibility of Cyprus’ business justification, and that the judge abused his discretion by excluding evidence that directly relates to Pero’s pretext argument.¹⁹ In light of our conclusion, we find that the judge did not adequately evaluate Cyprus’ rebuttal case or affirmative defense. In addition, we are troubled by the judge’s overly terse analysis of Cyprus’ defenses, and his wholesale adoption of the business justification without explaining his conclusion that Cyprus’ reasons were not pretextual. See *Bradley*, 4 FMSHRC at 993. We therefore vacate the judge’s decision and remand to permit Pero to adduce the additional evidence in her offer of proof concerning Cyprus’ treatment of other employees who violated company rules or caused costly mistakes, and for further consideration of Cyprus’ rebuttal argument and affirmative defense.

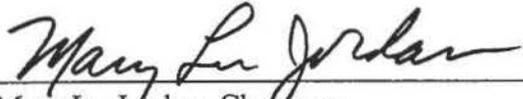
¹⁸ See also *Consolidation Coal Co.*, 8 FMSHRC 890, 895-97 (June 1986) (unambiguous goal of Mine Act is to prevent pneumoconiosis and other occupationally-related diseases), *aff’d*, 824 F.2d 1071 (D.C. Cir. 1987).

¹⁹ In an analogous context, the Eighth Circuit has held that “[t]he effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer’s account of its own motives.” *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1102-04 (8th Cir. 1988) (holding that lower court erred in discrimination case by excluding evidence of employer’s past practice of race and age bias).

III.

Conclusion

For the foregoing reasons, we vacate the judge's determination that Cyprus did not discriminate against Pero and remand to the judge for further consideration consistent with this opinion.



Mary Lu Jordan, Chairman



James C. Riley, Commissioner

Commissioner Beatty, concurring:

Although I agree with the majority's decision to vacate and remand this matter, I write separately to offer an analysis of this case that focuses on a different question than that discussed by my colleagues. In both the majority and dissenting opinions, my colleagues, by the cases they cite, appear to be fixated on the correct standard to be used in determining what evidence is admissible to establish a prima facie case of discrimination in a disparate treatment case. Although the judge's analysis in the instant case is anything but a model of clarity, it appears from his discussion of the reasons offered by the operator for the discharge and his finding that Cyprus "would have taken the adverse action in any event on the basis of Pero's unprotected activity alone" (20 FMSHRC 1104, 1117 (Sept. 1998) (ALJ)), that he did find that Pero established a prima facie case of discrimination and that the operator had affirmatively defended the case.¹ Accordingly, to decide this case, the focus should not be on reevaluation of the prima

¹ While Commissioner Verheggen takes issue with my reading of the judge's decision (slip op. at 19), I suggest that a comprehensive reading of the language used by the judge on the issue of motivation clearly establishes the judge's intentions on this crucial issue. For purposes of clarity, I offer the judge's complete findings on this point:

I find that the preponderance of the evidence established that Pero was discharged for her unprotected activity alone. The reasons for her discharge stated in the [termination notice] are not *pretext* and are supported by the record.

* * *

The record clearly demonstrates that the reasons given by the employer for the adverse action were not "*plainly incredible or implausible*." I conclude and find that the stated reasons for the adverse action taken by Cyprus were not *pretextual*.

20 FMSHRC at 1116, 1117 (emphasis added).

Beyond the obviousness of the judge's intentions in the above-reference paragraph, it is also important to note that he buttressed his findings in language taken directly from Commission decisions that evaluated an operator's affirmative defense. See *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937 (Nov. 1982) ("Once it appears that a proffered business justification is not *plainly incredible or implausible*, a finding of pretext is inappropriate.") (quoting *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983)) (emphasis added). If the judge found that Pero had failed to establish a required element of her prima facie case, as Commissioner Verheggen contends (slip op. at 19), why did he bother to take the added step of analyzing Cyprus' business justification, and make an explicit finding that its explanation was not pretextual? While the

facie case, but instead on determining whether or not the judge was correct in finding that Cyprus' business justification was not pretextual. *Id.* at 1116-17.

I begin with the language routinely cited in Commission discrimination decisions that provides the framework for analyzing Mine Act discrimination cases. As set forth by the majority in its opinion:

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

* * *

[Once the miner makes a prima facie case of discrimination, t]he operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may *defend affirmatively* by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also E. Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

Slip op. at 3-4, 5 (emphasis added).

While the *Paula/Robinette* test has been an effective tool in providing a framework from which to begin the section 105(c) discrimination analysis, it appears that recent decisions have taken a "learn by rote" approach to the test, offering little in the way of analytical guidance for resolving particular factual situations. This case provides a clear example of this phenomenon since the judge failed to recognize or analyze this case as a "mixed motive" discrimination case. *See Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). As a result, the judge erred by

judge's section 105(c) analysis is somewhat muddled, one thing is certain — he clearly conducted an evaluation of Cyprus' affirmative defense, a step that occurs only when a prima facie case of discrimination has been established.

failing to follow established Commission case law regarding the burdens placed on the litigants, and the affirmative duty placed on the judge to consider not only evidence offered to establish the defense, but also evidence offered by the complainant to refute it.

Under the *Pasula/Robinette* test, if an operator cannot *rebut* the prima facie case it is left with no other option than to affirmatively defend the charge of unlawful discrimination. In so doing, the operator essentially argues that the adverse action was motivated by the miner's unprotected activities and that it would have taken the adverse action against the miner for the unprotected activities alone. In a mixed motive case, the burden is on the operator to "prov[e] by a preponderance of *all* the evidence that . . . he would have taken the adverse action against the miner in any event for the unprotected activities alone." *Pasula*, 2 FMSHRC at 2799-2800 (emphasis added). On this issue, "the *employer* must bear the ultimate burden of persuasion." *Id.* at 2800 (emphasis added). Ordinarily, operators will attempt to meet this burden by showing, for example, "past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley*, 4 FMSHRC at 993.

This is, however, not the end of the inquiry in the mixed motive analysis. While the initial burden is placed on the operator, Commission case law makes it abundantly clear that the *ultimate* burden of persuasion remains with the complainant. *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 16 (Jan. 1984). Simply stated, the complainant has a burden to produce evidence designed to refute the operator's affirmative defense by showing that the affirmative defense offered by the operator is merely pretext and not the true reason for the adverse action. This can be accomplished by showing, among other things, that the adverse action would not have been taken in any event for such unprotected activities alone. *Robinette*, 3 FMSHRC at 818 n.20.

In cases where the Commission has examined these burdens, we have held that an affirmative defense should not be "*examined superficially or be approved automatically once offered.*" *Haro*, 4 FMSHRC at 1938 (emphasis added). It is the operator's burden to show that its justification is credible and that it would have moved the operator to take the adverse action against the miner. *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). Therefore, Commission judges must closely scrutinize the merits of an operator's evidence because "[i]t is not sufficient for the employer to show that the miner *deserved* to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, [it should] not [be] consider[ed]" *Pasula*, 2 FMSHRC at 2800 (emphasis added). We have stated that "pretext may be found . . . where the [operator's] asserted justification is weak, implausible, or *out of line with the operator's normal business practices.*" *Price*, 12 FMSHRC at 1534 (emphasis added).

In the instant case, Cyprus' termination letter indicates that Pero was discharged in part because her accusations led to a costly investigation. *See* 20 FMSHRC at 1115. In an attempt to refute Cyprus' affirmative defense, Pero's counsel attempted to introduce evidence during the

hearing to illustrate how Cyprus dealt with other employees who had violated company rules or caused costly errors. Tr. 196-99. Cyprus' counsel objected to this evidence on relevancy grounds, and the judge sustained the objection stating that the actions of the other Cyprus employees were not sufficiently related to Pero's case, which he characterized as involving "filling out forms." Tr. 198-99, 201.

Following the judge's ruling, Pero's counsel vouched the hearing record by providing an offer of proof that related to the following actions by other Cyprus employees: (1) tampering with a respirable dust sample which resulted in a section 110 MSHA investigation, an MSHA fine, lost production, and bad publicity; (2) making a major engineering error which cost Cyprus a large amount of money and later damaging a vehicle by driving too fast; (3) causing Cyprus to receive a MSHA fine for a roof control violation; (4) removing too much bottom and top coal that cost Cyprus thousands of dollars to correct; (5) using foul language and being abusive during a job interview; and (6) making numerous mistakes over a period of many years. Tr. 199-201. Pero's counsel further noted that in none of the aforementioned situations were the employees discharged by Cyprus for their transgressions. Tr. 199-201.

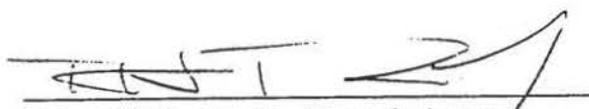
If we employ the analysis set forth in our case law involving mixed motive cases, the key issue presented here becomes: was the evidence offered by Pero's counsel something the judge should have admitted and *considered* in the course of carrying out his duty to evaluate the plausibility of Cyprus' affirmative defense. In answering this question, it is important to reemphasize that the judge's obligation is to ascertain whether or not Cyprus' actions were "weak, implausible, or *out of line with the operator's normal business practices.*" *Price*, 12 FMSHRC at 1534 (emphasis added). As we stated in *Pasula*, 2 FMSHRC at 2800, if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, it should not be considered. The only way the judge could make a reasoned assessment of whether or not Cyprus' asserted justification for the termination of Pero was "out of line with the operator's normal business practices" would be to compare Pero's discharge with the discipline meted out to the other Cyprus employees whose transgressions, regardless of job classification, also led to costly investigations.

I find nothing in my review of the Commission's case law, discussing the judge's role in this stage of the mixed motive analysis, that places restrictions on the evidence considered by our judges of the type arising under Title VII case law that is discussed by my colleagues in their analysis of this case.² While I agree with my dissenting colleague that a "rule of reason" should apply with respect to types of evidence that may be offered by complainants to refute the operator's affirmative defense (slip op. at 27), I believe that any such limitation should be firmly

² As my colleagues in the majority recognize, the Eighth Circuit has held in an analogous context, that "[t]he effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives." Slip op. at 12 n.19 (quoting *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988)).

grounded in objective standards governing the relevancy of evidence. Although the Commission has not defined “relevant evidence,” it is defined in Rule 401 of the Federal Rules of Evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401. In my view, the evidence referred to in Pero’s offer of proof concerning costly errors by other employees who were not discharged clearly satisfies this standard of relevance in determining whether the discharge of Pero was “out of line with the operator’s normal business practices” (*Price*, 12 FMSHRC at 1534), and therefore should have been admitted and considered by the judge.

Accordingly, it is my conclusion that the judge abused his discretion by his wholesale exclusion of evidence offered by Pero that may have been relevant in evaluating the plausibility of Cyprus’ affirmative defense. I would therefore vacate the judge’s decision and remand with instructions to the judge to treat this case as one involving mixed motive and, in the context of this analysis, allow Pero to adduce the additional evidence referred to in her offer of proof as a means of attempting to refute Cyprus’ affirmative defense.³


Robert H. Beatty, Jr., Commissioner

³ I disagree with Commissioner Verheggen’s assertion that my view of this case is “inconsistent” with that taken by Chairman Jordan and Commissioner Riley in their separate opinion, with which I concur. Slip op. at 28-29. To the contrary, I agree entirely with the result reached by my other colleagues — that is, to vacate the judge’s decision and remand with instructions to allow Pero to adduce the additional evidence referred to in her offer of proof, concerning other employees who violated company rules or committed costly mistakes, and to consider such evidence in further evaluating Cyprus’ rebuttal argument and affirmative defense. I write separately only to explain that I reached this result by a slightly different route, relying only on Commission discrimination law and not on the Title VII disparate treatment analysis.

Commissioner Verheggen, dissenting:

I find that substantial evidence¹ supports the judge's conclusion that Cyprus Plateau Mining Corporation ("Cyprus") did not violate section 105(c) of the Act, 30 U.S.C. § 815(c), when it discharged Pamela Bridge Pero. I would affirm the judge's decision, and therefore I respectfully dissent.

As a threshold matter, I note that it is not as clear to me as it apparently is to the Chairman and Commissioner Riley (whose opinion I will hereinafter refer to as the "plurality opinion" to distinguish it from the concurrence of Commissioner Beatty) that the record evidence compels a finding that Pero engaged in protected activity.² Slip op. at 4. At trial, Pero ascribed Cyprus' treatment of her to a variety of non-safety-related causes, i.e., the personality of her supervisor, the management style in the office, and management's reaction to a sexual harassment complaint she filed against Cyprus' vice-president and general manager. 20 FMSHRC 1104, 1107-08 (Sept. 1998) (ALJ). The judge clearly questioned the legitimacy of Pero's complaint, declining to "credit the sincerity or reasonableness of her safety concerns." *Id.* at 1116. A judge's credibility determinations are normally entitled to great weight. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

Commissioner Beatty goes even further than the plurality opinion and concludes that the judge found "that Pero established a prima facie case of discrimination." Slip op. at 14. To the contrary, the judge explicitly ruled that "Cyprus[,] in terminating Pero's employment[,] was motivated by Pero's unprotected activity and would have taken the adverse action in any event on the basis of Pero's unprotected activity alone." 20 FMSHRC at 1117. In other words, the judge found that Pero failed to prove one of the elements of her prima facie case, that Cyprus was motivated in any part by her purported protected activity.

¹ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

² My colleagues base this conclusion in part on Pero's testimony. According to the majority, Pero testified that she told management that "the company's policy of giving injured miners a day to go to a doctor but not reporting it as a lost day violated MSHA requirements." Slip op. at 4. But while Pero did testify she had "problems" with the reporting policy and thought it was wrong (Tr. 189-190), she never testified that she knew at the time that it violated MSHA's requirements. *See* Tr. 94 (Pero testifying as to her knowledge of MSHA regulations at the time of the hearing).

Nonetheless, I am prepared to assume, as the judge did, that Pero at least engaged in protected activity. The judge concluded that “Pero was discharged for her unprotected activity alone.” *Id.* at 1116. He stated that Cyprus’ reasons for terminating Pero were “not a pretext” and that Cyprus “would have taken the adverse action in any event on the basis of Pero’s unprotected activity.” *Id.* at 1116, 1117. Specifically, the judge found that Pero forged Grako’s name on two dinner certificates, one for herself and one for her husband, the action that began the disciplinary process which led to Pero’s termination.³ *Id.* at 1111.

The judge also found that Cyprus’ reasons for discharging Pero were “supported by the record” (*id.* at 1116), which includes the following: As charged in Cyprus’ termination letter, Pero failed to implement a new health and safety reporting system despite receiving several days of special training “at significant expense to Cyprus.” *Id.* at 1113-14. Although Pero testified that she could not implement the new system because of scheduling and computer problems, she admitted that some of the delay was her fault. Tr. 168-71, 280-81. Pero also failed to correctly complete I-9 immigration forms, another charge contained in the termination letter. 20 FMSHRC at 1114. Although Pero claims that she was not trained to complete the forms, did not know they contained errors, and completed them in the same way she had always done, she admitted that she did not complete them correctly. Tr. 171-75, 282-83.

The record also contains evidence that supports the allegation in the termination letter that Pero had a poor working relationship with Grako and, with no factual basis for doing so, told Cyprus employees and others that Grako was committing illegal acts in the handling of workers’ compensation claims. 20 FMSHRC at 1114-16. Although Pero argues that the human resources department as a whole was dysfunctional and had communication and morale problems (P. Br. at 14; *see also* Tr. 352-57, 425-26), the record evidence indicates that she had a poor working relationship with Grako and that she told Cyprus employees and others that Grako was making illegal reports involving workers’ compensation claims. Tr. 84, 131-33, 167-68, 175-76, 401, 515. However, there is no clear record evidence that Grako committed illegal acts in the handling of workers’ compensation claims. Although three of the MSHA citations (Nos. 3585716, 4525875, and 4525878) of which the judge took administrative notice (Tr. 452) alleged that Cyprus failed to correctly report lost days information on MSHA 7000-1 forms, these citations did not deal with workers’ compensation claims. Pero Letter dated April 10, 1997, Attach. In addition, Childs’ internal investigation carried out by Jack Trackemas, Cyprus’ safety manager at the time, did not find any evidence of illegal acts involving workers’ compensation claims. Tr. 398-400, 402. Thus, I find the judge’s conclusion that Pero’s discharge was based on unprotected activity alone to be supported by substantial evidence.

My colleagues, however, vacate the judge’s decision, finding that he abused his discretion when he prevented Pero from testifying about Cyprus’ treatment of employees who had violated company rules or caused costly errors. Pero claimed this evidence was relevant to proving her

³ Cyprus admits that it may have legitimately given Pero one of the certificates but that she signed Grako’s name to both certificates without authorization. 20 FMSHRC at 1111.

claim that Cyprus subjected her to disparate treatment when she received harsher discipline than the other Cyprus employees.

Abuse of discretion may be found when “there is no evidence to support the decision or if the decision is based on an improper understanding of the law.” *Mingo Logan Coal Co.*, 19 FMSHRC 246, 250 n.5 (Feb. 1997) (quoting *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991)). For a number of reasons, I do not agree with my colleagues that the judge abused his discretion. To the contrary, I find the judge had sufficient bases in law and fact to deny Pero’s request to testify on incidents involving certain miners who, despite their errors and violations disciplinary problems, were not discharged by Cyprus.

There is copious case law on what a plaintiff must do to establish a prima facie case of discrimination based on disparate treatment.⁴ In the discussion that follows, I set forth a summary of this case law, then I look to this body of law to determine whether the judge’s evidentiary ruling “is based on an improper understanding of the law” or lacks any evidentiary basis. *Mingo Logan*, 19 FMSHRC at 250 n.5.

The most important initial element of any such case is that those to whom the plaintiff compares his or her treatment be “similarly situated” to the plaintiff.⁵ In *Mitchell v. Toledo Hospital*, the Sixth Circuit held:

It is fundamental that to make a comparison of a discrimination plaintiff’s treatment to that of [fellow] employees, the plaintiff must show that the “comparables” are similarly-situated in all respects. Thus, to be deemed

⁴ Most of the appellate cases I cite in the following discussion arose under various federal civil rights statutes, such as Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e et seq. In resolving questions concerning the proper construction of the discrimination provisions of the Mine Act, the Commission has often looked for guidance to case law interpreting such civil rights statutes. See, e.g., *Meek v. Essroc Corp.*, 15 FMSHRC 606, 616-18 (Apr. 1993); *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 987-88 (June 1982); *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2794-95 (Oct. 1980).

⁵ In a different context, the Supreme Court has held that “[d]isparate treatment constitutes discrimination only if the objects of the disparate treatment are, for the relevant purposes, similarly situated.” *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 601 (1997) (Scalia, J., dissenting, but joined by the majority on this point, *id.* at 583 n.16). At issue in the *Camps Newfoundland* case was a Maine property tax statute exempting from taxation charitable institutions serving mostly state residents, but not institutions engaged primarily in interstate business. *Id.* at 568. The Court held that the tax discriminated against the institutions not covered by the exemption, in violation of the dormant commerce clause, U.S. Const. art. I, § 8, cl. 3. 520 U.S. at 571-95.

“similarly-situated,” the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.

964 F.2d 577, 583 (6th Cir. 1992) (citations and emphasis omitted). *Accord Harrison v. Metro. Gov’t of Nashville*, 80 F.3d 1107, 1115 (6th Cir.) (“The plaintiff must also demonstrate that the [other] employees to be compared with himself were ‘similarly-situated *in all respects*.’” (quoting *Mitchell*, 964 F.2d at 583) (emphasis in original)), *cert. denied*, 519 U.S. 863 (1996).

In a later case, the Sixth Circuit further stated that “the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in ‘all of the *relevant aspects*.’” *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) (citation omitted, emphasis in original). *Accord Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997) (“to make a comparison of the plaintiff’s treatment to that of non-minority employees, the plaintiff must show that he and the employees are similarly situated in all relevant respects”); *Byrd v. Ronayne*, 61 F.3d 1026, 1032 (1st Cir. 1995) (“A disparate treatment claimant bears the burden of proving that she was subjected to different treatment than persons similarly situated in all relevant aspects.” (emphasis and internal quotations omitted)). The *Ercegovich* court explained that courts “should make an independent determination as to the relevancy of a particular aspect of the plaintiff’s employment status and that of the non-protected employee.” 154 F.3d at 352.

The Court of Appeals for the District of Columbia Circuit explained “similarly situated” as follows:

In order to show that she was similarly situated to the male employee [whose treatment by the employer was offered as evidence of disparate treatment], Neuren [the plaintiff] was required to demonstrate that all of the relevant aspects of her employment situation were “nearly identical” to those of the male associate. *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994).

Neuren v. Adduci, Mastriani, Meeks & Schill, 43 F.3d 1507, 1514 (D.C. Cir. 1995). In *Neuren*, the court found that the plaintiff was not similarly situated to the male associate because there was no evidence he had difficulties similar to Neuren’s in “getting along with others in the firm,” the male associate “was lower in seniority,” and the problems in the male associate’s work were “entirely different [from] Neuren’s.” *Id.*

Thus, to be similarly situated to a plaintiff, a fellow worker thus must share with the plaintiff “relevant aspects of [his or] her employment situation.” *Id.* The Commission case cited in the plurality opinion (slip op. at 8), for example, *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, involved “data concerning the frequency of derailments and of resulting discipline” meted out to *engineers*. 3 FMSHRC 2508, 2512 (Nov. 1981), *rev’d on other grounds* 709 F.2d 86 (D.C. Cir. 1983). After explaining that disparate treatment may be shown “where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the same disciplinary fate which befalls the latter,” the Commission concluded that in the record before them, there was “no evidence that *engineers* who had excessive speed derailments causing serious damage, or who were involved in similar incidents, escaped discipline.” *Id.* at 2512-13 (emphasis added).

Here, the only “relevant aspects of [Pero’s] employment situation” (*Neuren*, 43 F.3d at 1514) contained in the record are her position as a clerical worker in the operator’s human resources office and a string of offenses that include forgery, failure to complete work assignments, work errors, and making unsubstantiated statements to others about her supervisor. In support of Pero’s claim of disparate treatment (*see* Discrimination Compl. at [8-9]), at the hearing, her counsel made the following offer of proof:

JUDGE CETTI: If you want to make an offer of proof, you may.

MR. GILL: Yes, I would like to.

[Pero] would testify that a number of instances, for example, in an instance of Reed Wilson, he was the ultimate cause of a 110 investigation for tampering with a respirable dust sample underground in front of his crew which caused a \$3,000.00 fine, plus legal expenses, lost production and bad publicity to the Company. He did not receive any time off, nor was he terminated. In fact, the Company may well have paid his fine.

She will also testify that John Citpathus [sic, *see* Discrimination Complaint at [8], where this employee’s name is noted as “John Kit Pappas”]⁶ had a major engineering error which cost the Company a significant amount of money due to lost coal revenue. He also received a lot of flack for failure to mine all of the coal reserves. He was not fired.

He later damaged a vehicle by driving too fast in an entryway which resulted in property damage. Again, he was not

⁶ The offer of proof made by Pero’s counsel largely reiterated the allegations made in Pero’s Discrimination Complaint at pages 8 and 9.

fired or reprimanded. These are things that she knows because she works in the HR Department.

She would also testify that Robert Powell received an order from MSHA for a roof control violation underground which resulted in a major assessment from MSHA and he was not fired. She would testify that Vern Watson has received several severe citations and closure notices. He has not been fired.

MR. GILL: She will testify that Joe Rukavina, while spellbossing, which is a term of art, I suppose, decided to mine more coal than he should so he would have a higher tonnage for a shift. He cut the bottom and top coal out and the Company had to spend thousands of dollars building a wooden support to allow the long wall support system to operate. There was a gap and it would not support the top coal. He was not fired, but was hired as a foreman the next month.

Mr. Grako was not reprimanded for using fowl [sic] language and being abusive to Nathan Marvidikis during a job interview. There was a threatened lawsuit involved there.

Mr. Grako, to my knowledge at least, was not disciplined in any way for sexual harassment allegations that were brought out in this Shaman investigation.

Gary Marx made numerous mistakes over a period of many years and was demoted to an hourly employee, but not terminated.

JUDGE CETTI: That is your offer of proof?

MR. GILL: Yes.

Tr. 199-201.⁷

⁷ Commissioner Beatty believes that Cyprus “affirmatively defended the case,” and that the offer of proof I have excerpted from the record was made in an effort to rebut Cyprus’ affirmative defense. Slip op. at 14, 18. An affirmative defense is raised, however, against a plaintiff who has established a prima facie case, which here, as I point out above, Pero did not do. This offer of proof was intended to establish retaliatory motive based on disparate treatment, an element of Pero’s prima facie case.

At any rate, this is a distinction that makes no difference. Even if the proffer was offered

An offer of proof “must be reasonably specific identifying the purpose of the proof offered . . . [and] must tell the judge what the tenor of the evidence would be and why the evidence is logically relevant.” 1 *McCormick on Evidence* § 51, at 218 (John W. Strong ed., 5th ed. 1999). I note that Pero’s counsel made no attempt in this offer of proof to show that any of the employees he mentions were similarly situated to Pero. Wilson, Pappas, Powell, and Rukavina appear to have been underground miners with isolated disciplinary problems. Grako was a member of management. Pero’s counsel said nothing whatsoever about Watson and Marx, other than very general statements that they had many disciplinary problems.

Keeping in mind the “relevant aspects of [Pero’s] employment situation” (*Neuren*, 43 F.3d at 1514), I find nothing in this offer of proof that could have led the judge to conclude that the employees held jobs similar to Pero’s. I also find that the judge could have reasonably concluded that none of these employees came even close to approximating such a *combination* of improper conduct as Pero’s. Indeed, I fail to see any reasonable basis on which the judge could have compared the underground miner Wilson’s tampering with a respirable dust sample to Pero’s combination of offenses as a clerical worker. Similarly, I find no reasonable basis for comparison between Pero’s situation and those of three other underground miners, Pappas, Powell, and Rukavina. In each instance, on the one hand we have Pero’s combination of offenses in the course of her duties as a clerk, while on the other hand we have miners making an “engineering error” and getting into a motor vehicle accident (Pappas), committing a “roof control violation” (Powell), and making a coal production error (Rukavina). Any such comparisons are of apples to oranges. On its face, I thus find this offer of proof insufficient to establish the relevancy of the evidence Pero sought to adduce.⁸

The only comparison in the record of an employee even remotely similarly situated to Pero is the case of Shirley Tucker-Spears, who, like Pero, was a clerical worker (in fact, she worked with Pero), and who made similar complaints to management about Cyprus’ injury policy, but who, unlike Pero, was never discharged. Tr. 330, 378. Her work record, however, apparently did not contain instances of forgery, incompetence, and insubordination. But in any event, I find that the example of Tucker-Spears not only further supports the judge’s conclusion that Pero was discharged for her unprotected activity alone, but also supports his decision to exclude the evidence of alleged disparate treatment that Pero sought to introduce.⁹

to rebut an affirmative defense, I believe it would still have been evidence of disparate treatment, and the employees would still have to have been similarly situated to Pero and share with her the “relevant aspects of her employment situation.” *Neuren*, 43 F.3d at 1514.

⁸ As for Watson and Marx, the offer of proof fails to provide any details whatsoever as to the relevance of the two employees. Nor does Pero’s counsel bother to indicate how Pero can be compared to Grako, a member of management.

⁹ I also note that Pero failed to object earlier in the proceeding to a protective order prohibiting disclosure of this information. On October 22, 1997, pursuant to 29 C.F.R.

In sum, I conclude that the judge did not abuse his discretion when he refused to admit Pero's testimony regarding the work histories of several of her co-workers. I find the judge's ruling sound both as a matter of law and fact.

The absence of any similarly situated employees in Pero's offer of proof does not prevent my colleagues in the plurality from turning the law of disparate treatment on its head and remanding this case to the judge with the instruction "to permit Pero to adduce the additional evidence in her offer of proof concerning Cyprus' treatment of other employees who violated company rules or caused costly mistakes." Slip op. at 12. I find their decision problematic for several reasons.

First, my colleagues' state in their plurality opinion that my "reference to the *Mitchell* 'same supervisor' test is particularly troublesome." Slip op. at 10. Yet, none of the cases I have discussed can be interpreted so as to make having the same supervisor the linchpin in a disparate treatment claim. It is but one of many factors that may be relevant in a particular case. In fact, I explicitly state that "the only 'relevant aspects of [Pero's] employment situation' (*Neuren*, 43 F.3d at 1514) contained in the record are her position as a clerical worker in the operator's human resources office and a string of offenses that include forgery, failure to complete work assignments, work errors, and making unsubstantiated statements to others about her supervisor." Slip op. at 23, *supra*. Nowhere do I mention Pero's supervisor.

More to the point, though, is that, as my discussion of the relevant case law demonstrates, the law of disparate treatment has evolved into something more than *Mitchell*. As stated above, it now requires a plaintiff alleging disparate treatment to show that his or her fellow workers share with the plaintiff "relevant aspects of [his or] her employment situation." *Neuren*, 43 F.3d at 1514.

My colleagues in the plurality appear unable to focus on the issue at hand — first to determine what the law states, which in case after reported appellate case is that employees being

§ 2700.56(c) and Rule 26(c) of the Federal Rules of Civil Procedure, Cyprus moved for issuance of a protective order prohibiting discovery of information about the treatment of other employees, contending that such information was not relevant, was not likely to lead to relevant evidence to support Pero's discrimination complaint, and would cause Cyprus oppression, undue burden, or expense. C. Mot. for Protective Order at 1-2. Pero did not oppose the motion and the judge granted the protective order on November 13, 1997, on the ground that the requested information was "not reasonably calculated to lead to evidence relevant to" Pero's discrimination complaint. On December 12, 1997, Pero moved for relief from the protective order, but the judge denied the motion on December 30, 1997, on the same ground on which he had issued the protective order. Pero did not request interlocutory review by the Commission under Commission Procedural Rule 76, 29 C.F.R. § 2700.76, of the judge's order denying relief. See *Consolidation Coal Co.*, 19 FMSHRC 1239 (July 1997) (interlocutory review of discovery order). Pero's failure to challenge Cyprus' motion further supports the judge's decision.

compared must be similarly situated in “all of the relevant aspects,” *Pierce*, 40 F.3d at 802, then determine whether the judge’s evidentiary ruling was contrary to the law or the evidence. As to what the law says, the plurality opinion appears muddled. My colleagues state: “It has been recognized that, in analyzing a claim of disparate treatment . . . ‘precise equivalence in culpability between employees’ is not required. Rather, the plaintiff must simply show that the employees were engaged in misconduct of ‘comparable seriousness.’” Slip op. at 8 (citations omitted). What my colleagues fail to grasp, and what case after case demonstrates, is that any employees who are held up for comparison must first be shown to be similarly situated to the plaintiff in all relevant aspects. The comparable seriousness of disciplinary offenses held up for comparison is but one of many possible factors a court must consider in determining whether those committing the offenses are similarly situated.

I also believe a rule of reason must apply here. In Pero’s case, I fail to see how any of our judges would be able to distinguish between the “comparable seriousness” of forgery committed by a clerical worker (to say nothing of the combination of offenses that led to Pero’s termination) and tampering with respirable dust samples committed by a miner. Moreover, although an employer’s policies towards widely differing offenses may strike some as not rationally related to the relative seriousness of the offenses, it is nevertheless not the job of this Commission to substitute its judgment for that of an employer in such instances. While our judges may determine whether “a proffered business justification is . . . plainly incredible or implausible,” more importantly, “[t]he Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity.” *Chacon*, 3 FMSHRC at 2516.

My colleagues in their plurality opinion appear to read the law not for what it says, but rather for what they apparently wish it said. A case in point is their misreading of the case *Petsch-Schmid v. Boston Edison Co.*, 914 F. Supp. 697 (D. Mass. 1996), in which they claim the district court disagreed “with the *Mitchell* ‘same supervisor’ test.” Slip op. at 10. This is not the point that case made. Instead, the judge stated that “[t]o the extent that *Mitchell* . . . can be read as Edison [the defendant] suggests, to require an employee to compare herself only with other employees disciplined by the same supervisor, I cannot agree.” 914 F. Supp at 705 n.17. In other words, the judge is responding to an argument made by a party taking as true that party’s underlying premise for the sake of responding to their argument. In fact, *Mitchell* did not set forth a “same supervisor” test. Instead, *Mitchell* and its progeny in the appellate courts set forth a circumstantial test that requires courts to make “an independent determination as to the relevancy of [the] particular aspect[s] of the plaintiff’s employment status and that of the [other] employee[s].” *Ercegovich*, 154 F.3d at 352.¹⁰

¹⁰ The majority’s reliance on *Petsch-Schmid* is misplaced for another reason. I fail to see the relevance of dicta in a district court opinion deciding a question of *state* law. See 914 F. Supp. at 700 n.2, 704-05 (note in which dicta appears related to discussion of count III of the plaintiff’s complaint alleging sex discrimination in violation of *Massachusetts* law).

Another problem I have with the plurality opinion is that it is at odds with the deferential standard of review governing this case on appeal, the abuse of discretion standard. As I stated earlier, a judge abuses his or her discretion when “there is *no evidence* to support [his or her] decision or if the decision is based on an *improper understanding of the law.*” *Mingo Logan*, 19 FMSHRC at 249-50 n.5 (emphasis added, internal quotations omitted). Here, I find sufficient evidence for the judge to have reasonably concluded that none of the employees cited by Pero in her proffer had work situations comparable to her own. I also find that the judge’s decision is consistent with the well-established principles of law governing disparate treatment set forth in the appellate case law that both I and the plurality opinion cite.

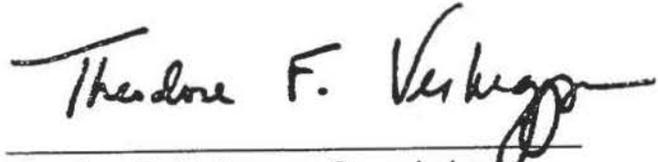
Although the plurality opinion states that it will apparently “not apply [these cases, including] *Neuren* to an offer of proof” (slip op. at 7), this is just what a judge must do when evaluating such an offer — i.e., he or she must determine whether the evidence contained in an offer is relevant under the legal principles governing the proceeding over which he or she presides. I am confident in the ability of our judges to undertake this task, as illustrated in this case where the judge effectively made “an independent determination as to the relevancy of [the] particular aspect[s] of the plaintiff’s employment status and that of the . . . employee[s]” in Pero’s offer of proof. *Ercegovich*, 154 F.3d at 352. The majority apparently does not share my confidence in our judges, and insists on substituting its views for that of the judge. Such a result is simply not appropriate under the deferential abuse of discretion standard.

My colleagues in their plurality opinion state that “the claimed relevance of the proffered evidence is readily apparent from the very excerpt of the offer of proof” I quote above. Slip op. at 7 n.10. But to establish the relevance of the evidence she sought to adduce, Pero needed to demonstrate at the very least that the employees with whom she wanted to be compared were similarly situated in some relevant aspect. I find that the judge properly recognized that Pero failed to do this. Her offer of proof simply does not include any such evidence, much less anything that might be “readily apparent.” The only thing readily apparent to me is that Pero’s offer of proof is unsubstantiated and merely a repetition of points already made in the complaint. By trial, a lawyer should have more to put into an offer of proof, at least enough to establish legal relevance, if he or she expects to have the evidence admitted.

If the plurality opinion were binding law, the end result would be a singularly unworkable legal construct. The door would be open in discrimination cases to complainants raising disparate treatment arguments based on the most tenuous of connections between them and their fellow workers. Section 105(c) complainants would be allowed to bring in ream upon ream of irrelevant evidence on other employees as alike to them as apples are to oranges. Under my colleagues plurality reasoning, the plaintiff in *Chacon*, an engineer, should have relied upon the discipline meted out to clerical workers. Even in the *Ercegovich* case on which they rely, the court found a legitimate allegation of disparate treatment “[b]ecause the positions previously held by Ercegovich, Evert, and Cohn were *all related human resources positions.*” 154 F.3d at 353 (emphasis added).

Under this decision, Pero will now be allowed to compare an underground miner's respirable dust sample tampering, or another miner's cutting too much coal, to the combination of forgery, incompetence, and insubordination that served as the basis for her termination from her position as a clerical worker. But to what end? The Chairman and Commissioner Riley have one view of this case, Commissioner Beatty another view fairly inconsistent with that of his colleagues. This case thus returns to the judge with no clear rationale under which he can render a decision. I do not envy the judge the task assigned to him by my colleagues.

For the foregoing reasons, I would affirm the judge, and therefore, I dissent.


Theodore F. Verheggen, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 4, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-613-D
on behalf of WALTER JACKSON,	:	MSHA Case No. BARB CD 95-13
Complainant	:	
v.	:	Mine ID No. 15-17234-NCX
	:	Huff Creek Mine
MOUNTAIN TOP TRUCKING CO., INC.,	:	
ELMO MAYES, ANTHONY CURTIS	:	
MAYES, and MAYES TRUCKING	:	
COMPANY, INC.,	:	
Respondents	:	

DECISION ON REMAND

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Complainant;
Stephen A. Sanders, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., Prestonsburg, Kentucky, for the Complainant;
Edward M. Dooley, Esq., Fairhope, Alabama, for the Respondents.

Before: Judge Feldman

A. Case History

The initial decision in this discrimination matter determined the respondents' February 17, 1995, discharge of Walter Jackson violated section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(1), and, that the above named respondents were jointly and severally liable for Jackson's damages.¹ 19 FMSHRC 166, 181-86, 197-203 (Jan. 1977) (ALJ). The initial decision was followed by a decision on relief that determined that the maximum period for which Jackson could be awarded back pay was February 18, 1995, the day after his discriminatory discharge, until June 21, 1996, the termination date of Mountain Top Trucking Company's haulage contract that necessitated the employment of truck drivers such as Jackson. 19 FMSHRC 875 (May 1997) (ALJ). The

¹ The case against William David Riley, who had also been named as a respondent in this matter, was dismissed. 19 FMSHRC at 201. It was determined that Riley, who was not a principal and acted solely in his role as a foreman, was not liable for the back pay relief sought by Jackson pursuant to the provisions of section 105(c). *Id.* at 200-01.

decision on relief further determined that the calculation for Jackson's relief shall be eight loads per day @ \$13.00 per load, or \$520.00 per five day work week. 19 FMSHRC at 878. Crediting Jackson for relief purposes of completing an average of eight round trip loads per day from the mine to the processing plant, each round trip taking approximately one hour and 15 minutes, was based on Jackson's normal 12 hour workday from 6:00 a.m. until approximately 6:00 p.m. 19 FMSHRC at 171.

Jackson's temporary reinstatement hearing was conducted on August 23, 1995. Jackson did not appear at the hearing. Instead, Jackson's counsel withdrew Jackson's application for temporary reinstatement because Jackson had obtained full time employment with Cumberland Mine Service beginning on August 3, 1995. Jackson worked for Cumberland Mine Service approximately ten weeks until he was laid-off on October 4, 1995. With the exception of one week of employment with the Garland Company in December 1995, during which time Jackson earned \$415.00, Jackson had no additional employment during the February 18, 1995, through June 21, 1996, period of relief. The Garland Company is affiliated with Cumberland Mine Service.

As a general proposition, a discrimination complainant has a duty to mitigate damages by remaining in the labor market and diligently looking for alternative work. *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1317 (D.C. Cir. 1972) (citations omitted). The May 21, 1997, decision on relief held that Jackson had not demonstrated reasonable efforts to mitigate his damages in view of his lengthy period of unemployment and his failure to even inquire with the Secretary about the possibility of reopening his temporary reinstatement application. 19 FMSHRC at 882. Thus, Jackson was awarded net back pay of 18,497.40 for the period February 18, 1995, through December 9, 1995, but not for the entire period of relief that ended on June 21, 1996. 19 FMSHRC at 880-83.

The Commission reversed the failure-to-mitigate determination on the ground that the Mine Act does not require a discriminatee to seek temporary reinstatement. 21 FMSHRC 265, 284 (March 1999). Consequently, the Commission remanded the case for a recalculation of back pay and interest owed Jackson consistent with its conclusion that it was not shown that Jackson failed to mitigate his damages. *Id.* at 284-85.

In view of the Commission's remand, On April 22, 1999, the undersigned had a telephone conference with the parties to determine if they wished to file briefs on the question of the recalculation of Jackson's damages. During the conference, the respondents' counsel advised that he had information to submit concerning Jackson's availability for work. The information furnished included details concerning Jackson's product liability suit wherein Jackson had complained of a significant eye impairment impacting on his ability to drive a truck, and information concerning Jackson's college attendance as of August 1995 at Union College. The information was relevant in view of Jackson's prior representations in this proceeding concerning his availability for work. A schedule was established for submission of the respondents' information and comments by the parties.

The information provided by the respondents indicated Jackson had been less than forthcoming.² Jackson had failed to disclose his college attendance despite a January 23, 1997, Order that he disclose any “periods when [he] was not available for employment.”³ 19 FMSHRC at 204. Moreover, by Order dated March 24, 1997, Jackson was specifically asked if he had “been a party in any legal action or claim involving *allegations of physical or mental impairment.*” 19 FMSHRC at 664 (emphasis added). Jackson responded on March 21, 1997, stating that his product liability suit was irrelevant despite what was ultimately revealed to be Jackson’s assertion of a serious eye impairment. However, given the Commission’s determination that the prior record did not support that Jackson had failed to mitigate his damages, on remand, Jackson was awarded net back pay damages of \$32,642, plus interest, less deductions of applicable Federal and local taxes, for the entire period of relief. 21 FMSHRC 913, 918.

The Commission subsequently remanded this matter on November 30, 1999. 21 FMSHRC 1207. The Commission, noting conflicting evidence, directed me to resolve the question of whether and to what extent Jackson was available for employment during the back pay period. *Id.* at 1214. Jackson continues to seek net back pay of \$32,642.00 plus interest for the entire February 1995 through June 1996 period of relief.

B. Findings and Conclusions

A hearing was conducted on September 14, 2000, in Pineville, Kentucky to determine the appropriate relief to be awarded to Jackson during the February 18, 1995, through June 21, 1996, back pay period. The scope of the hearing was limited to Jackson’s efforts to find employment during this period; whether Jackson suffered from any physical impairment during this period that interfered with his ability to work; and the impact, if any, of Jackson’s college attendance on his availability for employment.

² Jackson has sought to strike evidence concerning his college attendance and civil suit because it had not been raised during the pre-decisional liability phase of this case. The Commission, noting Jackson’s history of failing to provide accurate information, denied Jackson’s request to strike because of “the relevancy of the information . . . to the questions of whether and to what extent Jackson was available to work during the back pay period.” 21 FMSHRC at 1213.

³ As discussed *infra*, on October 19, 1995, Jackson certified to the Virginia Unemployment Commission that he was unavailable for work on Tuesdays and Thursdays due to his college attendance. (Jackson Ex 3, p. 1).

1. The Effect of Jackson's Eye Impairment
on Jackson's Ability to Work

On February 20, 1991, Jackson, while attempting to rotate the tires on his vehicle, was struck in the right eye by a metal fragment that was dislodged from the tire iron wrench he was using. Jackson's eye injury was the subject of a product liability suit docketed as Civil Action 92-112, in the United States District Court in the Eastern District of Kentucky. (Resp. Ex. 1, at 4-12, 19). A judgement in favor of Jackson against General Motors Corporation was entered on January 9, 1996, which, in addition to monetary damages for pain and suffering, and past and future medical expenses, included damages not to exceed \$12,043.00 for lost wages. *Id.* at 19.

The record contains deposition testimony, and medical and vocational assessments, that arose out of Jackson's civil action. During the course of a July 19, 1993, deposition, Jackson testified that he worked as a laborer for Cumberland Mine Service until his February 1991 eye injury. *Id.* at 8-9. Jackson further testified that he returned to work as a laborer for Cumberland Mine Service in June 1992. *Id.* In addition, Jackson's deposition testimony reflects that, upon returning to work, the only limitation caused by Jackson's eye impairment was his inability to spot weld because of his loss of visual acuity. *Id.* at 13.

Jackson was subsequently deposed on July 14, 1994, at which time he reported having been hired by Mountain Top Trucking three weeks before. *Id.* at 45-46. Jackson stated that he had a commercial driver's license and that he did not have to take any physical tests for his job at Mountain Top Trucking. *Id.*

Jackson was examined by Dr. John W. Garden on June 29, 1995. *Id.* at 17-18. Dr. Garden summarized a history of a right corneal laceration that was repaired at the University of Kentucky medical facility. *Id.* Garden noted Jackson subsequently developed a cataract that was removed in 1994. *Id.* On examination, Garden determined Jackson had corrected right eye vision of 20/50 and corrected left eye vision of 20/20. *Id.* Garden's diagnosis was post-traumatic right corneal scarring, pseudophakia, traumatic mydriasis, pupillary sphincter atrophy, and posterior capsule opacity. *Id.* Garden found Jackson's left eye was mildly myopic. Garden concluded Jackson "had a very nice result from a serious ocular injury." *Id.*

Jackson was seen on October 11, 1995, for a standard vocational evaluation by Luca E. Conte, a Vocational Rehabilitation Consultant. *Id.* at 13. During the vocational evaluation Jackson complained of a continuing right eye impairment and "loss [of] some vision in the left eye" reportedly due to "overcompensation." *Id.* at 14. During Conte's interview, Jackson reported past employment as a truck driver with Mountain Top Trucking. *Id.* Jackson also stated he had previously failed a physical examination for a truck driving position at Manalapan Mining Company although no further details were given. *Id.* at 14-15.

Conte's occupational analysis noted various subjective complaints of right eye discomfort

and corrected right eye vision of 20/50. *Id.* at 15. Conte concluded that Jackson's reported eye fatigue and light sensitivity were "not significant enough to affect [Jackson's] occupational functioning or success. Indeed, as indicated by [Jackson's] successful post-injury work as a commercial truck driver . . . Mr. Jackson retains his pre-injury capacity to access the labor" *Id.*

Records from the Commonwealth of Kentucky Division of Driver Licensing reflect Jackson retained a commercial driver's license until it was voluntarily surrendered on December 3, 1996. (Jackson Ex. 4). The respondents, relying on the provisions in Federal Highway Administration regulation 49 U.S.C. § 391.45 that require operators of commercial vehicles to have minimum corrected vision of 20/40 in each eye, assert that Jackson's right eye impairment is disqualifying. (Resp. Ex. 3). Thus, they maintain Jackson was not capable of performing truck driver duties during the period of relief. Consequently, they argue that they are not liable for back pay.

As a threshold matter, the duty to mitigate damages does not require the victim of discrimination to seek identical employment. Rather, the duty is satisfied as long as the discriminatee seeks "substantially equivalent employment." *NLRB v. Madison Courier, Inc.*, *supra* at 1317. Employment as a general laborer, in the context of mitigating lost wages, is substantially equivalent to employment as a truck driver. Thus, assuming *arguendo*, Jackson's eye condition disqualified him from holding a commercial driver license, Jackson could satisfy his duty to mitigate damages by seeking work as a general laborer. In fact, a portion of the wages Jackson earned as a laborer at Cumberland Mine Service shall be deducted from the relief that shall be awarded to Jackson in this proceeding.

Moreover, Jackson's ability to work despite his eye impairment must be evaluated based on Jackson's state of mind. There is no evidence that Jackson ever asserted, in furtherance of his civil suit, that he was incapable of working. In fact, Jackson disclosed working for Mountain Top Trucking as a truck driver during his July 14, 1994, deposition. In this regard, Jackson continued to hold a valid commercial driver license until December 1996. Significantly, it has neither been contended nor shown that Jackson's eye impairment interfered with his truck driver duties at Mountain Top Trucking. In fact, if the respondents had not discharged Jackson on February 17, 1995, in violation of the anti-discrimination provisions of section 105(c) of the Mine Act, Jackson would have continued working as a truck driver with Mountain Top Trucking. Accordingly, the evidence reflects that Jackson was capable of performing duties as a general laborer and/or a truck driver at all times during the February 18, 1995, through June 21, 1996, period of relief.

2. The Effect of Jackson's College Attendance on Jackson's Availability for Work

Having concluded Jackson was capable of substantially equivalent employment, the focus shifts to Jackson's availability for employment. As the Commission discussed in its previous decisions providing guidance in this matter, a back pay award "may be reduced in appropriate circumstances where an employee incurs a willful loss of earnings." 21 FMSHRC at 1212 (quoting *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 144 (February 1982) (other citations omitted). Under the duty to mitigate damages from discrimination, "a discriminatee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept *substantially equivalent employment*, fails diligently to search for alternative work, or voluntarily quits without good reason." *Id. Citing NLRB v. Madison Courier, Inc.*, *supra* at 1317 (emphasis in original).

In general, once discrimination has been found and a gross amount of back pay during a period for relief is alleged, "the burden is on the employer to establish facts which would negative the existence of [back pay] liability to a given employee or which would mitigate that liability." *NLRB v. Madison Courier, Inc.*, *supra* at 1318, quoting *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963); see also *Metric Construction, Inc.*, 6 FMSHRC 226, 233 (February 1984), *aff'd*, 766 F. 2d 469 (11th Cir. 1985). In this regard, in the absence of evidence to the contrary, there is a presumption that an unemployed victim of discrimination is ready, willing and able to work, and actively looking for work. There is no evidence that Jackson failed to mitigate his damages by not seeking alternative employment immediately following his February 17, 1995, discharge.

However, the respondents have provided evidence that Jackson attended college on a regular basis on Tuesdays and Thursdays beginning in August 1995. During this proceeding Jackson revealed, albeit reluctantly, that he attended Union College until December 13, 1995, leaving the impression that his college attendance terminated at that time. However, at the September 14, 2000, hearing, in the interest of full disclosure, Jackson's counsel elicited from Jackson the fact that Jackson's college attendance continued after he left Union College in December 1995. Jackson now admits he attended classes at Southeast Community College (SECC) on Tuesdays and Thursdays from January 17, 1996, through May 11, 1996.⁴ (Tr. 79). Thus, Jackson attended college on Tuesdays and Thursdays for two consecutive semesters during the period August 29, 1995, through May 11, 1996, at Union College and SECC.

⁴ As an officer of the court, in view of the inquiries made of Jackson concerning his college attendance, Jackson's counsel had a duty to ensure Jackson's attendance at SECC was disclosed. As discussed at the hearing, Jackson's private counsel's effort to ensure full disclosure is appreciated. (Tr. 222-25).

Although an operator is required to provide evidence that casts doubt on a complainant's availability for work, an operator is not required to prove that a discriminatee is not looking for work because a party can not be required to prove a negative. *See RAG Cumberland Resources Corporation*, 22 FMSHRC 1066, 1070 (citing *Kitt Energy Corp.*, 6 FMSHRC 1596, 1600 (July 1984), *aff'd sub nom. UMWA v. FMSHRC* 768 F.2d 1477 (D.C. Cir. 1985) (to continue a 104(d) chain the Secretary need not prove the absence of a clean inspection). To be required to do so, an operator would have to identify all businesses where a complainant had not applied for work. Rather, once an operator presents an affirmative defense to an award of back pay based on the complainant's apparent unavailability for work, the burden of persuasion shifts to the complainant seeking back pay relief. *See e.g., NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175-77 (2nd Cir. 1965), *cert. den.*, 384 U.S. 170 (1966). Having come forward with evidence of Jackson's college attendance, the burden shifts to Jackson to demonstrate that he was ready, willing and able to work, and actively looking for full-time employment during the back pay period. In addressing whether Jackson was available for full-time employment, it must be remembered that Jackson seeks lost wages based on his employment with Mountain Top Trucking that consisted of approximately a 60 hour, five day work week.

Jackson was discharged from his position as a truck driver at Mountain Top Trucking in violation of section 105(c) of the Mine Act on February 17, 1995. Following his termination from Mountain Top Trucking, Jackson applied for, but was denied, unemployment benefits. (Tr. 32-33).

Having failed to find employment after he was fired from Mountain Top Trucking, in July 1995, Jackson decided to enroll in the fall semester at Union College in Barbourville, Kentucky. (Tr. 64). Union College is approximately 70 miles away from Jackson's home in Evarts, Kentucky. Jackson registered for 12 credit hours by taking classes that were conducted on Tuesdays and Thursdays beginning on August 29, 1995. (Tr. 69; Resp. Ex. 1 at 14). Jackson's intention was to major in math or science with the ultimate goal of becoming a teacher on the high school or junior high school level. (Resp. Ex. 1 at 14). Jackson's \$4,100 per semester college tuition was financed with a Stafford loan. (Tr. 225-26).

Shortly after enrolling for the fall semester at Union College, Jackson found a job with a former employer, Cumberland Mine Service. Jackson had previously worked for Cumberland Mine Service from October 1986 until August 1988 when he resigned his employment to enroll in college as a full time student at Southeast Community College (SECC). (Resp. Ex. 1 at 14). Jackson had received an Associate in Arts (A.A.) degree from SECC in December 1991. *Id.*

Jackson began full-time employment at Cumberland Mine Service on August 3, 1995, earning \$8.00 per hour as a general laborer. (Jackson Ex. 1). Upon beginning Union College on August 29, 1995, Jackson adjusted his work hours at Cumberland Mine Service so that he did not have to work on Tuesdays and Thursdays. (Tr. 65, 69). In this regard, Jackson's employment records reflect that beginning on September 14, 1995, approximately two weeks after starting Union College, Jackson limited his employment at Cumberland Mine Service to three days per

week. (Jackson Ex. 7). Specifically, the number of hours worked by Jackson were:

Aug. 3 - Aug. 9 -- 33.25 hours regular time;
Aug. 10 - Aug. 16 -- 40 hours regular time plus 28 hours overtime;
Aug. 17 - Aug. 23 -- 40 hours regular time plus 18 hours overtime;
Aug. 24 - Aug. 30 -- 40 hours regular time plus 2 hours overtime;
Aug. 31 - Sept. 6 -- 40 hours regular time plus 13.75 hours overtime;
Sept. 7 - Sept. 13 -- 40 hours regular time plus 8 hours overtime;
Sept. 14 - Sept. 20 -- 23 hours regular time;
Sept. 21 - Sept. 27 -- 24 hours regular time;
Sept. 28 - Oct. 4 -- 30.25 hours regular time

Id.

Jackson worked at Cumberland Mine Service until October 4, 1995, earning \$3,342.60 during this period. (Tr. 183-84; Jackson Ex. 5). Jackson reported he was laid-off due to lack of work. Although there were lay-offs at the time Jackson stopped working on October 4, 1995, Nancy Garland, President of Cumberland Mine Service, testified she could not recall why Jackson's employment was terminated.⁵ (Tr. 179-80). The respondents contend Jackson worked at Cumberland Mine Service for the sole purpose of establishing eligibility for unemployment insurance. However, the respondents' assertion is conjecture that is not supported by the record.

After Jackson's employment was terminated on October 4, 1995, Jackson applied for Virginia state unemployment benefits. (Tr. 32-33; Jackson Ex. 3). I take official notice that in order to qualify for full state unemployment benefits an applicant must certify that he is ready, willing and able to work, and actively looking for work on a daily basis. While issues concerning the adequacy of mitigation efforts by a complainant seeking to recover lost wages under a Federal anti-discrimination statute are different from issues concerning eligibility to unemployment benefits, resolution of both questions requires an analysis of the availability for work of the party seeking relief. In this regard, Jackson was required to complete a biweekly Claim for Benefits form certifying, under penalty of perjury, that he was "ready, willing and able to work each day." (Jackson Ex. 3).

⁵ An affidavit from Nancy Garland executed on July 21, 1999, states Jackson was laid off in October 1995 due to "a reduction in work force." (Jackson Ex. 7). Attached to the affidavit is a summary of Cumberland Mine Service's personnel records prepared for Garland's testimony that reflects Jackson's earnings as well as the dates and names of employees who had been laid-off in October 1995. (Tr. 186-87). Jackson's name was not among those laid-off in October 1995. Garland testified Cumberland Mine Service records do not reflect why Jackson was terminated in October 1995. Garland testified she "[did not] really recall" why Jackson was terminated, but she assumed it was "probably because [they] had run out of work or work had slowed down." (Tr. 179-80). Garland also testified that she did not recall that Jackson had reduced his work hours in September 1995, or that he was attending college. (Tr. 196-97).

On the initial Claim for Benefits form for the two week period October 1 through October 14, 1995, Jackson certified on October 19, 1995, that he was ready, willing and able to work each day - - "Accept (sic) Tuesday and Thursday — going to school." *Id.* at 1. In apparent recognition that such a disclosure could jeopardize his continuing eligibility to unemployment benefits, Jackson failed to reveal his college attendance at Union College or SECC on seven subsequent Claim for Benefit biweekly unemployment certifications during the period October 15, 1995, through January 20, 1996. *Id.* at 2-8.

The biweekly Claim for Benefit certifications also require an unemployment claimant to list his efforts to seek employment. During the period October 15, 1995, through January 20, 1996, Jackson listed one employer contact each Monday, Wednesday and Friday. *Id.* at 1-8. During this entire period, Jackson listed no efforts to find employment on Tuesdays and Thursdays. *Id.* The Claim for Benefit certifications also require an unemployment claimant to indicate whether a job application was completed at the employers where the claimant reportedly sought positions. Significantly, without exception, Jackson reported that he had not filed a job application at any of the businesses where he purportedly sought employment. *Id.*

In support of his assertion that he was diligently seeking employment despite his college attendance, Jackson has failed to provide any independent evidence of his job efforts such as testimony from prospective employers, letters documenting scheduled interviews or letters documenting the results of such interviews. The only evidence of Jackson's reported employment efforts is Jackson's unemployment benefit certifications reflecting that he contacted only one employer per day, three days each week. Such reports, given Jackson's admitted failure to file any applications for a position where there was a job opening, are indicative of self-serving reports to maintain unemployment eligibility rather than sincere efforts to secure employment. In the final analysis, once an operator raises legitimate issues concerning a complainant's availability for work, it is incumbent on the complainant to present more than lists of business names, addresses and telephone numbers that can be obtained from any telephone directory.

Finally, the Commission, in its remand decision, citing *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269 (4th Cir. 1985), noted that "Jackson's status as a college student does not necessarily mean that he must be found to have failed to mitigate his damages during the time he was enrolled in college." 21 FMSHRC at 1214. Thus, the Commission directed me to consider the impact of Jackson's college attendance on his availability for employment.

A review of the case law concerning the effect of college attendance on back pay awards reveals ". . . that there is no *per se* rule that back pay is tolled during periods of enrollment in an education program. Rather, the issue is to be determined in the context of the factual matrix in a particular case." *Huegel v. Tish*, 683 F. Supp. 123, 125-26 E.D. Penn. 1988). Thus, this issue must be resolved on a case-by-case basis.

The *Brady* case cited by the Commission concerned the issue of the eligibility to back pay of Pendergrass, a complainant in a Title VII discrimination action, who was attending college during the day and working after school hours Monday through Friday from 2:00 p.m. until 9:00 p.m. In *Brady*, the court stated:

We take notice that the vast majority of full-time college students could not also hold down a full-time job, and that in the usual case when one decides to attend college on a full-time basis, it does curtail his present earnings capacity and effectively removes him from the employment market.

753 F.2d at 1276, citing *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263 (10th Cir.). However, the *Brady* decision distinguished Pendergrass' situation from the usual college student by noting that ". . . Pendergrass remained in the job market which is shown conclusively by the fact that he did maintain a full-time job during all the time he was in college." *Id.*

In the present case, unlike Pendergrass, Jackson curtailed his work week from five days to three days effective September 14, 1995, two weeks after Jackson began attending college. Moreover, unlike Pendergrass, with the exception of several weeks, Jackson was not employed during the period of his college attendance.

The issue of whether full-time college attendance effectively removes a student from the labor market has been addressed by the Supreme Court. In *Idaho Department of Employment v. Smith*, 434 U.S. 100 (1977), the Supreme Court, applying the rational basis test, upheld an Idaho statute under the equal protection clause that precluded any person who attended school during the day from receiving unemployment benefits. The Court noted that:

It was surely rational for the Idaho Legislature to conclude that daytime employment is far more plentiful than night-time work and, consequently, that attending school during daytime hours imposes a greater restriction upon obtaining full-time employment than does attending school at night"

434 U.S. at 101-02. Jackson's college attendance on Tuesdays and Thursdays severely restricted his opportunity to obtain full-time employment. Significantly, Jackson's self-serving assertion that he would have left college if he found full-time employment is belied by his reduction in work schedule to part-time employment at Cumberland Mine Service as of September 14, 1995.

While full-time college enrollment can evidence that an individual has removed himself from the labor market, courts have recognized circumstances where college attendance after a lengthy and diligent job search has become futile may be consistent with one's responsibility to mitigate damages. One such case, relied upon by Jackson, is *Dailey v. Societe General*, 108 F.3d 451 (2nd Cir. 1997). In *Daily*, the court was presented with a highly paid Title VII complainant

who served in dual roles as a Vice-President of a financial institution and a Manager of a banking group. The court noted that Daily had enrolled in college only after she had exhausted her efforts to find suitable employment in the banking industry by: (1) using her former employer's out-placement services; (2) contacting people in the industry to obtain job leads; (3) using the services of executive recruiters; and (4) interviewing for open positions. 108 F.3d at 455. Thus, the court concluded that Daily's decision to enter college in order to change careers, in view of her failure to find suitable employment in banking despite her diligent efforts, "was in accord with her duty to mitigate." *Id.*

Unlike *Daily*, Jackson does not have specialized skills or an employment specialty that limits him from obtaining equivalent employment. Jackson has not demonstrated that his decision to enhance his education in order to become a teacher was dictated by a lack of job opportunities for general laborers. Moreover, unlike the *Daily* case where the complainant made diligent efforts to seek equivalent employment, Jackson has furnished only lists of businesses and telephone numbers that were provided to the unemployment office in furtherance of his unemployment claim. There is no evidence that Jackson applied to any businesses that were accepting applications for present or future open positions.

As noted, the record lacks independent evidence supporting Jackson's reported job efforts such as job applications or letters from prospective employers. Moreover, Jackson limited his employment opportunities effective September 14, 1995, by his willingness to work only three days per week. His work limitations are further reflected by his admission that he only looked for work three days per week. It is also noteworthy that, despite Jackson's asserted longstanding inability to obtain work as a general laborer, he was able to find employment at the Garland Company in December 1995 during a week between college semesters.

It bears repeating that, in this proceeding, Jackson is seeking back pay for lost wages earned at Mountain Top Trucking that are calculated based on a five day work week consisting of approximately 60 hours per week. However, upon beginning Union College, Jackson reduced his full-time schedule at Cumberland Mine Service to part-time. When viewed in context, there is no basis for concluding that Jackson's decision to remove himself from the labor market on Tuesdays and Thursdays by returning to college was in accord with his duty to mitigate his loss of wages as a general laborer.

Jackson's claim that he would have left college for a full-time job is self-serving. It is entitled to little weight for several reasons. First, Jackson would have to forfeit the \$4,100 Stafford loan he had obtained to finance his Union College attendance. (225-26). Second, Jackson's purported continuing attachment to the full-time labor market is belied by his reduction to part-time work on September 14, 1995, shortly after he began college. Third, there is no evidence that Jackson applied for any open job positions while he was in college given his admitted failure to complete any job applications. Finally, and significantly, Jackson's failure to readily disclose his college attendance during this proceeding, as well as to Virginia State Unemployment officials, negatively impacts on his credibility.

As previously noted, the back pay period in this proceeding is February 18, 1995, through June 21, 1996. The record supports a finding that Jackson was available for full-time employment during the 30 week period from February 18, 1995, until September 13, 1995, the day before Jackson restricted his work week to three days. Jackson was unavailable for full-time employment during his college attendance from September 14, 1995, until May 11, 1996, when he finished attending SECC. Consequently, Jackson again became available for full-time employment during the seven week period from May 12, 1996, until the termination of the back pay period on June 21, 1996.

Thus, the relief to be awarded to Jackson is a total of 37 weeks back wages calculated at \$520.00 per week, or \$19,240, less earnings of \$2,724.60 from employment at Cumberland Mine Service from August 3 through September 13, 1995.⁶ Accordingly, the net relief to be awarded to Jackson is \$16,515.40 plus interest.

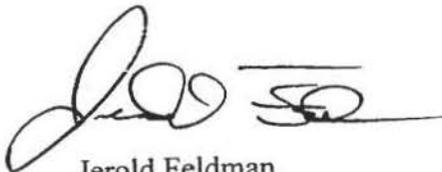
As a final note, the award of back pay is equitable relief. Jackson's continuing failure to forthrightly disclose his college attendance is troubling and could preclude his entitlement to any equitable remedy. However, Jackson's lack of full disclosure must be balanced against the respondents' discriminatory conduct that gave rise to this proceeding. Consequently, it is not without misgivings that I am awarding Jackson monetary damages in this matter.

ORDER

In view of the above, **IT IS ORDERED** that, consistent with the *Decision on Liability*, 19 FMSHRC 166 (January 1977), the respondents are jointly and severally liable for Payment of \$16,515.40 plus interest calculated from February 18, 1995, to the date of payment, less applicable Federal, State and local tax deductions, if any, to Walter Jackson, constituting payment for a total of 37 weeks net lost wages from February 18, 1995, through September 13, 1995, and, from May 12, 1996, through June 21, 1996. **IT IS FURTHER ORDERED** that payment shall be made to Walter Jackson by the respondents within 45 days of the date of this decision.

⁶ Jackson earned a total of \$3,342.60 at Cumberland Mine Service. The \$2,724.60 wages to be deducted from Jackson's back pay award do not include the \$618.00 Jackson earned at Cumberland Mine Service from September 14 through October 4, 1995, during which time Jackson worked part-time for a total of 77¼ hours @ \$8.00 per hour. The wages to be deducted also do not include the \$415.00 Jackson earned at the Garland Company in December 1995 during the interim period between college semesters since Jackson is not eligible for back pay during this period.

Interest shall be calculated in accordance with the formula adopted in the Commission's decisions in *Secretary of Labor o/b/o Bailey v Arkansas-Carbona Company*, 5 FMSHRC 2042, 2049-52 (December 1983) as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (November 1988). Applicable interest rates and daily interest factors may be obtained on the Internet at: www.nlr.gov/ommemo/ommemo.html.



Jerold Feldman
Administrative Law Judge

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DECISION

Appearances: Robert A. Cohen, Esq., Jennifer Honor, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner; R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Respondents.

Before: Judge Feldman

These consolidated proceedings, brought by the Secretary under section 110(c) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(c), concern whether civil penalties should be assessed against each of four supervisory personnel of National Steel Pellet Company because they “knowingly authorized, ordered, or carried out” violations of sections 56.6311(b) and (c) of Part 56 of the Secretary’s mandatory safety standards governing the handling and disposal of misfires. 30 C.F.R. § 56.6311(b) and (c). A hearing in these matters was conducted from October 31 through November 2, 2000, in Duluth, Minnesota. At the beginning of the third day of trial, the parties informed me that they had reached a settlement agreement. This decision formalizes approval of the terms of the parties’ agreement.

The underlying facts that gave rise to these proceedings essentially are undisputed. These proceedings concern a non-fatal blasting accident that occurred in the early morning on March 4, 1998, at National Steel Pellet Company’s (National’s) open pit taconite mine located near Keewatin in Itasca County, Minnesota. The accident occurred when the teeth of a bucket on a Caterpillar Model 5230 hydraulic front shovel, operated by Lois Dunn from the operator’s cab located approximately 18 feet above ground level, apparently detonated a significant quantity of ANFO (ammonium nitrate and fuel oil mixture) that remained after a December 15, 1997, shot of Bench No. 1510-85. The Caterpillar Model 5230 hydraulic front shovel is a very large piece of earth moving equipment that weighs approximately 700,000 pounds.

The dimensions of Bench No. 1510-85 were approximately 1,200 feet long by 150 feet wide by 40 feet high. National’s blasting records reflect the December 15, 1997, blast was accomplished by loading a total of 521,970 pounds of ANFO mixture into 199 drill holes spaced between 28 to 30 feet apart. The drill holes were 16 inches in diameter and approximately 40 feet in depth. The drill holes were positioned in four rows that extended the full length of the bench. Each hole contained two primers and approximately 2,500 pounds of explosives. The loaded holes were connected with plastic down-line tubing that was designed to effectuate a sequential detonation.

Bench No. 1510-82 was located adjacent to Bench No. 1510-85. Bench No. 1510-82 was blasted on November 5, 1997. While Bench No. 1510-82 was being removed, Bench 1510-85 was being loaded in preparation for the December 15, 1997 shot. During the course of removing the blasted material from Bench No. 1510-82, a shovel operator mistakenly dug into the outer perimeter of Bench No. 1510-85, causing the plastic down-line tubing to become

dislodged from the explosive material that had been placed in approximately six vertical drill holes near the overburden. The plastic tubing could not be retrieved from the steep slope of the embankment. In order to preserve the sequential design of the shot, the disconnected holes were rewired by bypassing the explosive material in the six holes. Thus, National knowingly removed these six holes from the detonation sequence at Bench No. 1510-85.

National reportedly believed the explosive materials loaded in these disconnected holes would be dissipated by the force of the blast. National was wrong. It was estimated that the amount of ANFO accidentally detonated on March 4, 1998, by Dunn's hydraulic shovel was comparable to the amount of ANFO used to destroy the Federal Building in Oklahoma City, Oklahoma.

As a result of an accident investigation conducted by the Mine Safety and Health Administration (MSHA), National was cited for violations of sections 56.6311(b) and (c) that govern the proper procedures for protecting personnel from the hazards caused by misfires. National did not contest the cited violations.

In addition, as a result of MSHA's investigation, Larry M. Schmelzer, National's Senior Mining Engineer, Day Pit Manager David T. Bath, and, Area Manager Arthur C. Baldwin, were each charged with knowingly authorizing, ordering, or carrying out violations of sections 56.6311(b) and (c). The Secretary sought to impose civil penalties of \$2,000.00 on each of these management personnel, consisting of \$1,000.00 for each of the two cited violations. In addition, National's Division Manager, Donald E. Healey, was charged with knowingly authorizing, ordering, or carrying out a violation of section 56.6311(b) for which the Secretary sought to impose a civil penalty of \$1,000.00.

Specifically, sections (b) and (c) of the cited mandatory safety standard provide:

§ 56.6311 Handling of misfires.

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

(c) When a misfire cannot be disposed of safely, each approach to the area affected by the misfire shall be posted with a warning sign at a conspicuous location to prohibit entry, and the condition shall be reported immediately to mine management.

The Commission discussed the criteria for determining if there is personal liability under section 110(c) of the Mine Act in *Lefarge Construction Materials, and Theodore Dress*, 20 FMSHRC 1140 (October 1998). The Commission stated:

The proper inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). 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.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558 (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*, 14 FMSHRC at 1245.

20 FMSHRC at 1148.

Determining whether an agent's conduct constitutes the requisite aggravated conduct to impose personal liability under section 110(c) requires consideration of the degree of risk posed to miners by the cited violations. It is axiomatic that, "[t]he risk reasonably to be perceived defines the duty to be owed." *Palsgraf v. Long Island R.R.*, 248 N.Y. 339 (1928). Thus, when violations expose miners to a high degree of danger, a heightened standard of care is required of management personnel. 20 FMSHRC at 1147. A good faith belief that a condition is not unsafe is not a defense to 110(c) liability if such belief is unreasonable. *Id.* at 1150.

Section 56.6000 of the Secretary's regulations set forth the definitions of the terms that are used in the Secretary's regulations governing the safe use of explosives. 30 C.F.R. § 56.6000. Section 56.6000 defines the term "misfire" as:

The complete or partial failure of explosive material to detonate as planned. *The term is also used to describe the explosive material itself that has failed to detonate.*

(Emphasis added).

During the first two days of the hearing, the respondents denied liability based on their assertion that a “planned detonation” is a condition precedent to the applicability of sections 56.6311(b) and (c) concerning misfires. The respondents note that the ANFO, and the related blasting caps and primers, were intentionally disconnected and bypassed during the sequential December 15, 1997, blast. Thus, the respondents argue the subject explosives were not misfires because there was no “failure of explosive material to detonate as planned” as required by section 56.6000 because detonation of these disconnected loaded holes was not attempted.

At trial, the Secretary maintained that misfires commonly occur when explosives, for whatever reason, become detached from the connecting detonating cord. Thus, the Secretary asserts that explosives are “misfires” regardless of whether the explosives were intentionally, or unintentionally, disconnected from the blasting cord.

The parties’ settlement agreement precludes the adjudicatory resolution of the applicability of sections 56.6311(b) and (c) to the March 4, 1998, accidental blast. However, I note, parenthetically, that a safety standard must be construed in accordance with its intended purpose. *Consolidation Coal Company*, 15 FMSHRC 1555, 1557 (August 1993). Thus, when interpreting a regulatory standard, the ordinary meaning of words must prevail unless such meaning thwarts the purpose of the regulatory standard or otherwise leads to an absurd result. *Emery Mining Corporation*, 9 FMSHRC 1997, 2001 (December 1997).

At the beginning of the third day of trial, the parties proffered a verbal settlement agreement that was approved on the record. The settlement terms were formalized in a written joint motion to approve settlement filed on November 15, 2000. Pursuant to the terms of the agreement, Larry M. Schmelzer and Arthur C. Baldwin have each agreed to a reduction in total civil penalty, from \$2,000.00 to \$1,000.00, consisting of \$500.00 for each of their knowing violations of the mandatory regulatory safety standards in subsections (b) and (c) of section 56.6311. The parties’ settlement terms include the dismissal of the civil penalty cases against Donald E. Healy and David T. Bath because the evidence is inadequate to demonstrate Healey or Bath knowingly violated either of the cited mandatory safety standards.

ORDER

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED**, and **IT IS ORDERED** that Larry M. Schmelzer and Arthur C. Baldwin each pay, within 30 days of the date of this Decision, as the Secretary shall direct, a total civil penalty of \$1,000.00 in satisfaction of the two citations in issue. Upon timely receipt of payment, Docket Nos. LAKE 2000-52-M and LAKE 2000-55-M **ARE DISMISSED**.

IT IS FURTHER ORDERED, consistent with the parties' agreement, that the civil penalty proceedings in Docket Nos. LAKE 2000-53-M and LAKE 2000-54-M brought by the Secretary against Donald E. Healy and David T. Bath **ARE DISMISSED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 7, 2000

KNOX CREEK COAL CORPORATION,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. VA 98-50-R
v.	:	Citation No. 7297931; 6/15/98
	:	
SECRETARY OF LABOR,	:	Docket No. VA 98-51-R
MINE SAFETY AND HEALTH	:	Citation No. 7297932; 6/15/98
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. VA 98-52-R
	:	Citation No. 7297933; 6/15/98
	:	
	:	Kennedy No. 2
	:	Mine ID 44-06872
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. VA 99-14
Petitioner	:	A.C. No. 44-06872-03504
	:	
v.	:	Kennedy No. 2 Mine
	:	
KNOX CREEK COAL CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;

Julia K. Shreve, Esq., and David J. Hardy, Esq., Charleston, West Virginia, for Respondent.

Before: Judge Barbour

These consolidated contest and civil penalty proceedings arise under sections 105(a), 105(d), and 110(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §§ 815(a), 815(d), 820(a)). The cases involve four citations issued at the Kennedy No. 2 Mine, an underground bituminous coal mine located in Buchanan, County, Virginia. All of the citations concern alleged violations of mandatory safety standards relating to the condition of the roof in the mine and/or the actions of the company's employees with respect to the condition. A hearing on the matter was conducted in Grundy, Virginia, following which the parties submitted briefs.

STIPULATIONS

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

1. The [Administrative Law] Judge . . . [has] jurisdiction to hear and decide the . . . proceeding
2. Knox Creek Coal Corporation [(Knox Creek or the company)] is the owner and operator of the . . . [m]ine.
3. [O]perations of the . . . [m]ine are subject to the jurisdiction of the Act.
4. [T]he maximum penalty which could be assessed for these [alleged] violations will not affect the ability of . . . [Knox Creek] to remain in business.
5. MSHA Inspector David Fowler was acting in his official capacity as an authorized representative of the Secretary of Labor [(Secretary)] when he issued Citation Nos. 7297931, 7297932, 7297933 and 7297939.
6. [T]rue copies of Citation No[s]. 7297931, 7297932, 7397933 and 7297939 along with all appropriate continuation forms and modifications were served on . . . [Knox Creek] or its agent as required by the Act.
7. Citation Nos. 7297931, 7297932, 7297933 and 7297939 are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
8. Citation Nos. 7297931, 7297932, 7297933 and 7297939 have not been subject to previous review proceedings.

9. [A] clean-up plan was not provided in writing at the entrance to the scene of the roof fall that occurred on June 11, 1989 (Tr. 30-31; see Joint Exh. 1).

THE FACTS

THE MINE AND THE ROOF CONTROL PLAN

The Kennedy No. 2 Mine is an underground bituminous coal mine. At all times pertinent to these matters coal at the mine was cut by remote controlled continuous mining machines (continuous miners) (Tr. 41). The extracted coal was removed from the mine by conveyor belt then hauled away by truck (Tr. 206).

Prior to June 1998, the roof control plan at the mine restricted cuts taken by continuous miners to 20 feet. However, the company believed longer cuts (also referred to as "deep" or "extended" cuts) could be taken safely and submitted to MSHA a proposed amendment to its plan. The amendment provided for cuts of up to 35 feet.¹

Upon receipt of the proposed amendment MSHA assigned Kenneth Shortridge, an MSHA roof control specialist, to investigate (Tr. 309). Shortridge went to the mine and looked at the roof in the areas where deep cuts were proposed. In general, the roof was cracked and seeping water, especially in the No. 3 and No. 4 entries. Shortridge recommended MSHA not approve the amendment. Shortridge testified that he "didn't feel . . . [the mine] had the type of roof that could stand [an] over 20[-]foot cut" (Tr. 310). When Shortridge told this to then mine superintendent Harry Childress, Childress asked if Knox Creek could withdraw the proposal and submit it later. Shortridge said that it could (Tr. 311).

Two or three weeks passed and the company resubmitted the proposal. Shortridge returned to the mine. He found the roof "tremendously" improved (Tr. 312). Although cracks still existed in the roof, they were small -- Shortridge described them as "hairline cracks". The hairline cracks ran in various directions. In other words, all of the cracks did not run in the direction the continuous miners would be advancing. Shortridge did not believe the hairline cracks prevented him from recommending approval. On February 18, 1998, the amendment was approved (Tr. 312-313; Gov. Exh.1).

¹ Opie McKinney, a mine inspector for the Commonwealth of Virginia, explained that until the late 1980s or the early 1990s, cuts normally were limited to 20 feet. The introduction of remote controlled continuous miners permitted the operators of the machines to remain outside face areas while operating the machines. Also, they allowed the mining of more coal in less time (Tr. 234). As a result, in certain instances MSHA began to approve longer cuts (Tr. 129-130).

THE AMENDED ROOF CONTROL PLAN

The amended plan stated that any working place developed further than 20 feet in by the last full row of roof bolts to the deepest point of penetration in the working face was a "deep cut" and that deep cuts could not exceed 35 feet (Gov. Exh. 1 at 4 ¶ C). It provided further, "When adverse roof conditions are encountered, the continuous min[er] . . . cut depth shall be limited to . . . 20 . . . feet . . . or less, as necessary to provide for effective roof control" (Gov Exh. 1 at 4 ¶ H). The provision listed eight circumstances which might indicate adverse roof conditions (Id. at 4-5). It further stated that adverse roof conditions were not limited to those listed (Id. at 4; see also Tr. 44).² The listed conditions were: "[w]ater coming through the roof"; "the presence of change in the type of roof . . ."; "cutting along the rib"; "[d]raw rock that is not mined with the coal"; "'drummy' or 'loose' roof detected during roof testing"; "[m]ining under a stream or other minimum cover . . ."; "[a] roof test hole in the cut adjacent to the cut to be advanced . . . [that] shows conditions, such as a slip, rash, rider seam, or other subnormal condition"; or "[a]ny other detectable condition, such as excessive loading of roof bolts, unusual spalling of ribs, or heaving of floor, that is known to indicate the presence of adverse roof conditions in the mine" (Gov. Exh. 1 at 5 ¶ H. a.- h.).

THE JUNE 11 ROOF FALL AND ROOF CONDITIONS IN THE AFFECTED ENTRIES

On the evening of June 11, 1998, Safety Director Neely was called at home and told that a large roof fall had occurred at the mine (Tr. 50-51). Neely telephoned McKinney and MSHA to report the fall (Tr. 51, 82, 208). Neely told McKinney that he was going to the mine to view the fall (Tr 51-52, 82).

When Neely reached the mine, he traveled underground to the affected area. He entered the No. 4 crosscut and observed that the fall. It extended throughout much of the crosscut. He also saw that in part it was deep, the deepest area being on the left side of the crosscut and the depth tapered off as the fall approached the right rib (Tr. 52). After viewing the fall and confirming that no one had been hurt, Neely left the mine.

The following morning David Fowler, an MSHA mine inspector, went to the mine to conduct a regular inspection. He arrived around 8:15 a.m.. He overheard members of mine management talking about the fall. Neely had returned and was present. Fowler asked him about reporting the fall (Tr. 207). Neely told Fowler that he called Wayne Hart, Fowler's supervisor, the night before and made a report. Satisfied that MSHA's reporting requirements had been met,

² Ted Neely, a former safety director for Knox Creek and a management official who assisted in developing the roof control plan (Tr. 40, 43), testified the listed conditions were intended to give "some defining but not all defining [adverse] conditions that could exist" (Tr. 45).

Fowler telephoned Shortridge and asked Shortridge to come and view the area (Tr.208). In the meantime, McKinney too arrived at the mine.

Neely, McKinney, Shortridge and others went to the site of the fall.³ Viewing the area a second time Neely realized the fall was larger than he first thought. It extended from the No. 4 entry well into the No. 3 entry, a total distance, according to McKinney, of 56 feet. In addition, the fall occurred across the entire 20-foot width of the No. 4 entry (Tr. 116, 189-190; see also Gov Exh. 3 at 3). The roof in the No. 4 entry intersection had not been bolted but in the No. 3 entry where it had been bolted the roof either pulled down the bolts or fell around them (Tr. 53-54, 84, 322).

To Neely the sides of the fall cavity looked "very slick" (Tr. 72). He believed the fall most likely was caused by a "slickensided slip", which he described as a fault or a crack that extended to the maximum height of the fall area and into which water had traveled causing the layers of roof material to deteriorate and break away (Id.).

McKinney agreed. He testified that the black rock he observed in the fall area lead him to believe there had been such a slip which meant the rock of the roof had not molded together and conformed to the adjacent rock (Tr. 159).⁴

Fowler also believed there was a slickensided slip in the No. 4 entry, one that ran at a high angle to the roof. He viewed the "feathered edge" of the largest crack in the entry as a possible sign of the slip (Tr. 280). After the roof fell the slickensided fault area was obvious, but Fowler admitted he did not know for certain whether it was obvious before the cut was taken (Tr. 281-282).

³ When the party reached the fall area they found that all of the fallen roof material had been cleaned up (Tr. 105).

⁴ To depict the roof conditions, the Secretary offered numerous photographs that were taken 29 days after the fall (Gov. Exh. 6). The photographs were admitted into evidence on the basis that they might reveal conditions that existed immediately after and prior to the fall. Following their admission Fowler cast doubt on their relevance. He testified that the area photographed had been rock dusted several times subsequent to the fall (Tr. 276-268). This tended to obscure the roof conditions. Moreover, Jackie Yates, a continuous miner operator, persuasively testified that the photographs were not a reliable source for evaluating roof conditions immediately after and prior to the fall because, "the conditions deteriorate with time" (Tr. 400). For these reasons the conclusions I have reached regarding the subject roof conditions are based on the testimony of the witnesses rather than the photographs.

In the No. 3 entry just outby the area where the fall had occurred members of the inspection party observed cracks in the roof. McKinney spoke of, "many cracks" and of some that ran across the width of the entry (Tr. 91, 152-153). According to McKinney, a few of the cracks had begun to separate (Tr. 155, 157, 158). Also he noticed several of the cracks had straps over them. McKinney believed that the roof bolter operators must have had concerns about the condition of the roof or they would not have installed the straps (Tr. 148).

Fowler and Shortridge also observed the cracks in the No. 3 entry (Tr. 210, 321). They concurred with McKinney that several of the cracks ran across the width of the entry and that several were strapped. Although the cracks were more than hairline cracks, Fowler noted they were not "gapped open" (Tr. 210) and Shortridge did not believe the cracks were wide enough for any harmful rock to fall out of them (Tr. 324).

In addition, the witnesses testified that there were many cracks outside the fall area in the No. 4 entry. These cracks caused the government's witnesses the most concern. McKinney testified the cracks in the No. 4 entry were more pronounced than those in the No. 3 entry. They were wider and, according to McKinney, they were "alarmingly visible" (Tr. 122, see also Tr. 88, 160). Some of the cracks ran into the fall area and some ran across the entire entry (Tr. 92). One prominent crack that ran past the most inby strap in the No. 4 entry and into the fall area was, according to McKinney, 16 inches wide (Tr. 163-164).

McKinney counted 5 straps in the No. 4 entry (Tr. 88, 91; see Gov. Exh. 3 at 3). McKinney reiterated he believed the straps indicated the roof bolter operators knew that the roof conditions were changing and that the roof needed additional support. He stated, "straps cost money and coal people normally don't install straps unless there's a reason" (Tr. 91, 101).

Shortridge testified that several of the straps spanned a, "high angular slip type condition", an area where the, "immediate roof [was] not connected together as one piece of rock" (Tr. 320). The straps, "tie[d together] the separate pieces of [rock] on both sides of the crack" (Tr. 324). As he recalled, the gap created by this crack was wide enough that a person could stick their hand into it (Tr. 328). To McKinney the crack signified that there was a, "[c]hange in roof conditions where you don't have a bonding of the roof material" (Tr. 88).

McKinney also believed the several parallel cracks in the No. 4 entry signaled a major fault in the roof, a fault that ran in the same direction as the entry and the mining. Although cracks were not specifically mentioned in the roof control plan as an adverse condition, McKinney noted that the list of adverse conditions in the plan was not exclusive (Tr. 183-184). The direction of the cracks indicated that any roof fall was likely to be extensive. Had the cracks run across the entry rather than in the direction of mining, the faulty roof would have tended to be supported by the pillar blocks (Tr. 93-94). Summing up what he found, McKinney testified that, "There was a major fault band, a separation, bad top, adverse [roof] conditions . . . [that] ran across that section from . . . [the No.] 4 entry into [the No.] 3 entry" (Tr. 170).

Fowler noted there was no indication that roof conditions existing on June 12 in the No. 3 entry and the No. 4 entry outside the fall cavity had been changed by the fall. The roof bolts and straps outside the cavity were not stressed or distorted. Therefore, he believed that the conditions that existed on June 12 outside the fall area also existed on June 11. Especially because of the conditions that existed in the No. 4 entry, it was clear to Fowler the extended cut should not have been taken (Tr. 288-289, 291). However, he admitted that even when cracks were present it sometimes could be "extremely" difficult to determine whether they represented a hazard (Tr. 274).

During the June 12 mine visit McKinney was unable to speak with miners who were present in the No. 3 and No. 4 entries on June 11 (Tr. 186-187). Therefore, he returned on June 15 and interviewed Kevin Ward, the continuous miner operator who mined the deep cut. McKinney testified that Ward told him that he was in the process of cleaning up when:

he saw the roof drip⁵], and he backed the continuous miner out of the [No.] 4 intersection He asked . . . Jackson [, the shuttle car operator,] to remove his shuttle car so they could get out of there . . . [H]e started walking back toward the [No.] 4 entry when . . . [the roof] fell (Tr. 113-114).

McKinney asked Ward if he had cut through into the No. 3 entry prior to the fall and Ward stated he did not know (Tr. 134).⁶ According to McKinney, Ward also stated he did not understand why the roof did not fall throughout in the No. 4 entry's entire intersection because, "the No. 4 intersection was cracked enough to fall" (Tr. 114).⁷

Fowler also spoke with Ward. He recalled Ward stating that he had seen the cracks in the No. 4 entry before he began the cut (Tr. 223) and that he was surprised all of the No. 4 entry had not fallen because the entry had a bad roof (Tr. 225). However, this characterization of the roof was disputed by Ward's roof bolter, Lester Lee "Chuck" Oden, who testified that prior to the fall he saw no indications the roof was hazardous (Tr. 532-533). It also was disputed by Ward himself who maintained that all he recalled seeing in the entry was a "[l]ittle scaley draw rock, a few straps" (Tr. 411). In addition, Ward was emphatic that there was no evidence of a slickensided slip in the roof prior to beginning the deep cut (Tr. 423).

⁵ Ward was not referring to water but rather to small pieces of rock that fell from the roof as he finished the cut and removed the continuous miner from the area (Tr. 224).

⁶ Had Ward cut into the No. 3 entry, the cut would have exceeded 35 feet and would have been illegal under the roof control plan (Tr. 135).

⁷ Ward testified he was not sure he said this to McKinney. If he did he could have been referring to pieces of draw rock that fell as he finished the cut and before the roof started to fall (Tr. 424-425).

Asked about supervision before and during the deep cut, Ward testified he remembered seeing Donald Riffe, his section foreman, "a couple of times" during the shift (Tr. 409). He could not recall if he saw Riffe before he took the deep cut, but he believed Riffe, "was probably around maybe once or twice" after he began the cut (Tr. 410).

Riffe was more specific. He stated that normally he examined entries before deep cuts were taken to be aware of conditions in the entries (Tr. 478). He did so on June 11. He saw the roof straps in the No. 3 and the No. 4 entries (Tr. 480). He did not know why they were installed, but he did not see anything about the roof in the strapped areas that alarmed him (Tr. 484). In addition, he felt that the cracks in the No. 3 and No. 4 entries were not unusual. Riffe termed them "thin laminations of rock" (Tr. 480).⁸ He maintained that the condition of the entries was the same when the roof control plan amendment was evaluated and when prior deep cuts were taken in the presence of state and federal officials (Tr. 480).

Everyone agreed test holes had been drilled in the No. 4 entry roof prior to the deep cut. Oden, who drilled the holes, testified they revealed the first couple of inches of roof was composed of some draw rock and from there up the roof was "one massive rock" with no cracks nor other abnormalities (Tr. 537).

McKinney examined the holes after the fall and found they indicated no faults or other hazardous roof conditions (Tr. 126, 180). Shortridge too found no evidence of hazards (Tr. 351). Both men noted, however that test holes are not the only indicators of hazardous roof (Tr. 127-129, 353). As Shortridge stated, they do not indicate conditions "all over the section", only where the holes are drilled (Tr. 327).

RIFFE'S JUNE 11 ON-SHIFT EXAMINATION

On June 15, McKinney spoke with Riffe about whether he conducted an on-shift examination of the section on June 11. Fowler was present during the conversation. McKinney recalled Riffe stating that he conducted an examination of the No. 3 and No. 4 entries prior to the deep cut, that he knew there were cracks in the entries but that he wasn't worried about them because they were incline cracks, not vertical cracks, and he only worried about vertical cracks (Tr. 114). Fowler agreed that Riffe stated he, "only worried about a vertical crack" (Tr. 284).

Riffe contended McKinney and Fowler misunderstood what he meant. "For someone to say that the only cracks they're worried about are vertical cracks [would be] . . . ridiculous" (Tr. 471). Rather, he told McKinney he worried about cracks that, "approached the vertical" (Id., see also Tr. 472). They are the same as "high-angle cracks" and they are the "most hazardous" kind of cracks (Tr. 471) because, as Childress observed, they can indicate a large slip (Tr. 569).

⁸ Riffe described the "laminations" as, "something that has a potential of becoming a crack, but . . . is not necessarily a crack" (Tr. 480).

Riffe testified he visually examined the roof and ribs in the entries before the deep cut was taken. He tested the roof in the No. 4 entry by the sound and vibration method. He felt inside the test holes. His examination did not indicate the roof was hazardous (Tr. 438). In addition, earlier Knox Creek had taken down roof in the No. 4 entry to accommodate the belt drives outby and inby the No. 4 intersection. In both instances, the roof was normal (Tr. 438-439). Finally, the roof bolters from previous shifts did not report to Riffe any roof conditions that were abnormal (Tr. 443). Summing up the results of the inspection he conducted before the deep cut, Riffe stated he, "saw no conditions present that were any different [than] in the rest of the Kennedy No. 2 Mine" (Tr. 506). In Riffe's view, the roof fall was caused by an undetectable fault (Tr. 452, 454, 489).

DOCKET NO. VA-51-R

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>
7297932	6/15/98	75.202

DOCKET NO. VA-99-14

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Proposed Penalty</u>
7297932	6/15/98	75.202	\$6,000

THE VIOLATION

The citation states in pertinent part:

[E]vidence and testimony indicate the approved 35 foot [d]eep [c]ut plan was not being complied with on . . . the No. 4 entry left cross cut where a roof fall occurred upon completion of the cut. The cut was mined even though evidence indicated there were numerous cracks in the mine roof in the No. 4 entry and in the No. 3 entry where the cut mined holed through. Additional supports such as straps had been installed in both entries across the cracks that were present in the areas of adverse roof. . . . The foreman stated he had observed the cracks and straps in both entries prior to mining the cross cut (Gov. Exh. 11)

A provision of a roof control plan, such as the deep cut provision, once adopted by the operator and approved by the Secretary, is enforceable as a mandatory safety standard. When an alleged violation of a plan is contested the burden of proof is on the Secretary. To meet the burden she must prove that the pertinent provision is part of the plan, that the cited condition or practice violated the provision, and she must establish her proof by a preponderance of the evidence (See Consolidation Coal Co., 11 FMSHRC 966, 973 (June 1989)). The Secretary may rely on direct evidence, on direct evidence and inferences, or, in some situations, on inferences

alone (Mid Continent Resources, 6 FMSHRC 1132 (May 1984)).

Here, the Secretary has established the first element of her required proof. The parties agree that on February 18, 1998, the roof control plan was supplemented to allow deep cuts of not more than 35 feet and to prohibit cuts to not more than 20 feet when, "adverse roof conditions" were encountered. They agree also that the supplement listed eight nonexclusive conditions that might indicate "adverse roof conditions" (Gov. Exh. 2 at 2¶ H; Tr. 45).

The phrase, "adverse roof conditions" is not defined in the provision nor elsewhere in the plan. Nevertheless, its meaning is discerned easily. The word "adverse" is defined generally as something that is "detrimental" or "unfavorable" (Webster's Third new International Dictionary (1993) at 31)). In the context of the supplement "adverse roof conditions" are conditions that a reasonably prudent person, familiar with the mining industry and the mine, would recognize as detrimental to the stability of the roof and as hazardous to miners. Such conditions might be indicated by any one of the conditions listed in subsections a. through h. of the provision, by a combination of the listed conditions, or by unlisted conditions that adversely and hazardously impacted the stability of the roof .

As is apparent from the wording of the citation, the Secretary is alleging that the adverse roof conditions constituting the violation were the cracks in the No. 3 and No. 4 entries and the straps that traversed some of the cracks.

With regard to the No. 3 entry, the general contention of the Secretary's witnesses was that several of its cracks ran across the entry's entire width. In addition, because some of the cracks were more than hairline cracks (in that they had begun to separate), the company should have realized the roof potentially was hazardous (Tr. 92, 152-153). The Secretary maintained the potential hazard also was evidenced by the straps the roof bolters installed over the cracks to support the roof (Tr. 87, 148). To Inspector Fowler the cracks in the No. 3 entry indicated the roof was not one solid piece (Tr. 211). To McKinney, although the cracks were not as alarming as those in the No. 4 entry, they were "indicators" of the adverse condition of the roof and of the need not to take a deep (Tr. 168).

In the No. 4 entry the witnesses contended the cracks were more numerous and wider than in the No. 3 entry. They were, "very visible" (Tr. 88) and as in the No. 3 entry some of them ran entirely across the entry. Also, as in the No. 3 entry the Secretary maintained the straps spanning the cracks indicated that the roof bolters knew the roof conditions were changing and that additional support was needed (Tr. 91, 101). The cracks should have signaled to mine management that the roof's condition was adverse, especially the large crack that was spanned by five straps. This crack was described as a, "high angular slip type condition" and as the result of an area where the, "immediate roof [was] not connected together as one piece of rock" (Tr. 320, see also Tr. 164-166).

The decision to take the deep cut was made on June 11. The alleged violation was based

on conditions observed by the Secretary's personnel on June 12. The critical question is what conditions were like when the decision was made. Did straps and cracks that existed in both entries on June 12 also exist on June 11? If so, would a reasonably prudent person, familiar with the mining industry and the conditions at the mine, have concluded the straps and cracks were a sign of adverse roof conditions and therefore that a deep cut should not be taken?

Certainly, the straps existed prior to the fall. No testimony was offered that they were installed after the fall but before the inspection party arrived on June 12. Moreover, Fowler's unrefuted testimony that on June 12 the straps showed no signs of being twisted, distorted, or displaced is supportive of the conclusion that they appeared on June 12 much as they appeared prior to the fall on June 11.

I also believe the record supports finding that on June 12 the cracks in both entries appeared much as they did on June 11 and that especially in the No. 4 entry the cracks were "very visible", as McKinney testified (Tr. 88). I am lead to this conclusion by Fowler's testimony that on June 12 there was no indication of stress on roof support (the roof bolts and plates) outside the roof fall cavity area (Tr. 288-289). This testimony is consistent with a dearth of specific evidence that any management officials told government investigators the conditions on June 12 were significantly different from those that existed the previous day (see e.g., Tr. 96). Had the conditions varied, I believe mine officials would have taken the initiative to advise the inspectors. After all, the company was faced with possible citations arising out of the incident.

I specifically reject Riffe's testimony that prior to the fall "[t]here [were] no visible cracks anywhere" in the No. 4 entry (Tr. 490, see also Tr. 492). The straps were installed to span the cracks, and the straps were present on June 11. Moreover, the lack of distorted roof supports outside the fall cavity makes it extremely unlikely that all of the cracks suddenly appeared after the fall and before the inspection party arrived. Finally, Riffe did not specifically deny that he told McKinney that he knew that there were cracks in the entries. Rather, he maintained McKinney misunderstood him, that he actually stated he was, "not as concerned about cracks that where horizontal as [he] was about cracks that approached the vertical" (Tr. 472). Clearly, the subject of cracks was discussed, and McKinney's version of the discussion is more plausible than Riffe's.

Having found that cracks existed in both entries on June 11, I also conclude the cracks were signs of "adverse roof conditions" and that the deep cut should not have been taken. This is because there is record support for finding the cracks in the No. 3 entry were more than harmless hairline cracks in that some ran all of the way across the entry and some had begun to separate (Tr. 91, 152-153, 157-158). It is perhaps self evident, but Fowler put it well when he described the cracks as evidence of "layers of rock that [were not] adher[ing] to each other" (Tr. 211).

In addition, there is record support for finding the cracks in the No. 4 entry were more pronounced even than those in the No. 3 entry (Tr. 88). Some were wider, and as in the No. 3 entry, some ran across the entry's width (Tr. 92, 96-97). Moreover, as McKinney persuasively

testified, because cracks in both entries tended to run in the same direction as the deep cut, a fall of greater proportions was more likely (Tr. 93-94).

For these reasons, I conclude that the more-than-hairline cracks in the No. 3 entry and the even more pronounced cracks in the No. 4 entry should have alerted mine management that the roof might not be bonded adequately and that if a deep cut were taken parallel with the cracks and toward the No. 3 entry the chance of an extensive roof fall was likely. The cracks were a sign of a condition that was detrimental to the stability of the roof and therefore were an adverse roof condition within the meaning of the deep cut plan. By making the deep cut in the presence of the cracks, Knox Creek violated the plan and section 75.202.⁹

S&S and GRAVITY

A violation is a significant and substantial contribution to a mine safety hazard (S&S) if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature (Arch of Kentucky, 20 FMSHRC 1321, 1329 (December 1998); Cyprus Emerald Resources, Inc., 20 FMSHRC 790, 816 (August 1998); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981)). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission held that to establish an S&S violation the Secretary must prove: (1) the existence of the underlying violation; (2) a discrete safety hazard — that is a measure of danger to safety contributed to by the violation; (3) a reasonable likelihood the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury in question will be of a reasonably serious nature.

In considering the third element, the likelihood of the injury must be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); see also Southern Ohio Coal Co. 13 FMSHRC 912, 916-917 (June 1991) and Halfway, Inc., 8 FMSHRC 8, 12 (January 1986)).

The Secretary proved each of the four elements. She established that the violation existed. She further established that by taking the deep cut in the presence of adverse roof conditions, the continuous miner operator increased the chances for a roof fall because as he mined coal in parallel with many of the cracks and as more roof was exposed he lessened the support for the existing roof. He failed to implement what McKinney described as "the ultimate

⁹ In reaching this conclusion I have not considered the presence of the straps in both of the entries. Although the record supports finding the straps existed, it does not support finding they were indicative necessarily of an adverse roof condition. Rather, the testimony reveals that the use of straps at the mine was not unusual and that while they could be used as roof support also they could be used to prevent potentially loose but not necessarily harmful rock from falling (Tr. 388-389, 412, 534, 544, 628-629). Thus, the straps did not invariably signal the roof could be dangerously unstable.

additional step" in roof support techniques -- he failed to lessen the cut (Tr. 175).

The danger of mining a deep cut in conjunction with adverse conditions was shown by the fact both Ward and Jackson were imperiled by the fall. Both were close to the fall. Once it started there was no predicting how extensive it would be. Had the fall continued back toward them and overridden the roof supports (as happened in the No. 3 entry) it was reasonably likely both miners would have been seriously injured or killed.

In addition to being S&S the violation was very serious. It subjected two miners to the real possibility of serious injury or death. Indeed, the reasonable likelihood of injury or death nearly was a certainty because I credit McKinney's testimony that Ward told him he was surprised all of the roof in the No. 4 entry did not come down (Tr. 114). McKinney's recollection corresponds with what Fowler heard Ward say (Tr. 223), and Ward's explanation that if he said such a thing he could have been referring to draw rock pieces that fell as he finished the cut, was decidedly unconvincing (Tr. 424-425).

NEGLIGENCE and UNWARRANTABLE FAILURE

Because Riffe failed to exhibit the care required by the circumstances, I conclude that Knox Creek was negligent. I have credited McKinney's testimony that Ward told him the roof in the No. 4 entry intersection "was cracked enough to fall" (Tr. 114). Riffe, was present on the section before the cut was taken and while it was underway (Tr. 175). He saw the roof. The cracks and the direction in which they ran were obvious. He should have recognized the cracks were an indication of a condition detrimental to the roof's stability. He should have made certain that Ward restricted the cut to no more than 20 feet.

Although he was negligent, the record does not support finding that Knox Creek unwarrantably failed to comply with its plan. Unwarrantable failure refers to more serious conduct by an operator in connection with a violation. It is characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care" (Emery Mining Co., 9 FMSHRC 1997, 2003-04 (December 1987); see also Buck Creek Coal, Inc. v. FMSHRC, 52F3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test)). Riffe misjudged the roof, but he did not deliberately nor indifferently allow Ward to take the deep cut in the presence of the cracks. Riffe examined the test holes, which, although not conclusive, could have indicated slips in the roof (Tr. 72). The examinations revealed nothing adverse. He also was mindful that the roof bolters and the miners from previous shifts had not alerted him to potentially hazardous roof conditions (Tr. 438-439,443). Moreover, and as Fowler admitted, even when cracks are present, it can be "extremely" difficult to determine whether they signal a hazardous condition (Tr. 274).

DOCKET NO. VA-50-R

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>
7297931	6/15/98	75.362

DOCKET NO. VA-99-14

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Proposed Penalty</u>
7297931	6/15/98	75.362	\$204

THE VIOLATION

Citation No. 7297931 states:

As evidence and testimony indicate an adequate on-shift roof evaluation examination was not conducted on the evening shift of June 11, 1998. The examiner stated he observed the numerous cracks in the No. 3 and No. 4 entries prior to the mining of an extended cut of at least 35 feet in the No. 4 entry left cross cut Roof straps were installed in the No. 3, [and No.] 4 entries where loose draw rock and cracks were present. Even though these conditions were present the cuts mined were not limited to no greater than 20 feet (Gov. Exh. 10).[¹⁰]

Section 75.362 requires in part that, “[a]t least once during each shift, or more often if necessary for safety, a certified person . . . shall conduct an on-shift examination of each section where anyone is assigned to work The certified person shall check for hazardous conditions”. The alleged violation is based upon the allegation that when Riffe conducted an examination in the No. 3 and No. 4 entries prior to Ward beginning the extended cut, that Riffe saw the cracks, but did nothing to restrict the cut (Tr. 114). The Secretary argues that inherent in the regulation is the obligation to take some action to correct any hazardous condition the examiner observes (Sec. Br. 28). “Simply performing an on-shift examination is not all that is required. Hazardous conditions must be corrected” (*Id.*).

I have found, as Riffe testified, that he was in the No. 3 and No. 4 entries prior to the deep cut and that he saw and evaluated the roof on those entries before the cut. Ward was assigned to work in the No. 4 entry, and I conclude Riffe’s evaluation constituted part of the on-shift examination required by section 75.362. Cracks in both entries were obvious. Riffe should have recognized them for what they were — signs of a potentially hazardous condition. Since Riffe did not alert Ward to the hazard or do anything to eliminate it — for example, Riffe did not

¹⁰ The citation also includes allegations concerning the roof in the No. 5 entry. The record contains insufficient evidence to make findings on the conditions in that entry. Therefore, I will not consider the allegations.

advise Ward to take a shorter cut — I conclude that Riffe did not adequately "check for hazardous conditions" as required by the section 75.362.¹¹

Riffe maintained, and the record fully supports finding, that the slicksided slip that most likely caused the roof fall could not be detected by Riffe when he examined the test holes in the No. 4 entry (Tr. 438). Moreover, while the slip clearly was visible after the fall, it is not at all sure that it or any evidence of it could be observed visually and with certainty prior to the fall. Only after the fall could those in the area see the slick sides of the fault. Only then could they see how high into the roof the fault rose as it approached and moved into the No. 3 entry (Tr. 452). Thus, it may well be that as of the time of Riffe's on-shift examination, the exact cause of the roof fall was undetectable (Tr. 489).

However, whether the cracks that existed in the No. 3 and the No. 4 entries before the deep cut were linked casually to the fault and thus to the fall is beside the point. Independently of the fall's specific cause the cracks signaled a potentially hazardous condition. The purpose of section 75.362 is the elimination of such conditions by correcting the conditions if possible or by removing miners from the hazard. As Fowler correctly observed, "the intent of the [on-shift] examination [is] in the first place, to find hazardous conditions and then when you find hazardous condition[s], to do something with it [t]o make the work area safe for the people on the section" (Tr. 228). By doing nothing, Riffe, and through Riffe, Knox Creek, violated section 75.362.

I recognize Riffe also testified he conducted an examination of the area after the roof fall (Tr. 464). During this examination he proceeded to the working face. He observed the condition of the roof and ribs. He checked for methane and oxygen deficiency. He took air readings (Tr. 464-465). This later and more thorough examination, did not excuse the initial inadequate examination he conducted prior to the extended cut. To hold that he had no obligation to act upon what he first saw, would be to subject safety to the timing of the examination.

Finally, and as the Secretary points out, section 75.362 requires that an on-shift examination be done more than once per shift, "if necessary for safety" (Sec Br. 29). In view of the condition of the roof in the entries and the work Riffe knew Ward would undertake, Riffe's examination prior to the cut was "necessary" and required.

S&S and GRAVITY

¹¹ Fowler testified if Riffe truly believed the conditions were such that a cut should not be limited, the onshift examination would have been adequate (Tr. 279). It is important to note however that the law is otherwise. There is nothing in the standard suggesting a violation is negated by the honest but mistaken belief of the on-shift examiner.

The violation was S&S. The danger presented was that because of Riffe's initial inadequate examination Ward and Jackson were subject to injury from a highly possible roof fall. The fact that in this instance Ward was working with a continuous miner that was operated remotely, reduced but did not eliminate the hazard. If Ward had he not moved and instructed Jackson to do the same as rock from the roof began to fall along the ribs, there was a reasonable likelihood that both men would have been hit. Even moving back did not fully eliminate the danger. There was no guarantee that once a fall started it would not carry to where the men were standing and pull down or fall around the roof bolts and plates. Finally, if the miners had been hit by the falling roof they almost certainly would have killed or seriously injured.

Because of the grave or even fatal potential consequences and the very real chance they would have occurred, Riffe's inadequate examination constituted a serious breach of section 75.362.

NEGLIGENCE

The on-shift examiner must meet a high standard of care. The environment in a mine is dynamic. Conditions can change dramatically from shift to shift and even during a shift. Therefore, the duty of the on-shift examiner to check for hazardous conditions as often as is necessary for safety and to take steps to alleviate such conditions when observed is an important component of the Act's scheme to ensure miners' safety. Riffe, acting on behalf of the company, failed to meet this duty.

DOCKET NO. VA-99-14

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Proposed Penalty</u>
7297939	7/15/98	75.220	\$140

THE VIOLATION

Citation No. 7297939 states in part:

The approved Roof Control Plan 35' Deep Cut Plan was not being complied with in the . . . No. 2 entry left cross cut where the cross cut had been mined through with a 35' deep cut. The continuous mining machine operator was observed operating the mining machine remotely while being positioned inby the second row of permanent supports. The approved Roof Control Plan 35' Deep Cut Plan requires the mining machine operator to be positioned outby the second full row of permanent supports while mining the deep cut remotely (Gov. Exh. 18).

On July 15, 1998, Fowler was conducting an inspection of the mine. He was

accompanied by Neely. The men went to the No. 2 entry where a continuous miner was in use. The continuous miner was completing a 35-foot cut (Tr. 260). Fowler saw the continuous miner operator, Jackie Yates, sitting near a rib. Yates, who had been cleaning up loose coal, was writing in a notebook (Tr. 60, 62).

According to Fowler, Yates was positioned under the first and second full row of roof bolts and all of Yates's body was inby the second full row (Tr. 255, 258). However, Neely remembered Yates as being in a somewhat different position, either under or a little inby the second row of roof bolts (Tr. 60). Yates himself testified that he was, "sitting underneath the second to the last row of bolts" (Tr. 383, see also Tr. 392). Fowler asked Yates to move outby the second full row, and the Yates complied (Tr. 255-256).

The deep cut provision of the roof control plan stated that when a deep cut was taken, "No workman shall proceed into the area inby the second full row of roof bolts where the continuous mining machine [has] increased cut depth in a deep cut" (Gov. Exh. 1, at 3 ¶ N, see also Tr. 61-62). Based upon what he observed, Fowler determined that Yates was "inby the second full row of roof bolts" and therefore that the company was in violation of the plan and section 75.220 (Gov. Exh. 18).

After receiving a citation, the company sent a written warning to Yates. According to Childress, the warning was, "to make sure that [Yates] was very aware . . . of where he was . . . and to ensure that he didn't proceed inby the second row [of roof bolts]" (Tr. 583, see also Tr. 384, 584; Gov. Exh. 20). The warning was sent despite the fact that this was the first such incident involving Yates (Tr. 583).

The company's witnesses did not disagree with Fowler's testimony that when he saw Yates, a deep cut was being completed (Tr. 260). In other words, as the pertinent provision of the roof control plan states, "the continuous mining machine [had] increased the cut depth" in the deep cut (Gov. Exh. 1 at 3 ¶ N). Therefore, the question of whether the violation existed turns upon whether the record supports finding that Yates was "inby the second full row of roof bolts" (Id.).

Perspective difficulties caused by the narrow confines of the mine may have made it hard for those other than Yates to determine his exact position with respect to the roof bolts. In any event, the person best situated to know his position was Yates. Because the demarcation line established by a row of roof bolts is decidedly more narrow than a person's body, his testimony that he was "sitting underneath the second to last row of bolts" leads to the reasonable inference that at least part of his body was inby the row.

If a person is partly inby and partly outby the second full row of roof bolts, has the deep cut provision of the plan been violated? Neely stated the plan meant that if a workman, "is inby the bolts, in between the first and second row of bolts, whether it's part of him or all of him, he is inby"(Tr. 65). Riffe agreed and testified that, "your entire body has to be outby permanent roof support[s]" (Tr. 518).

I believe they are right and that if any part of a workman's body is in by the second full row of roof bolts, the deep cut provision is violated. As Fowler explained, the danger presented by the violation was that an extended cut increased the possibility that a roof fall would travel back to or even through the first row of roof bolts to at least the second row (Tr. 257). If this happened and if a miner's hand, arm, or leg were in by the second row of bolts, the miner would be subject to injury (Tr. 258). To hold that a miner so positioned was not in violation of the plan would defeat its purpose. Therefore, I find the Secretary established the violation.

S&S and Gravity

The violation was S&S. The hazard presented by the violation was that a miner in by the second full row of roof bolts would be subject to serious injury or death should a roof fall in the unsupported deep cut area override the first row of roof bolts. The ability of a roof fall to override roof bolts was demonstrated by the June 11 roof fall. If a similar roof fall had occurred in the No. 2 entry on July 15, and if it had traveled Yates's direction, there is a reasonable likelihood that Yates would have incurred a serious injury or worse.

Because of the potential consequences and the very real chance that grave injury or death would have resulted, the violation was serious.

Negligence

There is no indication in the record that the violation was due to Knox Creek's neglect. Yates was in the wrong. He hazardously positioned himself in violation of the roof control plan. An employee's violative misconduct, while not a defense to liability for a violation, can be relevant for establishing an operator's negligence for penalty purposes. The operator's lack of fault is a factor to be considered in assessing a civil penalty (see Fort Scott Fertilizer-Cullor, Inc., 17, FMSHRC 1112, 1115-16 (July 1995) (and cases cited therein)). Rather than impute the employee's misconduct to the operator, the company's supervision, training, and the disciplining of the miner all must be examined (Id.).

The Secretary presented no evidence that Knox Creek's supervision or training of Yates with regard to the deep cut provision of the roof control plan was inadequate. Moreover, the company had not been required to discipline Yates for a previous similar violation (Tr. 583).¹²

¹² The Secretary's argument that Neely's presence established Knox Creek's negligence is misplaced (Sec. Br. 32). Neely, although a supervisor and a member of management, was accompanying the inspector not supervising Yates. The fact that together the inspector and Neely happened upon the violation does not justify finding Knox Creek failed to meet its duty of care.

In addition, the Secretary's argument that the company received "a related citation of its deep cut plan less than month before this citation" does not, standing alone, establish negligence

DOCKET NO. VA-52-R

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>
7297933	6/15/98	75.220

DOCKET NO. VA-99-14

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Proposed Penalty</u>
7297933	6/16/98	75.220	\$50

THE VIOLATION, GRAVITY AND NEGLIGENCE

The citation states:

The approved roof control plan was not being complied with on the 001 mmu in the No. 3 and No. 4 entries. According to the testimony given during the investigation of a roof fall accident the clean-up plan to remove the roof fall was not posted at the entrances of the roof fall that fell in the No. 4 entry left cross cut on June 11, 1998 (see Notice of Contest, WEVA 98-52-R).

The citation alleges that the violation was not serious and was due to Knox Creek's moderate negligence (Id.).

The parties agreed the violation existed as charged, and I so find (Tr. 31; Gov. Exh. 1, Stip. 9). Although the parties presented no evidence regarding any of the findings alleged in the citation, I conclude from their stipulation that the parties intended also to agree to the gravity and negligence findings of the inspector as stated thereon. Therefore, I find that the violation was not serious and was due to the company's moderate neglect.

OTHER CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

The Secretary introduced without objection a computer printout representing the mine's history of previous violations (Tr. 429; Gov. Exh 21). Counsel for the Secretary characterized the history as "moderate" (Tr. 430). I agree with counsel, and I conclude that Knox Creek's history of previous violations is not such that the civil penalties assessed otherwise should be increased.

SIZE

(Id.).

Childress testified that around June 11, 1998 the mine usually employed 30 to 32 miners (Tr. 552). According to Inspector Fowler, this "wasn't very big" (Tr. 206). Therefore, I find that the Kennedy No. 2 mine was medium to small in size and that the company was of a similar size (Tr. 552).

ABILITY TO CONTINUE IN BUSINESS

The parties stipulated that any penalties assessed would not affect the ability of Knox Creek to continue in business (Joint Exh. 1, Stip. 4; Tr. 30).

CIVIL PENALTY ASSESSMENTS

DOCKET NO. VA-99-14

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Proposed Penalty</u>
7297932	6/15/98	75.202	\$ 6,000

I have found that the violation was highly serious in that it subjected two miners to the very real possibility of grave injury or death. I also have found that the violation was the result of Knox Creek's ordinary negligence. Given these factors and in view of Knox Creek's medium to small size, I conclude that an assessment of \$1,500 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Proposed Penalty</u>
7297931	6/15/98	75.362	\$204

I have found that the violation was highly serious and was due to Knox Creek's ordinary negligence. Given these factors and in view of Knox Creek's medium to small size, I find that an assessment of \$300 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Proposed Penalty</u>
7297939	7/15/98	75.220	\$140

I have found that the violation was serious and was not due to negligence on the company's part. Given these factors and in view of Knox Creek's medium to small size, I find that an assessment of \$100 is appropriate.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Proposed Penalty</u>
7297933	6/16/98	75.220	\$50

In view of Stipulation 9 and of my conclusions drawn therefrom, I find that an assessment of \$50 is appropriate.

ORDER

Knox Creek's contests of Citation No. 7297931, Citation No. 7297932 and Citation No. 7297933 are **DENIED** and Docket Nos. VA-98-50-R, VA 98-51-R and VA 98-52-R are **DISMISSED**. Within 30 days of the date of this decision the Secretary **IS ORDERED** to modify Citation No. 7297932 to a citation issued pursuant to section 104(a) of the Act (30 U.S.C. §814(a)) and Knox Creek **IS ORDERED** to pay to MSHA civil penalties of \$ 1,950. Upon modification of the citation and receipt of full payment Docket No. Va-99-14-R is **DISMISSED**.


David F. Barbour
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 8, 2000

DAVID MORALES,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 99-188-DM
v.	:	
	:	Mission Mine Complex
ASARCO INCORPORATED,	:	
Respondent	:	Mine I.D. 02-02626

DECISION AFTER REMAND

Before: Judge Manning

This case is before me on a complaint of discrimination brought by David Morales against Asarco Incorporated (“Asarco”) under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the “Mine Act”). The complaint alleges that Asarco terminated Mr. Morales on August 13, 1998, in violation of section 105(c). A hearing in this case was held in Tucson, Arizona. In a decision issued on May 8, 2000, I held that Mr. Morales did not establish a violation of section 105(c) of the Mine Act and I dismissed his discrimination complaint. 22 FMSHRC 659.

Mr. Morales appealed my decision to the Commission. On August 30, 2000, the Commission vacated my decision and remanded the case to me to “determine whether any attempt was made [by Asarco] to influence [Tony] Rivera’s testimony as alleged in the petition, and if so, whether any such conduct had a material effect on the outcome of the proceedings before the judge.” 22 FMSHRC 947, 948. Mr. Rivera testified at the hearing in this case on December 15, 1999. His testimony was quite brief. (Tr. 113-18). Mr. Rivera testified regarding events that occurred on Interstate 19 on March 20, 1998, when Ken Dickey, an Asarco hourly employee who was driving another vehicle, displayed a handgun to Mr. Morales as they were driving down the freeway. Rivera also testified regarding the events that occurred in the company parking lot and at the mine after Mr. Morales and Mr. Dickey arrived that day. He also stated that he was aware that Morales complained about fumes in his truck and that he did not know whether Asarco supervisors took any action against Mr. Morales for his complaint.

Although

Mr. Morales called Mr. Rivera as a witness and examined him on direct and redirect, Morales did not ask Rivera detailed questions about Morales’s health complaint, the circumstances of his termination, or Asarco’s treatment of employees.

In his petition for discretionary review to the Commission, Mr. Morales attached written statements of Mr. Rivera and Rito Orrantia, another witness at the hearing. Mr. Rivera’s statement is as follows, as edited for spelling errors:

The day of David Morales's court, Mr. Jim Coxon told me not to say anything about safety or anything about the mine. I think that this is not right because I didn't testify freely.

Mr. Orrantia's statement is as follows, as edited for spelling errors:

My name is Rito Orrantia, Jr. I was a witness for David Morales but before I went into the courtroom, me and Tony Rivera met Jim Coxon right outside the courtroom doors. I overheard Jim Coxon tell Tony Rivera not to say anything about what goes on at the mine. The underground is a whole different department.

Mr. Coxon, the industrial relations manager at the Mission Mine complex, testified at the hearing on behalf of Asarco.

The focus of the Commission's remand is quite narrow: whether Asarco made any attempt to influence Mr. Rivera's testimony and, if so, whether any such conduct had a material effect on the outcome of the case. The Commission stated that I could, in my discretion, hold a hearing on this issue, if appropriate.

I. SUMMARY OF THE PARTIES' ARGUMENTS

On September 6, 2000, I ordered Asarco to respond to Mr. Morales's allegations. In a response filed on September 29, 2000, Asarco made a number of arguments in support of its position that Mr. Coxon did not take any action, intentional or unintentional, that could be viewed as an attempt to influence witness testimony at the hearing. A declaration signed by Mr. Coxon was attached to Asarco's response. In his declaration, Mr. Coxon provided the following explanation for the events that transpired outside the courtroom. During the entire time that Morales was employed at Asarco's Mission Mine Complex, Rivera worked in the underground mine. Mr. Morales, on the other hand, worked on the surface during his employment. As a consequence, Messrs. Morales and Rivera never worked in the same areas of the Mission Mine Complex during their employment.

Mr. Coxon stated that because he is the head of the mine's human resources department, he was familiar with Mr. Morales's case and he knew all of the witnesses Mr. Morales called to testify. When he arrived at the courthouse, he said hello to everyone and several of these employees asked why they were called to testify. Mr. Coxon told them that Mr. Morales, not Asarco, had called them and that they should simply tell the truth when asked questions at the hearing. Mr. Coxon denies that he instructed anyone how to testify at the hearing.

With respect to Mr. Rivera, Mr. Coxon recalls exchanging greetings and that Mr. Rivera asked why he was called because he did not know anything about Mr. Morales's case. Coxon recalls that Mr. Rivera was concerned because he worked underground and he did not understand what Mr. Morales's case had to do with the underground mine. Mr. Coxon states that, although

he cannot remember his exact words, he told Mr. Rivera that Mr. Morales's case "had nothing to do with the underground ... or with safety in the underground." (Coxon Declaration 3). He does not recall having any further conversation with Mr. Rivera. Coxon stated that because he frequently must testify at administrative hearings and arbitrations, he is "careful to avoid any discussion with any potential witnesses that could be misinterpreted by them as any attempt to influence testimony." *Id.* at 4.

Asarco also argues that neither Mr. Rivera's nor Mr. Orrantia's testimony "was material to the trial or to the resolution of the case." (Asarco Response 6). It contends that their testimony was limited to a few minor issues so that, even assuming that they felt intimidated by Mr. Coxon's presence or his conversation prior to the hearing, his conduct did not have "a material effect on the outcome of the proceedings."

On October 6, 2000, I ordered Mr. Morales to reply to Asarco's response. In his reply, Mr. Morales raises a whole host of issues, most of which are outside the boundaries of this remand. For example, he believes that the MSHA official who investigated his discrimination complaint was biased against him. I do not fully understand many of his other arguments. He makes several references to the fact that Asarco is now a wholly-owned subsidiary of Grupo Mexico S.A. de C.V. As it relates to the issue on remand, Mr. Morales states that Mr. Coxon intimidated his witnesses not to give "details pertinent to safety." (Reply 2). As a consequence, Mr. Morales states that these witnesses did not speak freely at the hearing.

Because Mr. Morales believes that he was not given a fair hearing, I also consider in this decision the major issues raised by Mr. Morales that are outside the boundaries of the Commission's remand order. These arguments are discussed below.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

In discussing the issues raised in the Commission's remand, it is important to understand the configuration of the courtroom. The hearing was held in a U.S. Bankruptcy courtroom that was located in a commercial office complex. This office complex was a series of two-story stucco buildings built around a plaza. The second floor of each building was accessed by an outside elevated walkway. This walkway functioned as the corridor for the second floor. When entering the building, one stepped into a rather cramped room that contained a small desk for the security guard, several chairs, and security devices. The courtroom opened directly into this room. I sequestered the witnesses at the hearing. As a consequence, if a witness were to be called within a relatively short period of time, he waited his turn in this small room or on the outside walkway. The weather was pleasant the day of the hearing.

In addition to testifying, Mr. Coxon was also Asarco's designated representative at the hearing. Thus, he sat next to counsel for Asarco during the entire trial. The hearing started at 9 am and all of Mr. Morales's witnesses arrived at that time. The conversation between Messrs. Coxon and Rivera occurred on the first day of the hearing, either as the witnesses arrived or during a break in the proceedings.

It is also important to understand a little about Asarco's Mission Mine Complex. Although I do not have detailed knowledge of all of the activities that occur there, I do know that there is an underground mine and an open pit operation. There are also other surface facilities at the Mission Mine Complex that are involved in mineral milling. When individuals at the Mission Mine Complex speak of "the mine," they are usually referring to the underground mine. Thus, someone who works in the open pit does not work in "the mine." The open pit is referred to as "the pit" or by other names associated with certain areas of the pit, such as the Mission Ramp. (Tr. 454).

As stated above, Mr. Rivera worked in "the mine," while Mr. Morales worked in the pit. In his statement, Mr. Rivera said that Coxon told him not to say "anything about safety or anything about the mine." Mr. Coxon states that he told Mr. Rivera that the case "had nothing to do with the underground ... or with safety in the underground." It is possible that Coxon used the word "mine" rather than "underground" when talking with Rivera. Coxon said these words after Rivera asked him why he was called to testify because he worked underground, not with Morales. Thus, when put in context, it appears that, at most, Coxon told Rivera not to talk about conditions in the underground mine. This interpretation is supported by Mr. Orrantia's statement. He said that he overheard Coxon tell Rivera "not to say anything about what goes on at the mine." He then said "[t]he underground is a whole different department." Thus, it appears that he used the term "mine" in his statement to mean the underground mine. The evidence indicates that Mr. Coxon did not intentionally attempt to influence the testimony of Mr. Rivera with respect to the issues raised in Mr. Morales's complaint of discrimination. I credit Mr. Coxon's declaration in this respect. It appears that he was attempting to assure Mr. Rivera that he need not testify about any concerns he might have with respect to the underground mine.

Nevertheless, it appears from the face of Mr. Rivera's statement that he believed that he could not "speak freely" at the hearing as a direct result of Mr. Coxon's statements. I also note that most employees will feel nervous and somewhat intimidated if they are required to testify under subpoena about employment issues in front of their employer's human resources director. For the reasons set forth below, I find that even if Mr. Rivera felt intimidated by Mr. Coxon's statements and believed that he could not speak freely at the hearing, this fact had no material effect on the outcome of this proceeding.

Mr. Morales called Mr. Rivera to testify on his behalf. Mr. Morales asked Mr. Rivera detailed questions about the incident that occurred on the Nogales Highway (I-19) on March 20, 1998, involving Ken Dickey, another Asarco hourly employee. (Tr. 114-16). This incident is described at 22 FMSHRC 662-63. Mr. Rivera was in a separate car that was behind Morales's car and Dickey's truck. He testified about what he observed. With the exception of one question, Mr. Morales limited his questioning of Mr. Rivera to that incident. Morales also asked Rivera if he was aware of Morales's MSHA complaint about fumes in the cab of his truck. Rivera stated that all he knew about the complaint was what Morales had previously told him. (Tr. 116). Morales did not ask Rivera anything else about his health complaint or about working conditions at the Mission Mine Complex. Morales also did not ask him any questions concerning Asarco's treatment of employees at the Mission Mine Complex. After cross-

examination, Mr. Morales asked Mr. Rivera on redirect whether he was intimidated by Asarco when he came to testify. (Tr. 118). Mr. Rivera replied, "No, they didn't say nothing much." *Id.*

For purposes of this decision after remand, I assume that Mr. Rivera believed that he was instructed by Mr. Coxon not to talk about safety and health issues at the Mission Mine Complex or the treatment of employees by Asarco. I find, however, that Mr. Coxon's instruction did not have any effect on the outcome of the proceeding because Rivera was not asked any questions by Mr. Morales about these issues. Morales only asked him about the incident on the highway, the subsequent related events at the mine, and whether he was aware of his MSHA health complaint. I also take into consideration the fact that I did not discuss Mr. Rivera's testimony in my decision in this case, except that I mentioned Rivera's description of a comment Dickey made to Morales in the parking lot when they arrived at the Mission Mine Complex on March 20, 1998. (22 FMSHRC 663; Tr. 115). His testimony was not significant in my resolution of the issues.

In reviewing the transcript on remand, I notice that Asarco's counsel, David Farber, asked questions on cross-examination that arguably went beyond the scope of Morales's direct examination. In the interest of fairness, I hereby strike from the record the cross-examination questions and answers at page 117, line 2 through page 118, line 5 of the transcript. If Mr. Rivera was influenced in any way by Mr. Coxon's comments at the courthouse, it would have been in answering these questions.

As stated above, Mr. Morales raised issues in this remand proceeding that are outside of the Commission's remand order. Morales notes that the caption of this proceeding contains the words "DISCRIMINATION PROCEEDING," but that I would not allow him to introduce all of the evidence that he wanted to introduce concerning discriminatory acts that Asarco took against him. I attempted to explain to Mr. Morales that a Commission administrative law judge is not a court of general jurisdiction. Many times during the hearing, Mr. Morales sought to introduce evidence supporting his claim that he was discriminated against because he is Mexican. I explained to him that I could not rule on those issues and I limited the amount of evidence he could introduce on such issues. I note that in the discrimination complaint he filed with MSHA in the case, he alleges that his rights were violated under the Civil Rights Act of 1964, that he was treated differently because he was Mexican, and that he was fired for filing complaints under Title VII of that Act. (Ex. R-25). Mr. Morales attempted to fold those issues into this proceeding, but I advised him that I was without jurisdiction to consider civil rights issues. It appears that he is still confused about this distinction. Most of the issues he raised in his reply on remand relate to his misunderstandings about the scope of Commission proceedings.

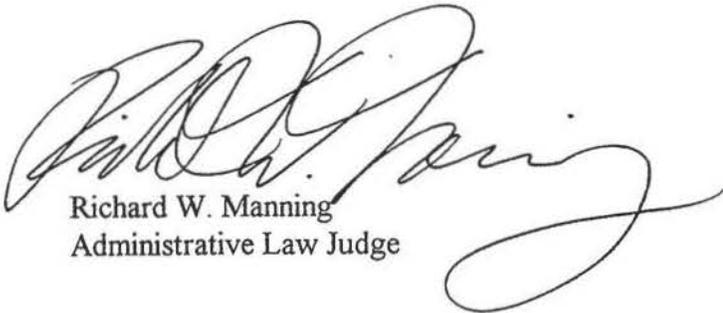
I tried to help Mr. Morales understand what this proceeding was about and how to best present his case. Mr. Morales continues to believe that I thwarted his efforts. For example, he states that I changed the translator that was to be used at the hearing on the day of the trial. He apparently expected me to use the same translator used by Mr. Farber at his deposition. I engaged a competent, independent translator for the hearing who did an excellent job. He also alleges that I did not give him sufficient time for rebuttal. Although I excluded some of the evidence that he sought to introduce on rebuttal because it was repetitive or irrelevant to the

issues in the case, I gave him all of the time he needed to establish his case in chief and to rebut the evidence presented by Asarco. As the administrative law judge in this case, I could not represent him at the hearing, but I tried to provide a fair and impartial forum in which he could present his evidence.

I conclude that Mr. Coxon of Asarco did not deliberately attempt to influence the testimony of Mr. Rivera. I also find, however, that Mr. Rivera may have misinterpreted his conversation with Mr. Coxon as an instruction not to openly discuss safety and health issues at the hearing or to otherwise testify in a manner that would compromise Asarco's position in the case. Nevertheless, I find that this possible misunderstanding did not affect the outcome of this proceeding. Mr. Morales limited Mr. Rivera's testimony to the events that occurred on Interstate 19. As I held in my decision on the merits, there was no showing that Mr. Morales's discipline following this incident was different from the discipline given Mr. Dickey. 22 FMSHRC 668. Mr. Rivera's testimony did not touch upon the fundamental issues in the case or materially affect its outcome.

III. ORDER

For the reasons set forth above, I find that Asarco did not purposefully attempt to influence the testimony of Tony Rivera and, to the extent that his testimony was influenced, such influence did not have any material effect on the outcome of this proceeding. Accordingly, for the reasons set forth in my decision of May 8, 2000, the complaint of discrimination filed by David Morales against Asarco, Inc., under section 105(c) of the Mine Act is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

December 12, 2000

CONSOLIDATED COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 93-77-R
	:	Citation No. 3109521; 11/09/92
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 93-78-R
ADMINISTRATION, (MSHA),	:	Order No. 3109522; 11/09/92
Respondent	:	
and	:	Docket No. WEVA 93-79-R
	:	Order No. 3109523; 11/09/92
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	Docket No. WEVA 93-80-R
Intervenor	:	Order No. 3109524; 11/09/92
	:	
	:	Blacksville No. 1 Mine
	:	Mine ID No. 46-01867
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 93-146-B
Petitioner	:	A. C. No. 46-01867-03938
and	:	
	:	Docket No. WEVA 93-146-C
UNITED MINE WORKERS OF	:	A. C. No. 46-01867-03938
AMERICA (UMWA),	:	
Intervenor	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Blacksville No. 1 Mine

DECISION

Before: Judge Melick

These consolidated Contest and Civil Penalty Proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et. seq.*, the "Act," are before me upon

remand by the Commission. The cases involve a citation and three orders issued by the Department of Labor's Mine Safety and Health Administration (MSHA), following its investigation of a methane explosion on March 19, 1992, at the Consolidation Coal Company (Consol), Blacksville No. 1 Mine. The explosion resulted in the deaths of four miners and injuries to two others.

Background

Consol's Blacksville No. 1 Mine liberated over 1 million cubic feet of methane during a 24-hour period and, therefore, was liberating "excessive quantities of methane," within the meaning of Section 103(i) of the Act. Donzel Ammons was a Consol vice-president who was in charge of several mines, including Blacksville No. 1. Among those working under Ammons were Daniel Quesenberry, Ammons' assistant; Robert Levo, superintendent of Blacksville No. 1; and Jack Lowe, foreman of Blacksville No. 1.

Consol ceased production at the mine in June 1991 and by 1992 began closing down the mine. The primary activities during January to March 1992 were maintenance, withdrawal of supplies and equipment, and removal of above-ground stockpiles of coal. By letter dated February 3, 1992, Consol's regional manager for safety, Charles Bane, notified MSHA that Consol was in the process of withdrawing production equipment from the mine. The letter further stated that Consol would shut down all fans and simultaneously cap all shifts when the underground areas had been vacated.

Later in February, Consol decided to install an 800-foot dewatering pipe in the production shaft to prevent water from accumulating in the mine and seeping into adjacent Consol mines. Consol's regional engineering office, headed by Van Pitman, was responsible for installing the dewatering pipe. Pitman directed Ed Moore, supervisor of environmental quality control, to arrange for the installation. Moore, in turn, retained an independent contractor, M.A. Heston, Inc. (Heston), to do the work. Heston had worked for Consol on many other jobs.

In order to install the dewatering pipe, it was necessary to build a work platform over the production shaft. Ammons assigned the project to his assistant, Quesenberry, who contracted with Forest Construction to construct a platform, sufficiently open to facilitate the work, but which later could be sealed to form a permanent cap over the shaft.

Officials from Consol, Forest Construction, and Heston conferred on methods to construct a cap over the shaft that would allow work to be performed on the dewatering pipe and also would support the weight of the pipe. Initially, Consol's regional engineering office had recommended the use of only a partial or "half" cap, so as to allow ventilation to enter the shaft, with a fireproof partition as a means to prevent sparks from entering the shaft.

Ammons told Quesenberry that he wanted threaded pipe to be used for the dewatering project, so that pipe segments would not have to be welded together over the production shaft.

Ammons was concerned with igniting grease in the production shaft, although he was also aware of the potential for methane occurring in the shaft. In a meeting with Consol's regional engineering department, Quesenberry relayed the request for threaded pipe and left the meeting with the understanding that it would be used. Subsequently, when the pipe was delivered to the mine, Quesenberry learned for the first time that engineering department personnel had decided to use non-threaded pipe that would have to be welded. Ammons then telephoned Pittman, who explained that threaded pipe would not hold the weight of the casing. Without consulting with the engineering office, Ammons decided to construct a "full" cap over the shaft, to ensure that sparks from welding would not enter the shaft.

The plan for construction of the cap over the shaft was based on a standard design used previously by Consol (though not as a platform for installing dewatering pipe). The base of the cap was to be constructed of 1/4-inch steel plate welded to 6-inch I-beams across the shaft opening. A 6-inch concrete deck would then be poured over the top of the steel plate. The plan included a 22-inch square opening in the center of the cap to allow entry of the 16-inch dewatering pipe, with additional I-beam support to bear the weight of the pipe. At least until the shaft was permanently capped, air would still be able to enter the shaft around the dewatering pipe. For ventilation, Ammons added two smaller steel pipes to the plant, each 6 inches in diameter, penetrating through the cap, welded to the steel plate below and extending 3 feet above the concrete deck where they would be capped by a valve connected to additional lengths of PVC pipe. The 6-inch pipes were incorporated into the plan, at least in part, to provide the ventilation necessary to dilute methane in the shaft.

Ammons' decision to add the additional pipes for ventilation of the shaft was based on his background and experience. It was standard procedure to cap a production shaft in this manner when sealing a mine, and Ammons determined that the pipes would provide adequate ventilation. He did not consult with any of Consol's engineers or conduct any simulations or tests to determine if the pipes would provide adequate ventilation while the work of installing the dewatering pipe was completed. He was unfamiliar with the methane liberation rate at the mine, the volume of air movement the two 6-inch pipes were capable of providing, or the velocity of the airflow. He assumed that the air intake through one of the ventilation pipes would have been sufficient to ventilate the production shaft. However, he had never been involved in a project similar to this where welded pipe segments (for the dewatering pipe) were installed through a modified cap.

Since Consol's regional safety office generally communicated with MSHA on ventilation plans, John Yerkovich, Consol's regional safety inspector (and Charles Banes' assistant), verbally informed Terry Palmer, an MSHA safety inspector specializing in ventilation, of Consol's plans to undertake what they characterized as capping the production shaft before capping the other shafts and vacating the mine. Following the conversations, by letter dated March 3, 1992, Yerkovich wrote to MSHA concerning the project. The letter did not indicate, however, that a dewatering pipe would be installed through the cap and into the shaft. Palmer drafted a response to the letter, dated March 16, for the signature of MSHA district manager

Ronald Keaton. Palmer recommended to Keaton that MSHA seek additional information from Consol because it was unclear why Consol was deviating from its original plan of capping all the shafts in the mine at one time. Palmer believed that since the production shaft was intaking 187,800 cfm of air, capping the shaft required agency approval under MSHA regulations because it involved a change in the ventilation plan. The plan stated that "all changes or revisions to the ventilation plan" must be approved before being implemented. Palmer's letter was not mailed to Consol until after the March 19 explosion.

Construction of the production shaft cap took place during the week of March 9, 1992, with the concrete deck being poured on Friday, March 13. Once the concrete was in place, airflow decreased from around 187,000 cfm to around 7,350 cfm. On March 13, Consol stopped its morning shift of underground personnel from entering the mine while portions of the cap were put in place. After Consol personnel evaluated the effects of the ventilation change, they determined that the mine was safe to enter, and the miners continued the removal of underground equipment. In evaluating the effect of the cap, Consol utilized the same procedures as a preshift examination that took approximately 30 minutes to complete. Consol also checked charts for the measured pressure differences. However, the charts on the fans would not show the impact of capping on airflow within the shaft itself. Around 11:00 a.m. on March 13, mine foreman Jack Lowe traveled underground to the bottom of the production shaft to release smoke from a smoke tube and ascertained that there was a drift of airflow down the shaft. He did not, however, measure the velocity of the airflow. Nor was the impact of the cap on airflow in the production shaft evaluated.

On Monday, March 16, Heston employees arrived at the Blacksville Mine to organize materials and begin preparations for fabricating the dewatering pipe. Consol environmental engineer Rodney Baird and Consol environmental technician Russell DeBlossio were assigned to oversee installation of the dewatering pipe, although each assisted in the manual labor of installing the pipe. Baird was certified to make methane examinations and had a working methane detector in his vehicle at the mine. Neither Baird nor DeBlossio had any experience in underground ventilation.

On Wednesday, March 18, Heston employees began installing the 16-inch dewatering pipe into the production shaft. The dewatering pipe was constructed by welding each 20-foot long section to the one below it. The first section of pipe was plugged to prevent welding sparks from entering the shaft through the pipe. As each new length of pipe was lifted in place, the 22-inch opening in the cap, through which the lengthening column of pipe extended into the shaft, was sealed with Thermoglass cloth and two steel plates cut to fit around the pipe. The pipe sections were then welded together several feet above the 22-inch opening by miners standing on the cap. With the plugged 16-inch pipe in place and steel plates and Thermoglass cloth surrounding the pipe, airflow into the production shaft was again reduced, this time from 7,350 to 790 cfm.

Consol environmental engineer Baird and Heston employees found that the 6-inch ventilation pipe closest to the 22-inch opening interfered with installation of the dewatering pipe. Blacksville Superintendent Robert Levo received a request from the production shaft site for a saw to cut off the PVC pipe extension of one of the 6-inch ventilation pipes. A ball of burlap or Thermoglass cloth was put inside the shortened pipe, and a second piece of the material was wired over the top. The elimination of one of the two 6-inch pipes as a source of ventilation further reduced airflow to 400 cfm. Levo visited the job site after the pipe was plugged. He could not recall whether he told Baird the importance of leaving the pipe open, but assumed Baird knew enough to reopen the pipe. Ed Moore, in charge of environmental quality control in Consol's regional engineering office and Baird's boss, was also aware that one of the ventilation pipes had been cut and covered or plugged.

Throughout the first day of installation, one welder was used, and approximately 12 sections of dewatering pipe were installed. Installation resumed at 7:30 a.m. the following day, Thursday, March 19, with Baird and DeBlossio again assisting. On this occasion, Heston utilized two welders instead of one, reducing by half the time it took to weld sections of pipe together. At approximately 10:18 a.m., a methane explosion occurred in the production shaft that completely destroyed the cap. Consol engineer Baird and three Heston employees were killed in the explosion; two other Heston employees were injured. In addition, underground stoppings, cribs, and overcasts within 100 feet of the production shaft were damaged.

Disposition on Remand

Citation No. 3109521

On review, the Commission found that Consol violated 30 C.F.R. § 75. 301 (1991) when it allowed methane to accumulate in the production shaft which it found to be an "active working" of the mine. It concluded that the methane was ignited on March 19, 1992, when Heston employees were welding during the installation of the 16-inch dewatering pipe. The Commission further held that the production shaft continued to be an "active working" even after it was capped on March 13, 1992, because miners continued to work above the cap during installation of the dewatering pipe. The Commission held that the fact that miners continued to conduct methane and airflow tests below the shaft on a daily basis was sufficient to establish that the entire shaft remained an "active working" up to the time of the explosion. The Commission further found that the ventilation in the production shaft was insufficient to dilute and render harmless methane in the shaft. It noted in this regard that both the Secretary's expert, John Urosek and Consol's expert, Donald Mitchell, concluded that airflow in the production shaft had been reduced to no more than 400 cfm. and agreed that the airflow was insufficient to render harmless the methane in the shaft.

While the Commission found that the evidence supported a violation of the cited standard the matter was remanded for consideration of whether the violation was "significant and substantial," whether it was a result of "unwarrantable failure," and for imposition of an

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

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

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

Within this framework of law the violation found by the Commission herein was clearly "significant and substantial" and of high gravity. It is essentially undisputed that the failure to adequately ventilate the production shaft led to the accumulation and ignition of methane therein resulting in serious injuries and fatalities.

The Secretary also alleges that the violation was the result of Consol's "unwarrantable failure" to comply with the cited standard. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991). The thrust of *Emery* was that unwarrantable failure results from aggravated conduct, constituting more than ordinary negligence. *Secretary v. Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993).

In addition, in *Mullins and Son Coal Co.*, 16 FMSHRC 192, 195 (February 1994), the Commission set forth a number of factors indicative of unwarrantability, including the extent of the violative condition, the length of time that it existed, whether the violation was obvious or posed a high degree of danger, whether the operator had been placed on notice that greater efforts were necessary for compliance and the operator's efforts in abating the violative condition made prior to the issuance of the citation or order.

In the initial decision in this case it was found that Consol intentionally violated the standard at 30 C.F.R. § 75.316 (1991) as charged in Order No. 3109523 because Consol failed to revise its mine ventilation plan to reflect the major ventilation changes that would result from capping the production shaft and therefore also necessarily failed to obtain prior approval of the MSHA district manager for such plan revisions (20 FMSHRC at 1348). Consol was indeed, specifically notified of the need to comply with those regulatory requirements before it began capping the production shaft. The Commission has affirmed those findings and the violation as well as the associated unwarrantable failure findings based on Consol's intentional misconduct in this regard.

In connection with such a ventilation plan revision and MSHA approval process, it may reasonably be inferred that Consol would have had to demonstrate the adequacy of the volume and velocity of air that would be entering and ventilating the production shaft during the capping process and to establish that such volume and velocity would have been sufficient to continue to render harmless explosive gasses in that shaft during and after the capping process. By willfully failing to provide a plan revision setting forth the measures to be taken to maintain adequate ventilation of the production shaft and have such plan revision approved by MSHA before undertaking the capping project, I find that Consol's failure to subsequently maintain the volume and velocity of air sufficient to render harmless explosive gasses in the production shaft was inexcusable and such an aggravated omission and serious lack of reasonable care as to constitute unwarrantable failure and high negligence. Moreover, in light of Consol's willful failure to have prepared a revised plan and have that plan approved, Consol cannot, for purposes of defending against unwarrantable failure findings, claim that it acted in a good faith or reasonable belief that it was in compliance with the cited standard.

Order No. 3109522

This order alleges, and it has been found, that Consol, violated 30 C.F.R. § 77.1112(b) when it failed to conduct methane tests at the production shaft where independent contractor Heston was performing welding operations. The cited standard provides as follows:

Before welding, cutting, or soldering is performed in areas likely to contain methane, an examination for methane shall be made by a qualified person with a device approved by the Secretary for detecting methane. Examinations for methane shall be made immediately before and periodically during welding, cutting, or soldering, and such work shall not be permitted to commence or continue in air which contains 1.0 volume percentum or more of methane.

In its remand decision the Commission referenced certain testimony to be considered in determining "unwarrantable failure." That testimony is set forth in the appendix hereto. That and other record evidence establishes several important facts: that the subject mine was known by Consol officials to have been a "gassy mine liberating over 1 million cubic feet of methane per 24 hours; that there was a possibility that methane would be liberated in the shaft, that

methane in the presence of an ignition source such as arcing from welding is an extreme danger; that the production shaft was to be capped with concrete and would have only two 6 inch pipes to provide a ventilation of the shaft while the dewatering pipe and the surrounding gap were sealed during installation; that no studies or tests were performed to determine the amount of methane present under the cap or the sufficiency of the ventilation at that location where welding was taking place; and that at least one Consol official was aware that during the installation of the dewatering pipe both that pipe and the surrounding gap as well as one of the 6 inch ventilation pipes were closed thereby limiting ventilation of the production shaft to one 6 inch pipe. Within this framework of evidence Consol cannot reasonably and in good faith claim that the cited area was not likely to contain methane. Consol's failure to perform methane testing in accordance with the cited standard may accordingly be characterized as "reckless disregard" and a "serious lack of reasonable care." The violation was accordingly the result of unwarrantable failure and high negligence.

In its remand decision the Commission also made independent findings sufficient to support unwarrantable failure. It stated in this regard as follows:

However, corporate balkanization at Consol apparently led to a situation where officials in one division did not know what those in another division were doing. Thus, Blacksville Mine vice-president Ammons was not consulted on the decision by Consol's regional engineering department to switch from threaded pipe to welded pipe. 20 FMSHRC at 1340. Ammons, without consulting anyone in Consol's environmental quality control department or its regional safety office, determined to utilize two six-inch ventilation pipes to ventilate the production shaft, even though he did not know the methane liberation rate or how much air would come in through the ventilation pipes. *Id.* At 1339. When Consol regional safety inspector Yerkovich notified MSHA of the proposal to cap the production shaft, he did not notify MSHA of when the proposed capping was to occur or that welded dewatering pipe would be installed in the shaft. *Id.* At 1338. Nor did Yerkovich alert anyone in the Consol hierarchy that MSHA had not responded to his notification of the early capping. Accordingly, Consol proceeded to construct the cap without hearing back from MSHA. *Id.* Finally, Consol regional engineering employees DeBlossio and Baird, who were assigned to the project, had no experience in underground mine ventilation. *Id.* at 1341. Indeed, DeBlossio was not even aware that the Blacksville Mine liberated large quantities of methane. *Id.*

The confusion resulting from this inadequate communication and coordination was itself a contributing cause of the explosion. There was a serious lapse of judgment among Consol personnel in not ordering or ensuring that methane checks were made underneath the production shaft cap. *See Rock of Ages Corp.*, 20 FMSHRC 106, 115 (February 1998) (a foreman's failure to search for undetonated explosives when such explosives had been uncovered in the past

evinced a reckless disregard for the hazards associated with misfires), *aff'd in pertinent part*, 170 F.3d 148 (2nd Cir. 1999).

22 FMSHRC at 354-355.

I also now find, for the following additional reason, that the instant violation was the result of Consol's unwarrantable failure and high negligence. As previously noted, In the initial decision in this case it was found that Consol intentionally violated the standard at 30 C.F.R. § 75.316 (1991) as charged in Order No. 3109523, because Consol failed to revise its mine ventilation plan to reflect the major ventilation changes that would result from capping the production shaft and failed to obtain prior approval of the MSHA district manager for such revisions (20 FMSHRC at 1348). As also previously noted, Consol was specifically told of the necessity to comply with those regulatory requirements before it began capping the production shaft. The Commission has affirmed those findings and the associated unwarrantable failure findings based on Consol's intentional misconduct in this regard.

In connection with such a plan revision and MSHA approval process and as previously noted, it may reasonably be inferred that Consol would have had to demonstrate the adequacy of the ventilation of the production shaft during and after the capping and dewatering pipe installation process and establish that such ventilation would have been sufficient to render harmless explosive gasses in the shaft. It may also reasonably be inferred that Consol would have had to set forth the manner and location of methane testing to be performed during the capping project in light of the proposed ventilation changes and, in particular, before and during exposure to the potential ignition source from welding over the shaft. By willfully failing to provide such a plan and have such plan approved by MSHA before undertaking the capping project, I find that Consol's failure to have conducted such methane testing at times and locations relevant to the cited standard was inexcusable and such an aggravated omission and lack of reasonable care as to constitute unwarrantable failure and high negligence. Moreover, in light of Consol's willful failure to have submitted a revised plan and have that plan approved, Consol cannot, for purposes of defending against unwarrantable failure findings, claim that it acted in a good faith or reasonable belief that it was in compliance with the cited standard.

Order No. 3109524

This order charges that Consol, during the capping of the production shaft and installation of the dewatering pipe, violated 30 C.F.R. § 75.322 (1991) and that the violation was "significant and substantial" and the result of Consol's "unwarrantable failure." The cited standard provided as follows:

Changes in ventilation which materially affect the main air current or any split thereof and which may affect the safety of persons in the coal mine shall be made only when the mine is idle. Only those persons engaged in making such changes shall be permitted in the mine during the change. Power shall be

removed from the areas affected by the change before work starts to make the change and shall not be restored until the effect of the change has been ascertained and the affected areas determined to be safe by a certified person.

On review the Commission found that the Secretary charged two separate violations in this order and that, in the decision below, only one violation was considered. On remand the Commission directed that the trial judge also determine whether there was a second violation, i.e., whether on March 13, after Consol had properly withdrawn its personnel from the mine to evaluate changes in ventilation caused by the construction of the cap, Consol violated the regulation by permitting miners to return underground without evaluating ventilation changes within the production shaft.

The Commission has affirmed the findings below that the production shaft intake can be properly characterized as a "split of air" to which the requirements of Section 75.322 apply. As the Secretary also notes, the cited standard is applicable if both parts of the first sentence of the standard are met, i.e., the change must be material and it must affect the safety of workers. It is undisputed that the reduction of airflow within the production shaft affected the safety of persons in the mine. The first issue before me then is whether the change in ventilation on Friday, March 13, when the cap was placed over the production shaft, materially affected the main air current or any split thereof. The Commission has interpreted Section 75.322 as being triggered by any ventilation change that would "materially affect" any split of a mine's main air current.

On March 13, when the cap was placed over the production shaft it is undisputed that the airflow in the shaft was reduced from approximately 187,000 cfm. to approximately 7,350 cfm. The Commission has already affirmed the finding below that a reduction from 7,350 cfm to 400 cfm, a reduction of more than 94%, was a material reduction. It is clear, and I also find, that a reduction in air flow from 187,000 cfm. to approximately 7,350 cfm., a reduction of more than 96%, would likewise materially affect the airflow in the production shaft. Within this framework it is clear that Consol was therefore required to follow the procedures set forth in cited standard after the reduction in airflow on March 13, 1992. Indeed, Consol appeared to handle the initial ventilation change on March 13, as a major ventilation change. The order itself states that mine officials removed all electric power from the affected area during the capping operation and that Consol evaluated the ventilation changes underground but then failed to evaluate the change to the air ventilation in the production shaft itself before allowing miners to return to work. The evidence in fact shows that the changes in ventilation following the March 13, capping were evaluated only by making air readings underground and checking the surface fan charts. These readings did not however show the effect on the airflow within the shaft itself. Accordingly there was also a violation on March 13, when the production shaft was capped and the changes in the ventilation within the production shaft were not adequately evaluated. It is also clear that the violation was "significant and substantial" and of high gravity. It may reasonably be inferred that Consol's failure to ascertain the effect that capping the shaft had on the ventilation within the shaft contributed to the accumulation of methane and the fatal explosion.

The violation was also the result of Consol's unwarrantable failure. As already noted in the initial decision in this case it was found that Consol intentionally violated the standard at 30 C.F.R. § 75.316 (1991) as charged in Order No. 3109523 because Consol failed to revise its mine ventilation plan to reflect the major ventilation changes resulting from capping the production shaft and failed to obtain prior approval of the MSHA district manager for such plan revisions before capping the production shaft. (20 FMSHRC at 1348). As previously noted Consol was specifically notified of the necessity to comply with those regulatory requirements. The Commission has affirmed those findings as well as the associated unwarrantable failure findings based on Consol's intentional misconduct in this regard.

In connection with such a plan revision and MSHA approval it may reasonably be inferred that Consol would necessarily have had to evaluate the changes in ventilation caused by capping the production shaft (including the effect of inserting the dewatering pipe and the use of ventilation pipes in the cap) before allowing work to continue. By willfully failing to provide a plan revision and have such plan revision approved by MSHA as required by Section 75.316, I find that Consol's failure to subsequently perform an evaluation to determine the effect of the changes in ventilation in the production shaft after its capping, was inexcusable and such an aggravated omission and serious lack of reasonable care as to constitute unwarrantable failure and high negligence. Moreover, in light of Consol's willful failure to have prepared a revised plan and have that plan approved, Consol cannot, for purposes of defending against unwarrantable failure findings regarding the instant violation, claim that it acted in a good faith or reasonable belief that it was in compliance with the cited standard.

As noted in the Commission's remand decision since a second violation has been found to have been committed on March 13th, and that violation was found to have resulted from Consol's unwarrantable failure there is no need to revisit the issue as to the violation on March 17th.

Civil Penalties

Operator's History of Previous Violations:

The record evidence shows that Consol had a significant history of prior violations.

Appropriateness of the Penalties the Size of the Business of the Operator

Consol is a large size operator.

The Demonstrated Good Faith in Attempting to Achieve Rapid Compliance:

The Secretary does not maintain that the charging documents were not satisfactorily abated.

The Effect on the Operator's Ability to Continue in Business:

There is no evidence that Consol's ability to continue in business would be affected by penalties as high as those assessed herein. In the absence of such evidence there is a presumption that the penalties would have no such adverse effect. See *Sellersburg Stone Co.*, 5 FMSHRC 287 (March 1983) *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

Whether the Operator was Negligent:

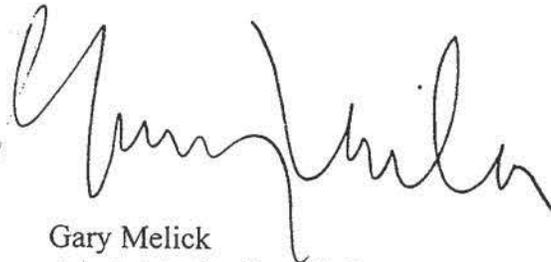
As noted, each of the violations herein was the result of high operator negligence.

The Gravity of the Violations:

As noted, each of the violations was of high gravity.

ORDER

Citation No. 3109521 is affirmed with "significant and substantial" and "unwarrantable failure" findings. Order No. 3109522 is affirmed with "significant and substantial" and "unwarrantable failure" findings. Order No. 3109524 is affirmed with "significant and substantial" and "unwarrantable failure" findings. Consolidation Coal Company is hereby directed to pay civil penalties of \$50,000 for each of the violations charged herein, for a total civil penalty of \$150,000, within 40 days of the date of this decision. Consolidation Coal Company is further directed to pay, if it has not already done so, a civil penalty of \$50,000, for the violation charged in Order No. 3109523, within 40 days of the date of this decision .



Gary Melick
Administrative Law Judge
703-756-6261

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APPENDIX

In its remand decision, the Commission specifically referred to the testimony at transcript pages 555, 562, 580-81, 616, 624, 686, 691, 958, 1202, 1243-46, 1288 and 1693, as evidence of unwarrantable failure. An examination and evaluation of the referenced testimony accordingly follows. As noted, the difficulty in establishing unwarrantable failure based on the cited evidence is the requirement in the standard at issue, i.e., 30 C.F.R. § 77.1112(b) to prove that the cited area must be an area “likely” to contain methane. As noted herein, the witnesses have generally claimed that so long as the vent pipes were open methane was not likely to be present below the cap over the production shaft.

Tr. 555 cited by the Commission as evidence of unwarrantable failure for the violation of 30 C.F.R. § 77.1112(b), a violation that requires a finding that the cited area was “likely to contain methane,” is the testimony of Consol Supervisor of Environmental Quality Control, Edward Moore. In relevant part the following colloquy occurred:

Judge Melick: If the shaft is lined in concrete, is there any likelihood -- what source of methane would there be in that shaft other than from the mine itself?

The Witness: If the lining is intact within the shaft, there should be no other source.

Judge Melick: All right.

The Witness: If it is cracked or whatever, sure, it could seep in.

(Tr. 555).

Moore had testified earlier however that with a concrete - lined shaft he would not have expected there to be any methane in the shaft itself (Tr. 485). He had also testified that the likelihood of there being methane in the shaft was “pretty remote.” Moore also later testified as follows:

I wouldn't expect there to be methane in the shaft period. It is a concrete - lined shaft. It is more or less like a piece of concrete pipe only it is several hundred feet long.” (Tr. 492).

With respect to the proper location for methane tests if such tests were performed Moore testified “[a]t the bottom of the shaft I would think. The shaft is pulling air in . . . if there were anything in the shaft, it should be swept to the bottom (Tr. 513-514). See also Tr. 527-528. While Moore also acknowledged that he had no expertise in mine ventilation he nevertheless believed that there was no problem with the ventilation as long as one of the vent pipes in the

completed cap was intaking fresh air (Tr. 533-534).

The Commission next cites Moore's testimony at Tr. 562 as supporting a finding of unwarrantability. The colloquy actually begins on Tr. 561 and is quoted below:

Further ReDirect-Examination by Mr. Wilson:

Q. The shaft was intaking, as I understand it, because there are other fans drawing air out of the mine, right?

A. That's correct.

Q. That creates negative pressure within the shaft?

A. Yes.

Q. So, if there was methane being liberated around the water rings and you had negative pressure within the shaft, couldn't that tend to pull the methane into the shaft?

A. If there was an opening to pull it through, yes.

Q. Such as a crack in the lining?

A. Yes.

Q. It is possible that methane could seep into the production shaft from those water rings?

A. I would say yes it is possible.

(Tr. 561-562).

This testimony, based on a speculative hypothetical question, does not however alter Moore's belief that the presence of methane in the shaft was unlikely. Within this framework of evidence, it is apparent that Moore did not believe methane was likely to have been present in the subject shaft and that even if methane testing were performed it should properly have been performed at the bottom of shaft as was done in this case. The cited testimony of Edward Moore does not therefore necessarily support a finding of unwarrantability for a violation of Section 77.1112(b) which requires a finding that the cited area was "likely to contain methane."

The Commission next cites the testimony of Consol Assistant Vice President for Blacksville Operations, Daniel Quesenberry at Tr. 580-581 as evidence of unwarrantable failure

for the violation of Section 77.1112(b). The relevant portions of those pages are set forth below:

Q. Were you familiar with the water rings in the shaft?

A. Yes.

Q. Did you know if it was possible for the water rings to liberate methane?

A. I have been in the water rings before. I had never known of any methane coming out of the water rings while I was at Blacksville.

Q. I will repeat the question. Do you know if it was possible for the water rings to liberate methane?

A. It could be possible, yes.

Q. The shaft lining was made of concrete; is that right?

A. That's correct.

Q. Do you know is it possible for shaft linings to have cracks?

A. Sure. Yes.

Q. When such cracks are present, is it possible for methane to liberate through those cracks into the shaft?

A. Could be possible, yes.

Q. Were you involved at all in the development or the approval of the ventilation plans for the Blacksville Number 1 mine?

A. I reviewed them.

Q. Were you aware that the Blacksville Number 1 mine was considered a gassy mine?

A. Yes.

Q. You knew that it was on a 103(i) spot inspection cycle?

A. Yes.

(Tr. 580-581).

The cited testimony thus establishes (1) that Quesenberry had never known of any methane emanating from the water rings at the Blacksville mine but that it “could be possible” for water rings to liberate methane, (2) that it is possible for concrete shaft linings to have cracks and liberate methane and (3) that the subject mine was considered a “gassy” mine. Quesenberry also testified however that “[t]here was never any concern of us for methane in the shaft due to the two pipes and the proximity of the service shaft” (Tr. 606), and that “we didn’t consider it likely” for methane to have been liberated from “coal seams water rings” (Tr. 652).

The Commission next cites Quesenberry’s testimony at Tr. 616 as evidence of unwarrantable failure:

A. No. I agree with the statement that the pipes were put in there for ventilation. Can you ask the first question again?

Q. My first question was: Do you think that any Consol official appreciated the possibility of methane being liberated in the shaft?

A. Being liberated, yes. Accumulating under the cap, no.

Q. Would the reason for not appreciating that possibility be because those ventilation pipes were there?

A. That was one reason they were put in. In addition, to my knowledge, there was never methane detected in that shaft in the 20 years it was there.

Q. You don’t discount the possibility that there could be methane in that shaft?

A. No. Any time there is a coal seam there is a possibility. I will agree with that.

Q. That was a high methane mine, correct, high methane liberation?

A. You will have to define “high.” We had some much higher.

Q. Would you consider a million cubic feet of methane in a 24-hour period to be high?

(Tr. 616).

Quesenberry testified that “to my knowledge there was never any methane detected in

that shaft in the 20 years it was there” (Tr. 616). Quesenberry also testified that if he had seen one or both of the ventilation pipes shut off he would have “stopped it” (Tr. 622-623). He was “shocked” to learn after the explosion that one of the vent pipes had been closed off (Tr. 623). He also testified however that “with the pipes we did not expect any methane building up under the cap.” (Tr. 629).

The Commission also cites Quesenberry at Tr. 624:

Q. Now, assuming that methane were to accumulate in the shaft, where would you expect it to accumulate?

A. Excuse me. Did you say where or weren't?

Q. Where. Where within the shaft if it were to accumulate?

A. At the top.

Q. Beneath the cap?

A. Yes.

Q. You have already testified that there was a possibility for methane to be present in the shaft. What was your understanding of the requirements for testing for methane when welding around a shaft?

A. If methane was suspected, you would test for methane.

Q. What do you base that on?

A. You did say around a shaft?

Q. Yes.

A. Yes. Where methane is likely to accumulate and welding and cutting operations are being performed, methane tests will be made.

Q. You understand that that was the requirement of the law; is that right?

(Tr. 624).

Quesenberry also testified that MSHA inspector Dinning was present at the time the shaft was capped and accompanied Consol personnel who checked the fan charts to see if there had been a change in mine ventilation. Dinning later told Quesenberry there was no “appreciable

change.” (Tr. 634-636).

The Commission next cites the testimony of Consol’s Vice President of Blacksville operations, Donzel Ammons at Tr. 686 as evidence of unwarrantable failure. That testimony is reproduced below:

... exactly who all Danny told. I would assume he told regional engineering people too.

Q. Why would you assume that regional engineering would know that those pipes were supposed to be kept open?

A. They knew about ventilation.

Q. How do you know they knew about ventilation?

A. Well, everybody knows you have to ventilate a coal mine.

Q. It would be fair to say that it was your decision to ventilate that shaft using the two, 6-inch pipes?

A. That’s right.

Q. And was part of the purpose for ventilating that shaft to prevent any accumulation of methane?

A. That’s right.

Q. So you were aware of the potential for methane to be present in the shafts at the Blacksville 1 mine; is that right?

A. There is potential for methane anywhere in any shaft in the Pittsburgh seam of coal.

Q. The Blacksville mine was in the Pittsburgh seam right?

A. It is no different.

(Tr. 686).

The Commission also cites Ammons at Tr. 691, the subject of which actually begins on Tr. 690, as evidence of unwarrantable failure. This testimony is as follows:

Q. What did you base your decision on to go with two, 6-inch pipes?

A. Well, I figured one pipe would probably ventilate it but I just put another one in for good measure because I felt certain two would.

The air goes down the shaft okay, going down the pipes and down the shaft. You took a reading every

- - you made a check there every day.

If there was any methane in the shaft, that air would bring it right down where the guy could read it at the bottom of the shaft.

Q. You did understand at the time that methane was lighter than air, correct?

A. I have always know that.

Q. You said that you felt that one six-inch pipe would have been adequate?

A. Yes.

Q. What did you base that on?

A. Experience. The shaft would have made very little methane. I mean, it wouldn't take much air to keep it clean.

Q. You were aware of the presence of water rings in the shaft, correct?

A. Yes.

Q. Were you aware that there were other coal seams above the Pittsburgh seam that that shaft intersected?

A. There was a Sewickley seam.

Q. Was that shaft there since the mine opened in the late 60's?

A. It was one of the first shafts they put in

(Tr. 691).

I do not find that the above testimony in itself supports a finding of unwarrantability for a violation that requires a finding that the cited area was "likely to contain methane." 30 C.F.R. §

1112(b). Rather it shows that although Ammons did not believe there was a likelihood of methane emanating from the shaft, he took the precaution of installing two pipes for ventilation to make sure there would be no methane accumulating in the shaft. He based these determinations on his 42 years experience in the mining industry. Ammons testified that he told his assistant Quesenberry "to make sure he put the two [vent] pipes in [the cap] and make sure everybody knew after he put the pipes in that they were to be left wide open for ventilation. (Tr. 684).

The Commission next cites the testimony of Robert Levo, former superintendent of the Blacksville No. 1 Mine at Tr. 958 as evidence of unwarrantable failure. The referenced testimony is as follows:

. . . drawing methane out of the mines, yes, sir.

Q. I am talking specifically in the production shaft, wasn't it possible -- well, after the fact obviously?

A. After the fact obviously it is possible.

Q. You knew at the time of the possibility for methane to be present in shafts?

A. I cannot say that I honestly knew that, that it was ever thought of as a concern in the shaft.

Q. You knew that concrete shaft linings could crack, correct?

A. They do crack, yes, sir.

Q. You knew that methane is liberated not only from coal seams but surrounding strata, correct?

A. Yes, sir.

Q. And you knew that shafts have water rings in them, correct?

A. Yes.

Q. Now, did you know what Mr. Moore's experience with mine ventilation issues was?

A. I do not know his background. I assumed he had no ventilation experience. He never worked underground to my knowledge.

Q: Did you know at the time that Mr. Moore . . .

(Tr. 958).

This testimony shows that Levo believed there was a possibility for methane to be present in shafts.

The Commission next cites the testimony of John Yerkovich, former Regional Safety Inspector for Consol, at Tr. 1202 as evidence of unwarrantable failure. That testimony is as follows:

A. They had some problems with methane, yes.

Q. You understood prior to March 19th of 1992 that there was a potential for methane to be in shafts; did you not?

A. Well, I knew that there was a feeder at Humphrey.

Q. Did you know that water rings in shafts could liberate methane?

A. Yes.

Q. Do you know if the other mines under your safety department in the -- well, you were in the North West Virginia region, correct?

A. That's correct.

Q. Do you know if the other mines in that region were also considered gassy mines?

A. I think just about every mine in the Pittsburgh seam would have been probably considered gassy mines or a gassy mine.

Q. Now, did you have any dealings with the regional engineering department?

A. No, sir. Prior to the explosion you mean?

Q. Yes.

A. That's correct I had no dealing with them, no.

(Tr. 1202).

This testimony supports a finding that Yerkovich was aware of the potential for methane in shafts and that the subject mine, as a whole, was considered to be a "gassy mine."

The Commission next cites Yerkovich at Tr. 1243 through 1246:

. . . pull that air, whether it be through leakage around the cap, through vent pipes, whatever was there, that air would ultimately end up at the bottom of the shaft coming out of the bottom of the shaft.

Q. If there was no ventilation in that shaft, where would you expect methane? If there was any methane in the shaft, where would you expect it to go?

A. Methane should go to the top.

Q. And as you increase ventilation, the more ventilation, the more it is going to flush the methane down to the bottom of the shaft, correct?

A. That's correct.

Q. Without making any methane examinations under the cap, how can you know whether or not the ventilation was adequate to flush it out?

A. You don't know. Obviously it wasn't.

Q. You said you talked to Mr. Levo about methane examinations a day or two before the explosion. Did you also talk to him about that the morning of the explosion?

A. I may have. I don't remember talking to him that morning. I know I dropped off safety awards and I was in a hurry to get to Blacksville 2. I don't know if I talked to him. I thought I talked to John . . . that morning and not to Bob Morrison.

Q. John Morrison?

A. Yes.

Q. What time would that have been, do you know?

A. Probably 7:00, quarter after seven.

Q. When you gave a deposition on March 11, 1994 at the offices of Steptoe and Johnson, at Page 115 of that deposition, do you recall being asked the

question:

“The morning before - - of the explosion - - before the explosion, you asked Mr. Levo if the checks were being made; is that correct?”

Answer: “To the best of my recollection that’s correct.”

Again if you would like to, you can review your testimony here.

A. Well, no. I just can’t remember if it was that morning or the morning before. I knew I talked to him and John on a couple of occasions.

Q. You talked to either Mr. Levo or Mr. Morrison about methane checks on a couple of occasions; is that right?

A. Yes.

Q. Mr. Levo, when you were talking with him about making methane checks, did he express any reservations to you about that?

A. Yes.

Q. Could you explain what that was?

A. He didn’t have the people to make the checks continuously while welding and cutting was going on.

Q. As I understand it, at this time they had laid off the entire safety department at the mine other than Mr. Morrison; is that correct?

A. I think that’s correct, yes.

Q. Would it have normally been someone from the safety department that would have made those types of methane tests?

A. No. Not normally. It could be. It wouldn’t have to have been. It could have been anybody certified to make those exams.

Q. Would you agree that whenever you are welding around a mine there is a potential for a fire or an ignition?

Mr. Hardy: Objection to the term “around a mine.” That could be 100 yards from a mine or inside a mine. Object to the form of the question.

Mr. Wilson: I will rephrase the question.

By Mr. Wilson:

Q. Would you agree that any time you are welding over shafts there is a potential for starting a fire or igniting methane?

A. That was my primary concern on that shaft was starting a fire, yes.

Q. There is also the potential - - you knew of the potential for igniting methane; isn't that right? Isn't that why you talked with Mr. Levo about making methane tests?

A. Yes. That and compliance. I mean, we had welding and cutting guidelines that required someone to be making examinations at the bottom of that shaft any time welding or cutting was taking place on top of it.

But again, primarily that person was to look for hot spots, material that got to the bottom of that shaft and could potentially start something smouldering down there and no one would know about it.

(Tr. 1243-46).

From this testimony it is apparent that the discussion related to methane testing at the bottom of the shaft - - something that was in fact being performed. The answer to the hypothetical general question that if there was no ventilation in the shaft methane would be expected to go to the top is not relevant because Yerkovich believed that the shaft was in fact being ventilated by the two vent pipes. Based on Yerkovich's belief that both vent pipes were open it cannot therefore be concluded that he also believed methane was likely to accumulate at the top of the shaft. Unwarrantability cannot therefore be inferred from this testimony.

The Commission next cites the testimony of Yerkovich at Tr. 1288. That testimony is set forth below:

... operating fans in the mines, the service shaft is 3 or 400 feet away, it is all providing pressure on this cap.

In my opinion, I would have thought that everything would have been pulled down the shaft, yes.

Q. Without adequate ventilation in that shaft, don't you agree that the methane is likely to rise?

A. Without any ventilation or adequate ventilation, methane will rise, yes. It rises without the ventilation. That doesn't make any difference. It is still lighter

than air.

Q. Yes. Well, then you agree that not only did you need ventilation in that shaft but you needed a certain degree of ventilation, a certain velocity of air to move that methane down, correct?

A. Now yes. I agree with you. Then I didn't see any reason or any problem that would have caused methane to accumulate into the shaft.

Judge Melick: Let me ask you something. There has been testimony in this case that at the bottom of the shaft on the morning of the 19th that someone expressed the opinion that there was not . . .

(Tr. 1288).

This testimony confirms Yerkovich's belief that the ventilation that was provided was adequate and that methane would not accumulate in the shaft.

The Commission next cites the testimony of Consol's former Regional Manager for Safety, Charles Bane at Tr. 1693. That testimony is set forth below:

Q. In general, as of March 1992, you did know for the potential for methane to be present in shafts; is that correct?

A. Well, I knew that we had methane in the Bower's shaft. As far as the Hagan's shaft, that had no relevance whatsoever to what was going on at Blacksville. That scenario never even entered my mind as far as the Hagan's goes.

Q. My question is as of March of '92 you knew of the potential for methane to be present in shafts?

A. If I am ventilating , yes. I guess it could be, yes.

Q. Now, let's talk about the Loveridge incident which we were just talking about, Respondent's Exhibit 54. Do you recall how much air was intaking into the intake portion of this shaft prior to it being capped? Not capped but prior to the air change being made?

A. I feel very safe to say in excess of 100,000.

Q. You don't know how much in excess?

A. No, sir.

Q. You didn't review the ventilation plan in preparation for your testimony here today, did you?

This testimony establishes that Baines agreed that, in general, there is a potential for methane in mine shafts.

The Commission next cites Moore's testimony at Tr. 481-485; Yerkovich's testimony at Tr. 1309 and Jack Lowe's testimony at Tr. 1436 for the general proposition that Consol officials were well aware, as a general scientific principle, of the hazards associated with methane accumulations and welding.

Yerkovich's testimony is set forth below:

Q. So, would it be fair to say that after that meeting it was your understanding that there would be a partial covering of the production shaft?

A. Yes.

Q. Had you and Mr. Baird made that suggestion?

A. Yes. I am sure it was a suggestion, yes.

Q. Was that based upon the prior experience that you had with previous jobs?

A. Yes.

Q. How many times had you been involved with this type of project before?

A. I believe three other times.

Q. Could you name what those jobs were?

A. Blacks Run Shaft for Humphrey Mine, the Core Shaft for Pursglove and the Stewart's Run Shaft at Arc Right.

Q. The Blacks Run at Humphrey, do you recall when that was?

A. No. It was probably at least two or three years prior to Blacksville.

Q. Was there a contractor working on that job?

A. Yes, there was.

Q. Who was the contractor?

A. Fourquer Contracting.

Q. Mr. DeBlossio had stated that he believed that M.A. Heston was involved in that project. Are you certain it was Fourquer?

A. I am certain it was Fourquer, yes.

Q. Was Pursglove one of the jobs that you had mentioned?

A. Yes.

Q. Could you describe what that job entailed?

A. It was the same thing. We were preparing to abandon the mine or at that time abandon Pursglove. We needed to a watering pump for that location. We were installing the pipe or conduit, if you will, to set the pump in.

Q. What size pipe were you installing?

A. I believe in that case it was 22-inch diameter.

Q. Was that even large than the Blacksville job?

A. Yes.

Q. Did that job involve welding over the shaft?

A. Yes, it did.

Q. Could you describe the working platform that was used on the Pursglove job?

A. It was a temporary decking of plate, steel plate.

Q. Was this a partial covering of the shaft?

A. Yes, I believe it was. That was a three compartment shaft. I think maybe only one compartment was covered. I can't remember exactly.

Q. The Pursglove job, was that job contracted out?

A. Yes, it was.

Q. Who did that job?

A. Fourquer Contracting again.

Q. Was there any type of support structure to support the weight of the casing used in that job?

A. Yes. Again, it was a beam structure.

Q. I-beams?

A. I-beams, yes.

Q. Similar to what was done at Blacksville?

A. Yes, I believe maybe a little larger but similar.

Q. Because the casing was larger?

A. Yes.

Q. It would have to - -

A. Support more weight.

Q. What about the two other jobs, Stewart's Run and Blacks Run, did those jobs also involve welding over shafts?

A. Yes, they did.

Q. What type of working surface was used in those jobs.

A. Again temporary decking.

Q. Partial covering?

A. Partial covering, yes.

Q. Do you know why on those jobs part of the shaft was left uncovered?

A. To facilitate ventilation.

Q. To provide ventilation into the shaft?

A. Yes.

Q. Was there any provision on these prior jobs for preventing sparks from going into the shaft?

A. Yes. There were precautions taken especially, as I recall, in the case of Core and Blacks Run. I don't remember Stewart's Run. It was much earlier.

In the case of Core it was steel decking, solid decking, with a fireproof cloth around the pipe to prevent anything from being pulled down along the pipe and also a plug installed in the pipe to prevent air from being pulled down the pipe itself.

Q. Again similar to what was done at Blacksville?

A. Very similar, yes.

Q. Would it be fair to say that the reason for taking these precautions on these prior jobs was that you didn't want any potential ignition sources entering the shaft?

A. Yes.

Q. On those prior jobs did you have any problems with ignition sources entering the shaft?

A. No, we did not. Not that I recall.

Q. What type of shaft was Stewart's Run?

A. Intake shaft.

Q. Was igniting methane a potential concern on that job?

A. Not in the shaft itself, no.

Q. What do you mean by "not in the shaft itself"?

A. Being an intake shaft it would pull air through the mine. If you would pull an ignition source, I guess, through the mine, then you might ignite something elsewhere.

If it is a concrete-lined shaft, I wouldn't expect there to be any methane in the shaft itself.

Q. Being that that was an intake shaft, it was

Yerkovich further testified Tr. 1309 as follows:

A. No, sir, I have no knowledge of that.

Q. Do you know why there were no inspections done at that work site?

A. No, sir.

Q. Would it have been consistent with the policy we referred to before, the memo not to make inspections of the work site?

A. No, sir.

Q. Would it have been consistent with the policy we referred to before, the memo not to make inspections of the work site?

A. I don't know that.

Q. Mr. Yekovich, your conversations with Mr. Levo about methane tests being made at the bottom of the production shaft, did you discuss with him when such exams would be required to be made?

A. When? Any time the welding and cutting was being done above the shaft.

Q. So, methane examinations being done at the beginning of each shift, would that be sufficient in your opinion?

A. That wasn't the way the policy was intended, no.

Q. What policy?

A. On the welding and cutting procedures.

Q. Are you talking about the regulation which requires methane tests when welding and cutting?

A. No, Northern West Virginia Region.

Finally the Commission cites the testimony of Jack Lowe, former Mine Foreman at the Blacksville No. 1 Mine at Tr. 1436 as evidence of unwarrantable failure. That testimony is as

follows:

A. I didn't know, sir. I didn't know.

Q. Had you ever been involved or seen a job like this where a shaft had been capped and they were installing a pipe through that cap and welding on the pipe?

A. No, sir.

Q. In general, what was your understanding of the time of the requirements to make methane checks when welding was being done?

A. On the inside? Underground?

Q. Well, let's start with that, underground. What was your understanding?

A. You would make an examination every 20 minutes or thereof.

Q. Most of your work was underground; is that correct?

A. It was all underground.

Q. Did you know what the requirements were when welding on the surface?

A. No, sir.

Q. You were involved in making methane tests at the bottom of the production shaft; is that correct?

A. Yes, sir.

Q. Can you testify as to when you made those.

(Tr. 1436).

This evidence shows Lowe's general knowledge of the need to conduct methane tests underground under certain circumstances where welding is performed.

The Commission again cites the testimony of Mr. Quesenberry at Tr. 624-625 for the proposition that he "understood the need to test for methane underneath the cap." The testimony at the cited pages is as follows:

A. [By Mr. Quesenberry] Extent, no.

Q. [By Mr. Wilson] Now, assuming that methane worked to accumulate in the shaft, where would you expect it to accumulate?

A. Excuse me. Did you say where or weren't.

Q. Where. Where within the shaft if it were to accumulate?

A. At the top.

Q. Beneath the cap?

A. Yes.

Q. You have already testified that there was a possibility for methane to be present in the shaft. What was your understanding of the requirements for testing for methane when welding around a shaft?

A. If methane was suspected, you would test for methane.

Q. What do you based that on?

A. You did say around a shaft?

Q. Yes.

A. Yes. Where methane is likely to accumulate and welding and cutting operations are being performed, methane tests will be made.

Q. You understand that that was the requirement of the law; is that right?

A. Yes.

Q. Would it be fair to say that if you were making methane tests that you would make tests in the areas where methane was likely to be?

A. Yes.

Q. So, in this case that would have been beneath the cap at the top of the shaft, right?

A. Beneath the cap at the top of the shaft? With the pipes plugged off, yes.

Q. Had you worked with M.A. Heston people on projects prior to this one?

A. They had done work for us before. Me personally working with them, no.

Q. Now, had your worked with other independent contractors while you were the assistant vice president or assistant to the vice president?

A. In what capacity?

Q. In any capacity did you work with contractors?

A. I guess Forest Construction was considered a contractor. We actually considered them part of our work force. They did a lot for us as far as construction, yes.

Q. Do you agree M.A. Heston worked for Consol on . . .

(Tr. 624-625).

As Quesenberry explained, the need for testing for methane underneath the cap would have arisen in this case only “[w]ith the pipes plugged off - - a situation that was not anticipated.”

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 19, 2000

PLATEAU MINING CORP.,	:	CONTEST PROCEEDINGS
(formerly CYPRUS PLATEAU	:	
MINING CORPORATION)	:	Docket No. WEST 98-191-R
Contestant	:	Citation No. 7611106; 2/17/98
	:	
v.	:	Docket No. WEST 98-192-R
	:	Citation No. 76111107; 2/17/98
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Willow Creek Mine
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 98-317
Petitioner	:	A.C. No. 42-02113-03520
	:	
v.	:	
	:	Willow Creek Mine
	:	
PLATEAU MINING CORP.,	:	
(formerly CYPRUS PLATEAU	:	
MINING CORPORATION),	:	

DECISION

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

Before: Judge Cetti

These consolidated Contest and Civil Penalty Proceedings arise under the Federal Mine Act of 1977, 30 U.S.C. § 801 *et seq.* ("Mine Act"). The Secretary of Labor (Secretary) acting through her Mine Safety and Health Administration ("MSHA"), pursuant to section 105 of the Mine Act seeks the imposition of civil penalties against Plateau Mining Corp. ("Plateau"). Plateau challenges the S&S and the unwarrantable findings in the citation and order. Both documents were issued under section 104(d)(1) of the Act.

At the hearing in Salt Lake City, Utah, the parties filed comprehensive stipulations and presented testimony and documentary evidence. Both parties filed post-hearing briefs. For the reasons set forth below, the existence of the violations alleged by MSHA in the two enforcement documents are affirmed, civil penalties are assessed, and the S&S and unwarrantable failure findings deleted.

Both the citation and the order at issue in these consolidated cases involves the number of water sprays on a 12CM12 Joy continuous miner No. 5062, after the miner was rebuilt by the Joy Manufacturing Company. These cases are concerned with the reasons why there was a discrepancy, at the time of inspection, with the number of sprays found on the continuous miner and the number of sprays called for in the parameter sheet for that 12CM12 Joy miner No. 5062. The parameter sheets for each miner is a part of the approved mine ventilation plan.

Order No. 7611107 issued by Inspector Passarella pursuant to section 104(d)(1) of the Act alleges a violation of 30 C.F.R. § 75.362(a)(2) as follows:

Persons designated by the operator did not conduct a thorough examination to assure compliance with the respirable dust control parameters specified in the approved mine ventilation plan. These examinations shall include water spray numbers and orientations. Deficiencies in dust controls shall be corrected before production begins or resumes. The required number of water sprays for the continuous mining machine being operated in the D-1 Headgate section, MMU 006-0 did not comply with the approved respirable dust control parameter sheet, dated January 16, 1998. Two spray banks containing three sprays had never been mounted on the continuous mining machine before it was put into production. Ten additional sprays were plugged off and was not being used. The records for this examination had been certified that the parameter sheet was being complied with since January 16, 1998.

The cited safety standard at 30 C.F.R. §75.362(a)(2) reads in pertinent part as follows:

A person designated by the operator shall conduct an examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan.... Deficiencies in dust controls shall be corrected before production begins or resumes. The examination shall include air quantities and velocities, water pressures and flow rates, excessive leakage in the water delivery system, water spray numbers and orientations ...

Citation No. 7611106 charges Plateau with a 104(d)(1) violation of 30 C.F.R. § 75.370(a)(1). The citation in pertinent part alleges:

The approved Ventilation Plan was not being complied with. The operators [sic] dust suppression spray system approved on January 16, 1998, for the continuous mining machine, Serial No. 5062, MMU 006-0 which was approved on January 16, 1998, shows a total of 53 sprays. A three spray bank under the cutter head on the left side and a three spray bank on the right side had never been installed by the operator, before this miner was put into production. An additional, 14 sprays were plugged and were found inoperable.

The safety standard cited, 30 C.F.R. §75.370(a)(1), in pertinent part provides:

The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine.....

STIPULATIONS

At the hearing, the parties entered into the record stipulations covering the relevant basic facts involved in these consolidated cases as follows:

1. The Willow Creek Mine is a large underground bituminous coal mine located in Helper, Utah. Currently, the mine has approximately 270 miners.
2. The Willow Creek Mine is owned and operated by Cyprus.
3. The Willow Creek Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 801 *et seq.*
4. The presiding Administrative Law Judge has jurisdiction over these proceedings, pursuant to section 105 of the Act, 30 U.S.C. § 815(c).
5. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.
6. Cyprus' operations affect interstate commerce.
7. Citation No. 7611106 and Order No. 7611107 were properly served by duly authorized representatives of the Department of Labor upon agents for Cyprus on the dates and at the places indicated therein.

8. Citation No. 7611106 and Order No. 7611107 were properly served by duly authorized representatives of the Department of Labor upon agents for Cyprus on the dates and at the places indicated therein.

9. Citation No. 7611106 was issued on February 17, 1999, at the Willow Creek Mine, pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), and alleging a violation of 30 C.F.R. § 75.370(a)(1).

10. Order No. 7611107 was issued on February 18, 1999, at the Willow Creek Mine, pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), and alleging a violation of 30 C.F.R. § 75.362(a)(2).

11. The inspection on which the Citation and Order are based was prompted by the report of an ignition on February 16, 1999, in the D-1 Headgate longwall development section of the Willow Creek mine. At approximately 9:45 p.m. on that date, mining was being conducted on the right side of the No. 1 entry of that section and an orange flame appeared on the right side rib approximately 2-3 feet from the face. The flame lasted 20-30 seconds and was extinguished by the miner operator with the washdown hose.

12. There were no injuries or property damage.

13. The methane display on the continuous miner read .4-.5 percent methane at the time of the ignition.

14. There are liquid hydrocarbons present in the coal seam at Willow Creek and such hydrocarbons may have caused the flame.

15. The methane monitor on the continuous miner was functioning properly at the time of the flame.

16. The methane monitor sensing head on the continuous miner was on the right side of the head of the continuous miner.

17. The continuous miner was in permissible condition at the time of the incident.

18. The number of water sprays required on the continuous miner at issue in the ventilation plan were 53. Under the plan, ninety percent of the required number of sprays, i.e., 48 sprays, must be operating during mining.

19. The number of water sprays operable at the time of the flame incident was 33. Six sprays depicted on the ventilation plan drawing of this miner were absent because they had not been installed by the manufacturer when the machine was rebuilt.

20. Ten of the sprays were plugged mechanically. No hoses connected these ten sprays to the water system of the miner. The continuous miner at issue here was not utilizing a scrubber.

21. One continuous miner model 11CM12 is approved with 33 sprays in this ventilation plan; the model at issue here (model 12CM12) is approved with 53, 55, and 58 sprays. In the ventilation plan, on continuous miners with scrubbers, ten sprays are marked "only used with scrubber."

22. Four other sprays were not working on the day of the inspection because they were plugged with coal dust. The miner operator checked the sprays before beginning the cut in which the flame incident occurred and all sprays that were present and connected to the water system were working. That would include 37 sprays.

23. The water pressure for all the water sprays in the continuous miner required in the ventilation plan is 125 p.s.i. The water pressure measured during the investigation was 250 p.s.i.

24. On January 14, 1999, two MSHA inspectors, William Reitze and Harold Sherer, inspected the D-1 headgate section. The continuous miner, Serial No. 5062, which is the subject of this Citation and Order was present in that section but was not in operation and was not inspected by either inspector, according to their notes.

25. Inspector Passarella refers in the Citation and Order to two previous ignitions at the Willow Creek Mine, one on November 29, 1997, and one on December 4, 1997. Both ignitions involved a different continuous miner than the one at issue in this case. MSHA investigated both incidents and did not issue any citations in either instance.

26. On January 7, 1998, Inspector Passarella inspected the D-1 headgate section and observed the continuous miner at issue here operating but did not inspect the water sprays on the miner.

ISSUES

The issues presented in this case are as follows:

1. Whether the condition that was the basis for the issuance of Citation No. 7611106 and/or Order No. 7611107 were properly designated significant and substantial violations.

2. Whether the condition that was the basis for the issuance of Citation No. 7611106 and/or Order No. 7611107 resulted from an unwarrantable failure to comply with the cited standard.

3. What penalty is appropriate for the violation described in Citation No. 7611106 and in Order No. 7611107.

This docket consists of two MSHA enforcement documents, Citation No. 7611106 and Order No. 7611107. The parties stipulated that both documents could be admitted into evidence to establish the issuance, but not the truth of any statement asserted therein. (Stip. 8).

The inspection on which the citation and order are based was prompted by the report of an ignition on February 16, 1999, in the D-1 Headgate longwall development section of the Willow Creek mine. At approximately 9:45 p.m. on that date, mining was being conducted on the right side of the No. 1 entry of that section and an orange flame appeared on the right side rib approximately 2-3 feet from the face. The flame lasted only 20-30 seconds and was extinguished by the miner operator with the washdown hose. No injuries or property damage was caused by the ignition. (Stip. 12). The methane display on the continuous miner read .4 to .5 percent methane at the time of the ignition. (Stip. 13). The parties stipulated that liquid hydrocarbons exist in the coal seam at Willow Creek and such hydrocarbons may have caused the ignition. *Ibid.*

The Violations

The number of water sprays required on the parameter drawing for the continuous miner at issue, miner No. 5062, was 53. Under the plan, 90 percent of the required number of sprays, i.e., 48 sprays, must be operating during mining. The number of water sprays operable at the time of the flame incident was 33. Six sprays depicted on the parameter sheet drawing for this miner were absent because they had not been installed by the manufacturer when the machine was rebuilt at the manufacturer's facility. Ten of the sprays were plugged mechanically because the sprays were designed to be used only with a scrubber on all other continuous miners of the same model and the continuous miner at issue did not have a scrubber. This resulted in a difference of 16 sprays between the parameter drawing in the plan and the actual number of sprays on the miner after it was rebuilt at the Joy manufacturing facility.

Credible evidence was presented that, normally, Plateau compared the approved drawing with the spray configuration on the miner before a miner is put in service, but this was apparently not done for miner No. 5062. (Tr. 117). The difference was apparently overlooked when the rebuilt miner was received and taken underground. (Tr. 118). If the comparison between the approved drawing and the sprays on the miner had been made, the disparity would have been noticed and it could have been easily corrected by amending the drawing or installing the additional sprays that were left off when the continuous miner was rebuilt by the manufacturer.

The miner operator checked the sprays to see that they were working before beginning the cut in which the flame incident occurred. All sprays that were present and connected to the water system were working. That would include 37 sprays. Four other sprays were not working at the time of inspection because they were plugged with coal dust. Such plugs were to be expected in the normal mining process.

Checks were made on a regular basis to make sure the sprays on the No. 5062 miner were operating properly but, apparently, no one counted the number of sprays on the continuous miner and compared them to the number of sprays on the parameter sheet of the plan drawing. The operator of the continuous miner and his helper made the assumption that the sprays on the miner after the manufacturer rebuilt the miner were the ones that were required under the plan. This mistaken assumption resulted in an inadvertent, unintentional but, nevertheless, a clear violation of the standard charged in the citation and order. The evidence clearly established a violation of the cited standards.

The Evidence Presented Fails to Establish by a Preponderance of the Evidence That the Violation Was S&S or Was Due to the Operator's Unwarrantable Conduct

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).

In *United States Steel Mining, Inc.*, 7 FMSHRC 1125, 1129, (August 1985), the Commission explained the third element of the *Mathies* criteria as follows:

We have explained further that the third element of the *Mathies* formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984).

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

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

The Commission has firmly established that 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 2007 (December 1987).

The facts surrounding the violation as shown in the stipulations and the undisputed evidence in this case do not show that serious injury or illness was reasonably likely. For example, the water pressure for all the water sprays in the continuous miner in question required in the ventilation plan is 125 p.s.i. The water pressure measured during the investigation for the sprays on the Joy continuous miner in question was 250 p.s.i. (Stip. 23). Thus, the water pressure for the sprays on the miner, in question, was twice the pressure required in the ventilation plan. The ten sprays that were mechanically plugged were plugged because those sprays were designed for use only on all other continuous miners of the same model with a scrubber and the miner, in question, did not have a scrubber. All other continuous miners of the same model, 12CM12 used at the Willow Creek Mine, the corresponding ten sprays at issue were specifically restricted "Only use with scrubber." There was undisputed evidence that if those ten sprays were unplugged, they would have conflicted with other sprays on the miner and would not have assisted in the control of dust.

Upon careful review of all the evidence presented in this case, I find no evidence of overexposure to an excess of harmful respirable dust. The evidence presented in this case fails to establish by a preponderance of the evidence the reasonable likelihood that the hazard contributed to by this violation, assuming continued normal operation, will result in an injury or illness of a reasonable serious nature.

There was some speculative testimony by the inspector indicating that perhaps miners on the crew may have been over exposed to an excess of harmful respirable dust but there was no persuasive evidence to that effect. There was only a bald-naked statement which I find to be based on speculation and not on any evidence presented in this case. Petitioner has failed to prove the reasonable likelihood of an injury or illness occurring as a result of the hazard contributed by the cited violations. There is no persuasive evidence in this case that establishes that the violations are significant and substantial.

Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 8 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* At 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct,"

“indifference,” or a “serious lack of reasonable care.” *Id* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test). The Commission has discussed various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, whether the violation is obvious, or poses a high degree of obvious danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator’s efforts or lack thereof in abating the violative condition once he is aware of the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has examined the operator’s knowledge of the existence of the dangerous condition. *E.g.*, *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination).

Even more germane to the facts of this case is the Commission holding that the culpability determination for finding of unwarrantable failure is more than a “knew or should have known” test. *Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993).

I am satisfied from the evidence presented in this case that the operator was not aware of the disparity and did not know, before Inspector Lana Passarella’s inspection, of the disparity between the number of water sprays on the rebuilt miner and the number specified in the approved ventilation plan. A somewhat similar case involving a similar disparity of water sprays on a continuous miner is *Basin Resources, Inc.*, 19 FMSHRC 1565, 1567. In that case MSHA Inspector Fleshman indicated that the difference between the number of sprays on the mine plan and the number of sprays on the continuous miner was a “typical oversight” that is generally corrected by amending the plan. In that case, the violation was held to be of a “technical nature only” rather than serious. Likewise, in this case MSHA admitted that the violation could be abated by amending the parameter drawing in the plan or installing the additional sprays shown in the drawing.

The evidence established to my satisfaction that had Plateau been aware of the disparity, they would have promptly corrected the problem by simply adding the additional water sprays called for or would have amended the parameter drawing for continuous miner No. 5062 to conform to the number of sprays that existed on the miner when it was received at the mine after it was rebuilt by the manufacturer. Plateau was not trying to hide or mislead anyone. Plateau, in this instance, just failed to use the ordinary care required to make sure the number of sprays on the miner and the parameter drawing were identical. They were properly cited for their negligence and violations are affirmed.

Although the citation and the order refer to two previous ignitions, both previous ignitions involved different continuous miners, not the one involved here, No. 5062. Those ignitions were investigated by MSHA and no violations were found and no citations were issued. (Stip. 25).

About a month before the incident which prompted the inspection and resulted in the issuance of this citation and order, Inspector Lana Passarella observed continuous miner No. 5062 operating, but she did not inspect the water sprays on the miner, although she always pays attention to the dust parameters and control measures. (Tr. 10, Stip. 26, Tr. 72). She did not observe any unusual amounts of dust or other conditions which would have prompted her to inspect the miner more closely. (Tr. 71-3). In addition, the operator of miner No. 5062 observed nothing unusual in the dust conditions when operating that miner. The violation was not obvious. It would require counting the number of water sprays on the miner and comparing that number to the number of sprays on the parameter drawing for miner No. 5062. This was overlooked. It was a mistake and a violation of the standard as previously stated. The operator failed to use the ordinary care required by the facts and circumstances. I, therefore, find the operator was negligent and that the level of the operator's negligence was moderate rather than aggravated conduct.

I, therefore, conclude upon consideration of all the evidence and factors that the violations of the cited standards was not a result of the operator's aggravated conduct. The unwarrantable failure designation in the citation and order should be deleted and the findings as to negligence should be amended to moderate negligence.

Appropriate Civil Penalties

The Judge is required by Commission Rule 30, 29 C.F.R. § 2700.30 as well as by the Mine Act itself, to consider the statutory criteria set forth in § 110(i) of the Mine Act in determining the appropriate civil penalty to each violation.

Section 110(i) provides in relevant part:

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.

Size

The parties stipulated that the Willow Creek Mine is a large underground bituminous coal mine and employs approximately 270 miners.

History of Previous Violations

Plateau's Ex. 1 sets forth Plateau's history of violations before February 17, 1996. Petitioner's Ex. 2 sets forth Plateau's history during the period beginning February 17, 1996, and ending February 16, 1998, which is the two-year period before the February 17, 1998, inspection which resulted in issuance of the citation and order. During this two-year period, Plateau received 186 citations and/or orders of which 16 had been designated significant and substantial.

Negligence

Respondent failed to exhibit the ordinary care that was required by the facts and circumstances and this resulted in the two violations previously discussed. I evaluated the operator's negligence to be moderate rather than unwarrantable conduct.

Operator's Ability to Continue in Business

No evidence was offered on this criteria. Consequently, in the absence of evidence, I rely on the presumption that the penalty assessed will not affect Plateau's ability to continue in business.

Gravity

I have previously discussed the gravity and found that the preponderance of the evidence presented in this case fails to establish a S&S violation of the cited standard.

Good Faith in Rapid Compliance

The evidence demonstrated Plateau's good faith in achieving rapid compliance after notification of the violations. All violations were timely abated.

Upon consideration of the stipulations and my evaluation of the evidence in this case, I find the appropriate penalty for each of the violations is \$200.00

In view of the findings, decision and assessment of penalties in the Penalty Proceeding Docket No. WEST 98-317, the issues in the Contest Proceeding, Docket Nos. WEST 98-191-R and WEST 98-192-R, have been resolved, and are now moot. Consequently, those Contest Proceedings are dismissed along with Docket No. WEST 98-317 upon receipt of payment of the civil penalties I have assessed in the Penalty Proceeding.

ORDER

Accordingly, it is **ORDERED THAT PLATEAU MINING CORP. PAY** a civil penalty of \$400.00 to the Secretary of Labor within 30 days of the date of this decision. Within the same 30 days, the Secretary shall modify Citation No. 7611106 and Order No. 7611107 to delete the S&S and the unwarrantable failure findings and change the level of negligence to "moderate." Upon receipt of payment of the penalties, these consolidated Contest and Penalty Proceedings are **DISMISSED**.



August F. Cetti
Administrative Law Judge

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/sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

December 21, 2000

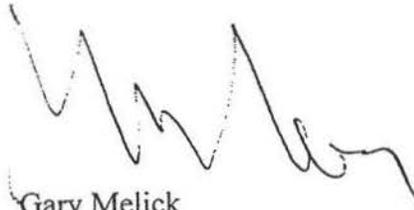
PORTABLE ROCK PRODUCTION CO.,	:	EQUAL ACCESS TO JUSTICE
Applicant	:	PROCEEDING
	:	
v.	:	DOCKET NO. EAJ 2001-1
	:	
SECRETARY OF LABOR,	:	Formerly WEST 99-309-M
MINE SAFETY AND HEALTH	:	A. C. No. 35-02761-05521
ADMINISTRATION (MSHA),	:	
Respondent	:	Sears Road Pit

DECISION APPROVING SETTLEMENT

Before: Judge Melick

This case is before me upon an application for fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504. The parties have filed a motion to approve a settlement agreement and to dismiss the case upon Respondent's payment of \$13,000.00.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay the amount of \$13,000.00, within 30 days of this order. These proceedings are accordingly dismissed in accordance with the joint request of the parties.



Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

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\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 26, 2000

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 2000-101-M
Petitioner : A.C. No. 41-00320-05591
v. :
 : Bayer Alumina Plant
ALCOA ALUMINA & CHEMICAL, L.L.C., :
Respondent :

DECISION

Appearances: Ernest A. Burford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Harold J. Engel, Esq., Arent Fox Kintner Plotkin & Kahn, PLLC, Washington, D.C., for Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor, through the Mine Safety and Health Administration (“MSHA”), against Alcoa Alumina & Chemical, L.L.C. (“Alcoa”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(c). The Petition seeks civil penalties for alleged violations of 30 U.S.C. §§ 56.18002(a), 48.28(a), and 48.31(b), in the amounts of \$1,603.00, \$9,000.00, and \$3,000.00, respectively.

A hearing was held in Houston, Texas. The parties’ post-hearing briefs are of record.¹ At hearing, the parties moved for approval of settlement of 104(d)(2) Order No. 7879416, which settlement motion was granted on the record, subject to filing of the executed agreement (Tr. 6). The terms of the agreement and final approval of settlement shall be set forth as part of this Decision. Order Nos. 7879697 and 7879698, for the reasons set forth below, shall be AFFIRMED, as amended.

¹The parties were notified that the record would be closed on July 31, 2000. Consequently, portions of MSHA Inspector Melvin “Whitey” Jacobson’s deposition, appended to Respondent’s post-hearing brief, filed September 18, 2000, have been considered as part of Respondent’s closing argument only.

I. Stipulations

The following are the parties' stipulations:

1. Alcoa stipulates, for the purposes of this proceeding only, that Order 7879416, 7879697 and 7879698 were timely issued and contested.
2. It is also stipulated, for the purpose of this proceeding only, that the Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.
3. It is further stipulated, for the purpose of this proceeding only, that the proposed penalties will not have an effect on Alcoa's ability to continue in business.
4. The parties are also prepared to stipulate as to the authenticity of the exhibits and admissibility of the exhibits that the other party's going to offer in this proceeding.
5. And it is also noted for the record that the parties have settled Citation [sic] No. 7879416, on the grounds that it be reduced to a 104(a) citation and the penalty amount shall remain as proposed.

II. Factual Background

Alcoa's Bayer Alumina Plant, located in Point Comfort, Texas ("Point Comfort plant"), produces alumina from bauxite that is mined and shipped from Africa, Puerto Rico, and other overseas locations (Tr. 12-13). Point Comfort is a large plant, employing 700-800 workers and operating 24 hours a day, seven days a week (Tr. 14-16). Bauxite, taken from storage at the plant, is mixed and ground with sodium hydroxide to form a slurry (Tr. 54, 169-70). The slurry is combined under high heat and pressure with steam in large vessels called digesters, which creates sodium aluminate (Tr. 170-72). The sodium aluminate is then clarified, which is the settling out of the mud characteristics of the liquor stream, thus leaving the other chemicals intact in the solution (Tr. 173). The final product produced at the plant is alumina, which is aluminum oxide (Tr. 173, 175). Point Comfort's processing of bauxite is a milling operation and, therefore, subject to the jurisdiction of the Act (Tr. 13, 54).

On July 13, 1999, MSHA Inspector Larry Parks conducted an inspection of the Point Comfort plant, in response to a hazard complaint made that day by a Point Comfort employee to MSHA's San Antonio Field Office (Tr. 11). Specifically, the complaint alleged that there were "frontline supervisors and other supervisors who had not had any refresher training (Tr. 16)." Inspector Parks met with Alcoa safety specialist Richard Ripley (standing in for Point Comfort's safety and industrial hygiene manager Ray Scott) and union representative Mike Monroy, discussed the particulars of the complaint, reviewed Alcoa's training records for the previous year, and interviewed several employees, in order to ascertain when their last training had occurred (Tr. 16-17, 158; ex. P-10).

As a result of his investigation, Inspector Parks concluded that over 80 supervisors had not received annual refresher training and six salaried employees had not received hazard training, during the period covering one year prior to the inspection date (Tr. 18, 28, 35-36). Consequently, Inspector Parks issued 104(g)(1) Order Nos. 7879697 and 7879698, for violations of the Part 48 training standards (Tr. 18-21). Alcoa subsequently contacted MSHA's Dallas District Manager, Doyle Fink, who agreed to "work with [Alcoa]," to avoid negatively impacting production by withdrawal of the affected employees (Tr. 60-63, 161-62). In response, Alcoa promptly abated the Orders by training all the affected miners within the ensuing week (Tr. 68, 161-62).

III. Findings of Fact and Conclusions of Law

A. Order No. 7879697

1. Fact of Violation

104(g)(1) Order No. 7879697, as modified, charges a violation of 30 C.F.R. § 48.28(a), describing the condition or practice as follows:

Allegation: seven day-shift supervisors in area two have not received Part 48 annual refresher training and there may be additional supervisors not trained in other areas of the plant.

Finding: eighty-seven salary employees which includes supervisors working in the plant have not received annual refresher training within the last 12 months. The mine operator was aware of the training requirements. The operator is hereby ordered to withdraw the eighty-seven employees from the affected work area until they have received the required training. The Federal Mine Safety and Health Act of 1977 declares that an untrained miner is a hazard to himself and to others. (Listed names of 87 salaried and supervisory employees omitted)

(Ex. P-3).

30 C.F.R. § 48.28, Annual refresher training of miners; minimum courses of instruction; hours of instruction, provides that: "(a) Each miner shall receive a minimum of 8 hours of annual refresher training as prescribed by this section." The scope of the standard is found in Subpart B, section 48.21, which covers "miners working at surface mines and surface areas of underground mines." By definition, "miner," for purposes of the standard, means, in pertinent part, "any person working in a surface mine or surface areas of an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a service or maintenance worker contracted by the operator to work at the mine for frequent or extended periods." 30 C.F.R. § 48.22(a)(1). At the time of inspection, the only surface supervisors exempted from Part 48 training were those certified under an MSHA-approved State certification program, which exemption was inapplicable at Point Comfort, because it applies to the coal industry and, in any case, Texas has no State certification program (Tr. 33-34, 222; see ex. P-8).

Alcoa takes the position that Part 48 training standards are not applicable to Point Comfort, however, because the plant is neither a surface mine nor a surface area of an underground mine, but a milling operation (Tr. 170-71; Resp. Br. at 9-12). Essentially, Alcoa appears to be arguing that Point Comfort is a mine for jurisdictional purposes under the Act, but not a surface mine for purposes of Part 48 training regulations (Resp. Br. at 9-14). The meaning of the scope and definitional provisions of Part 48, Subparts A and B, is plain and unambiguous, and the two sections distinguish training required for underground miners from that which is required for surface miners. Nothing on the face of the provisions suggests an interpretation of “mine,” whether underground or surface, that would exclude any operation deemed a “mine” under section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1), from training its employees under the applicable standards (Tr. 28). Accordingly, I find that Alcoa’s Point Comfort plant is covered by Part 48, Subpart B.

The violation period at issue spans July 13, 1998, to July 13, 1999 (Tr. 26). At the time the Orders were issued, there had been no active training program for the supervisory and salaried personnel since, at least, 1986, and Alcoa stipulated at hearing that “the employees listed in both Citation [sic] Order No. 7879697 and 7879698 did not receive the training required by the listed standard in the citation [sic] (Tr. 21, 86; Resp. Br. at 4).” Accordingly, having found that the Point Comfort plant is covered by Part 48 training standards, and that the listed supervisory and salaried miners had not received annual refresher training, I conclude that Alcoa violated section 48.28(a).

2. Significant and Substantial

Section 104(d) of the Act designates a violation “significant and substantial” (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 that 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, 103-04 (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 mining operations.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998).

Inspector Parks determined that the violation was S&S. He testified that there are many kinds of valves and caustic acid at Point Comfort, and that miners untrained in the proper procedures to be followed in the plant are exposed to tripping and traffic hazards, which could result in burns, falls and guarding injuries of a very serious nature (Tr. 23-24). Moreover, the inspector testified that a vital component of annual refresher and hazard recognition training is emergency evacuation, irrespective of the limited exposure of the supervisory or salaried employee to the plant operations (Tr. 75-76). I find, based on the evidence, that there was a reasonable likelihood that supervisory and salaried miners, not updated periodically on safe plant procedures, could be seriously injured by machinery or chemicals. Therefore, I conclude that the violation was S&S.

3. Penalty

While the secretary has proposed a penalty of \$9,000.00, 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(j). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (March 1983), *aff'd*, 763 F.2d 1147 (7th Cir. 1984). Section 110(i) provides, in pertinent part:

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.

Alcoa urges a reduction in penalty based on its good faith belief that it had a grace period in which to complete training of its supervisors (October 1999), and because of the exemplary manner in which it trained all the affected employees to abate the Orders (Resp. Br. at 18).²

Point Comfort is a large mine, and the parties have stipulated that the proposed penalties will not affect Alcoa's ability to continue in business.

In analyzing the history of previous violations, the Commission has indicated that the operator's general history, rather than its history of similar violations, should be considered.

²Alcoa filed a Motion to Compel Depositions on March 31, 2000, in which it sought to depose "person or persons at MSHA's Office of Assessments who made the decision regarding the amount of the penalty for each of the orders which are the subject of this proceeding." By Order of April 6, 2000, the motion was denied. In its Post-hearing Brief, Alcoa moves for exclusion from my consideration of penalty, of any evidence presented at trial on the six penalty criteria, and requests reconsideration of my ruling and reopening of the record for depositions (Resp. Br. at 2, 15-17). The motion is hereby denied.

Cantera Green, 22 FMSHRC 616, 623 (May 2000) (citations omitted). In the 24-month period prior to the subject inspection, Alcoa was issued 234 citations, one of which involved violation of a Part 48 training standard, distinguishable from the standards at issue herein (Tr. 15, 129-30, 134-36; exs. P-7, P-11). Although Alcoa has a significant overall history of violations, I find that the company has a good record respecting training violations and, therefore, consider its violations history a mitigating factor in assessing appropriate penalties.

A finding on the gravity criterion requires an assessment of the seriousness of the violation. *Hubb Corporation*, 22 FMSHRC 606, 609 (May 2000), citing *Consolidation Coal Co.*, 18 FMSHRC, 1541, 1549 (September 1996); *Sellersburg*, 5 FMSHRC at 294-95. In evaluating the seriousness of a violation, the Commission has focused on “the effect of a hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC at 1550. In this case, the annual refresher and hazard training standards contemplate safety awareness and procedures for supervisory and salaried employees who are exposed, irrespective of frequency, to the operations in the Point Comfort plant, which exposure could result in serious injury. For the reason that failure to train these miners on safe plant procedures on a regular, periodic basis, exposes them to the very hazards that the standards seek to prevent, I find the violations to be serious.

Respecting Alcoa’s negligence in violating the standards, Inspector Parks testified that he assessed the negligence as high based on the substantial number of untrained employees, and his conclusion that Alcoa was aware of the training requirements, since the company had trained several similarly situated supervisors and salaried employees in 1996-97, and during the violation period (Tr. 25-28, 65-66). The inspector further testified that Ray Scott explained to him that he (Scott) was under the impression, from a previous safety director, that Part 48 training was not required for the supervisory and salaried employees (Tr. 25, 66). Many of the affected employees interviewed by Inspector Parks communicated to him that they had been told that they did not need the training, while some stated that they had taken the training with their departments, of their own volition (Tr. 22, 27, 111; ex. P-10).

Alcoa takes the position that its failure to regularly conduct annual refresher and hazard training for its supervisory and salaried employees since, at least, 1986, was based on a good faith belief that the training was not required, because those employees had limited exposure to plant operations and did not perform the hands-on work of the hourly workers. Ray Scott testified that there was no training program in place for supervisory and salaried employees in 1989, when he joined Point Comfort’s safety department, and that his predecessor, as well as MSHA personnel, communicated to him that the training was not required (Tr. 84-88, 100-01). Scott also explained that some supervisory and salaried personnel had received training between 1990 and 1996, in preparation for strikes that never occurred, since Alcoa had anticipated that those employees would be taking on the duties of the hourly workers (Tr. 99, 101, 133-34). Moreover, Scott testified that MSHA’s San Antonio inspectors had conducted Part 48 audits during regular inspections of the Point Comfort plant between 1990 and 1994, had been satisfied with Alcoa’s training records, and had not cited Alcoa for training violations, respecting its supervisors and salaried employees, until the date of the instant Orders (Tr. 87-91, 122; ex. P-

12). Finally, Alcoa places great significance on a December 7, 1998, cover letter from J. Davit McAteer, Assistant Secretary for Mine Safety and Health, providing the mining community with a "Compliance Guide for MSHA's Modified Regulations on Training and Retraining of Miners," to assist the industry in complying with new training requirements (Ex. R-6). Alcoa argues that, based on its prior belief that its supervisors and salaried employees were exempt from Part 48 training, the effect of the McAteer letter and new Compliance Guide was to create the impression that those employees were no longer exempt, and that Alcoa had until the end of October 1999, to complete their annual refresher or hazard training, as appropriate (Tr. 85, 91-95, 112, 137-38).

MSHA Inspector David Weaver, training specialist with Educational Field Services Division, testified that all mines are covered by Part 48 training, and that the new training requirements under Part 48 modify the definition of "miner" to include all supervisory personnel, whereas the old rule exempted State-certified supervisors from annual refresher training (Tr. 192-93). "All other supervisory personnel," he testified, "were required all of Part 48 training (Tr. 193)."

Alcoa had been operating for years under a misconception that it had no duty to provide annual refresher and hazard training for the affected Point Comfort miners. During that time, MSHA had been examining Point Comfort's training records and had failed to issue any citations or orders. The Secretary called MSHA Inspector Melvin "Whitey" Jacobson to testify that, pursuant to his Part 48 audit of Point Comfort's training in 1992, he had advised Ray Scott that supervisory and salaried employees needed Part 48 training (Tr. 225-27; ex. P-12). While the record as a whole substantiates Jacobson's testimony, it is equally clear that MSHA dropped the ball after the audit, by failing to take any enforcement action until July of 1998. Furthermore, the Secretary has not rebutted the testimony of Scott and Ripley, that discussions between Alcoa and MSHA, during reviews of Point Comfort's training records, contributed to Alcoa's assumption that it was in compliance with Part 48 standards; MSHA's behavior during inspections also indicates some confusion on the part of San Antonio Field Office inspectors, as to the requirements of Part 48 standards. Alcoa's interpretation of the new requirements under Part 48, from its reading of the McAteer letter and new Compliance Guide, was a continuation of the misconception it held prior thereto. Simply stated, the McAteer "package" was inapplicable to Point Comfort, because the affected employees had never been exempt from training in the first place. Whitey Jacobson's statements to Scott and his audit report, alone, did not get Alcoa's attention or, at least, straighten out its confusion over Part 48 requirements. It is clear that MSHA's course of behavior over the years-- its failure to cite Alcoa for its failure to appropriately train Point Comfort's supervisory and salaried miners-- reinforced the company's good faith belief that those employees were exempt; likewise, there is no doubt that citing Alcoa at an earlier stage would have brought its non-compliance to a head. There is no reason to believe, especially in light of Alcoa's overall training record and its rapid compliance in this matter, that Alcoa knowingly ignored Part 48 requirements. Moreover, for the reason that Point Comfort's considerable number of supervisory employees is solely a consequence of its sizeable operation, I am not persuaded by the Secretary's argument that the number of affected miners is significant or justifies a finding of high negligence. Therefore, having found that Alcoa

proceeded on a good faith belief that it was in compliance with the standards, and that MSHA's lack of enforcement over several years reinforced Alcoa's misconception, I find that Alcoa's negligence was low.

Finally, respecting Alcoa's good faith efforts at abatement, the evidence establishes that Alcoa did an excellent job in training all affected miners expeditiously.

Accordingly, having considered Alcoa's large size, ability to continue in business, seriousness of violation, low degree of negligence, and good record of past violations and rapid compliance as mitigating factors, I conclude that a penalty of \$2,250.00 is appropriate.

B. Order No. 7879698

1. Fact of Violation

104(g)(1) Order No. 7879698, as modified, charges a violation of 30 C.F.R. § 48.31(b), describing the condition or practice as follows:

Allegation: seven day-shift supervisors in area two have not received Part 48 annual refresher training and there may be additional supervisors not trained in other areas of the plant.

Findings: Six salary employees have not received hazard training within the last twelve months. The mine operator was aware of the training requirements. The operator is hereby ordered to withdraw the six employees from the affected work areas until they have received the required training. The Federal Mine Safety and Health Act of 1977 declares that an untrained miner is a hazard to himself and others. (Listed names of six salaried employees omitted)

(Ex. P-4).

30 C.F.R. § 48.31, Hazard Training, provides, in pertinent part, that: (a) Operators shall provide to those miners, as defined in § 48.22(a)(2) (Definition of miner) of this Subpart B, a training program before such miners commence their work duties. This training program shall include the following instruction, which is applicable to the duties of such miners: (1) Hazard recognition and avoidance; (2) Emergency and evacuation procedures; (3) Health and safety standards, safety rules and safe working procedures; (4) Self-rescue and respiratory devices; and, (5) Such other instruction as may be required by the District Manager based on circumstances and conditions at the mine. (b) Miners shall receive the instruction required by this section at least once every 12 months." "Miner," for purposes of the standard, means, "any person working in a surface mine, including any delivery, office, or scientific worker or occasional, short-term maintenance or service worker contracted by the operator, and any student engaged in academic projects involving his or her extended presence at the mine." 30 C.F.R. § 48.22(a)(2). As discussed above, Point Comfort is a "mine" under section 3(h)(1) of the Act, its employees are

covered by Part 48, Subpart B, training requirements, and having found that the listed salaried employees had not received hazard training during the violation period, I conclude that Alcoa violated section 48.31(b).

2. Significant and Substantial

Inspector Parks determined that the violation was S&S. He described salaried employees as those not performing the hourly work in the plant, in occupations such as engineering, safety, clerical/office and security, who go into the plant and are exposed to its hazards, on a daily basis (Tr. 27-28, 32, 35-37). He testified that, while the salaried employees primarily stay in the office, the training is designed to teach hazard recognition and emergency evacuation procedures, so that traffic hazards, as well as hazards specific to equipment can be avoided (Tr. 38-39, 75-76). For these, and the reasons discussed above, I find that there was a reasonable likelihood that salaried miners, not periodically trained in recognizing hazards in the plant, could be seriously injured by machinery or chemicals. Therefore, I conclude that the violation was S&S.

3. Penalty

Consideration of the six penalty criteria under section 110(i) of the Act has been discussed fully above, and applies to both Orders. The Secretary has proposed a penalty of \$3,000 for this violation. As discussed previously, my determination of the appropriate penalty takes into account Alcoa's large size, ability to continue in business, seriousness of violation, low negligence, and the mitigating factors of good overall history of training violations and rapid compliance. Accordingly, I conclude that a penalty of \$750.00 is appropriate.

C. Order No. 7879416

The parties' settlement agreement, respecting 104(d)(2) Order No. 7879416, was considered under the criteria set forth in section 110(i) of the Act, and approved at hearing. Under the terms of the agreement, Alcoa agreed to pay-in-full the proposed penalty of \$1,603.00, and the Secretary agreed to modify the Order to a 104(a) citation, with high negligence. The parties having filed the executed agreement, approval of settlement is hereby confirmed.

ORDER

WHEREFORE, the approval of settlement is **GRANTED**, it is **ORDERED** that the Secretary **MODIFY** Order No. 7879416 to a 104(a) citation, and that Alcoa Alumina & Chemicals, L.L.C., **PAY** a civil penalty of 1,603.00.

IT IS FURTHER ORDERED that Order Nos. 7879697 and 7879698 are **AFFIRMED**, as modified to cite the appropriate standards, that the Secretary **MODIFY** the Orders to reduce the level of negligence to "low," and that Alcoa Alumina and Chemicals, L.L.C., **PAY** civil penalties of \$2,500.00 and \$750.00, respectively, for the violations.

IT IS FURTHER ORDERED that Alcoa Alumina & Chemicals, L.L.C., **PAY** a total civil penalty of \$4,853.00, in satisfaction of the subject Citation and Orders, within 30 days of the date of this Decision. Upon receipt of payment, this case is **DISMISSED**.


Jacqueline R. Bulluck
Administrative Law Judge

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