DECEMBER 2002

THERE WERE NO COMMISSION DECISIONS OR ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

DECEMBER 2002

No cases were filed in which Review was granted during the month of December:

No cases were filed in which Review was denied during the month of December:

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

December 3, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2002-224-M
Petitioner	:	A. C. No. 04-01299-05542
v.	:	
	:	Docket No. WEST 2002-225-M
ORIGINAL SIXTEEN TO ONE MINE,	:	A. C. No. 04-01299-05543
INCORPORATED,	:	
Respondent	:	Sixteen To One Mine

DECISION

Appearances: Matthew Vadnal, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, on behalf of Petitioner;
Michael Miller, President, Original Sixteen to One Mine, Inc., Alleghany, California, on behalf of Respondent.

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Citations No. 7992100 and 7987759 have been severed from Docket No. WEST 2002-224-M and consolidated with Docket No. WEST 2002-224-M(A).

At hearings the Secretary vacated Citations No. 7992098, 7996613 and 7992158 and proposed to settle the remaining citations. Modification of certain citations and a reduction in penalty to $852.00, were proposed. I have considered the representations and documentation submitted in this case and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $852.00, within 40 days of this order.

Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 18, 2002

KINDER MORGAN OPERATING L.P. "C",	:	CONTEST PROCEEDINGS
	:	
Contestant	:	Docket No. KENT 2003-85-R
v.	:	Citation No. 7648459; 5/21/2002
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 2003-86-R
MINE SAFETY AND HEALTH	:	Citation No. 7648560; 5/21/2002
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. KENT 2003-87-R
	:	Citation No. 7648561; 5/21/2002
	:	
	:	Docket No. KENT 2003-88-R
	:	Citation No. 7648562; 5/21/2002
	:	
	:	Docket No. KENT 2003-89-R
	:	Citation No. 7648563; 5/21/2002
	:	
	:	Docket No. KENT 2003-90-R
	:	Citation No. 7648565; 5/30/2002
	:	
	:	Docket No. KENT 2003-91-R
	:	Citation No. 7648566; 5/31/2002
	:	
	:	Docket No. KENT 2003-92-R
	:	Citation No. 7648567; 5/31/2002
	:	
	:	Docket No. KENT 2003-93-R
	:	Citation No. 7648572; 6/12/2002
	:	
	:	Docket No. KENT 2003-94-R
	:	Citation No. 7648685; 7/16/2002
	:	
	:	Grand Rivers Terminal
	:	Mine ID 15-18234

ORDER OF DISMISSAL

Before: Judge Barbour

On November 4, 2002, counsel for the operator, Kinder Morgan Operating, L.P. ("Kinder") filed a notice of contest for ten citations issued in the above captioned cases. In the notice of contest, Kinder admits the untimely filing, but contends its employees inadvertently failed to forward the citations to company officials due to the employees' confusion over MSHA jurisdiction in other cases currently on appeal in the U.S. Court of Appeals for the 6th Circuit. The Secretary of Labor ("Secretary"), subsequently filed an answer and Motion to Dismiss, arguing that Commission case law requires the dismissal of contest proceedings if they are not timely filed.

Although Kinder may have been confused about MSHA jurisdiction, the Commission has made no exception to the 30 day restriction for "confusion." As the Secretary correctly asserts, a long line of cases dating back to the Interior Board of Mine Operation Appeals have held the late filing of notices of contest of citations is not permissible under the Mine Act and under its predecessor the Federal Coal Mine Health and Safety Act of 1969. *Consolidation Coal Co.*, 1 MSHC 1029 (1972); *Old Ben Coal Co.*, 1 MSHC 1330 (1975); *Alexander Brothers*, 1 MSHC 1760 (1979); *Island Creek Coal Co. v. Mine Workers*, 1 FMSHRC 989 (Aug. 1979); *Amax Chemical Corp.*, 4 FMSHRC 1161 (June 1982); *Industrial Resources, Inc.*, 7 FMSHRC 416 (Mar. 1985); *Allentown Cement Company, Inc.*, 8 FMSHRC 1513 (Oct. 1986); *Rivco Dredging Corp.*, 10 FMSHRC 889 (July 1988); *Big Horn Calcium*, 12 FMSHRC 463 (Mar. 1990); *Prestige Coal Co.*, 13 FMSHRC 93 (Jan. 1991); *Costain Coal Inc.*, 14 FMSHRC 1388 (Aug. 1992); *Diablo Coal Co.*, 15 FMSHRC 1605 (Aug. 1993); *C and S Coal Co.*, 16 FMSHRC 633 (Mar. 1994); *Asarco, Inc.*, 16 FMSHRC 1328 (June 1994); *See also*, *ICI Explosives USA, Inc.*, 16 FMSHRC 1794 (Aug. 1994).

Accordingly, the Secretary's Motion to Dismiss is **GRANTED**. Kinder should note, however, that the failure properly to contest a citation does not preclude it from challenging in a subsequent civil penalty proceeding the violations alleged in the citations.

David F. Barbour
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
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December 23, 2002

CORD EASLEY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2001-133-DM
	:	WE MD 00-13
	:	
v.	:	
	:	Portable Crusher #1
MORRILL ASPHALT PAVING,	:	Mine I.D. 45-03357
Respondent	:	

DECISION

Appearances: Devin Poulson, Esq., Lacy & Kane, East Wenatchee, Washington, for Complainant;
Lewis L. Ellsworth, Esq., Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, Tacoma, Washington, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Cord Easley against Morrill Asphalt Paving ("Morrill") 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"). Mr. Easley alleges that he was terminated from his employment with Morrill because he complained about safety conditions at the crusher. An evidentiary hearing was held in Wenatchee, Washington. The parties filed post-hearing briefs. For the reasons set forth below, I find that Mr. Easley established a *prima facie* case of discrimination but that Morrill established that it would have terminated Easley for his unprotected activities alone.

I. SUMMARY OF THE EVIDENCE

At all pertinent times, Morrill was in the sand and gravel business. Prior to November 2000, Morrill operated a portable rock crushing plant in the State of Washington. This case arose as a result of events that occurred between January and May 2000 at the portable crusher.

Cord Easley starting working for Morrill in July 1999 as a groundsman. He performed various tasks such as greasing bearings and cleaning up spilled material from under conveyor belts. After he had worked for Morrill for several months, he was transferred to the

maintenance crew. As a maintenance employee at the crusher he welded guards on equipment, replaced bearings on shafts, and repaired equipment.

In October 1999, the portable crusher was moved from Gold Bar, Washington, to Maple Valley, Washington. Sometime after the crusher was set up in Maple Valley, Easley was assigned to work on the evening maintenance shift assisting Mike Fletcher. They were the only employees working on this shift during which equipment maintenance was performed. Sometime in January 2000, Fletcher was transferred to the day shift as a plant operator and Easley remained on the evening shift as the maintenance man.

Because Morrill needed to have more than one person working on the evening shift, it hired Don Drinkwater to work with Easley. Easley functioned as the chief mechanic on the evening shift. Easley and Drinkwater reported to work about two hours before the end of the day shift, so there was an overlap of shifts. Their supervisor was Roger Harting, the plant superintendent.

In January, Fletcher, Easley, and other employees became concerned that Drinkwater and Randy Syria were either drinking on the job or drinking before they arrived at work. They believed that both employees smelled of alcohol. Easley testified that he saw Drinkwater go to his truck on a number of occasions to get a drink during the evening shift. (Tr. 42). Easley testified that he could smell alcohol on Drinkwater's breath. Easley also stated that Drinkwater admitted that he was drinking. (Tr. 43). Easley testified that sometime before Christmas 1999, when he was working the day shift, he noticed that Syria sometimes smelled of alcohol. (Tr. 41). He would be surly when he had been drinking. Easley was concerned that these employees could cause an accident or injury.

Easley discussed the drinking issue with Fletcher and John Partridge, another Morrill employee. Approximately a week after Drinkwater started work, Easley raised the drinking issue with Mr. Harting. About a week later, Fletcher and Easley became concerned that Harting was not doing anything to stop employees from being intoxicated at work. Fletcher had previously developed a relationship with Richard Thody, the safety director for Goodfellow Brothers, Inc., the parent company of Morrill. Fletcher called Thody on the telephone to discuss the drinking problem. Fletcher handed the phone to Easley so that Easley could describe what he knew from events that occurred on his shift. This short conversation was the only contact that Easley had with Mr. Thody.

Thody raised the drinking issue with upper management. Morrill held a meeting at the crusher on February 8, 2000, to discuss alcohol abuse. Easley, Fletcher, Syria, Drinkwater, and all other crusher employees were in attendance. Chris Gibbs, Morrill's shop superintendent, was also present. Gibbs supervised Morrill's maintenance shop in Wenatchee, Washington, but he also indirectly supervised maintenance employees at the crusher. At this meeting, employees were told that anyone who was suspected of consuming alcohol on the job

would be tested and that, if he tested positive, he would be immediately terminated from his employment.

Immediately following this meeting, Harting told Fletcher that he was being laid off from his job. He was not given much of an explanation except that Morrill did not need two plant operators at the crusher. When he discussed his lay-off with Thody, Thody told him that he may have been discriminated against for raising safety issues. Fletcher filed a discrimination complaint with the State of Washington under the Washington Industrial Safety and Health Act ("WISHA"). The Washington Department of Labor and Industries ("L&I") investigated Fletcher's complaint. Fletcher also filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"). After MSHA determined that he was not discriminated against, Fletcher filed a complaint on his own behalf under section 105(c)(3) of the Mine Act. Following an evidentiary hearing, I determined that Morrill discriminated against Fletcher in violation of the Mine Act. *Fletcher v. Morrill Asphalt Paving*, 24 FMSHRC 232 (Feb. 2002).

Easley testified that neither Syria nor Drinkwater exhibited any signs of drinking after the meeting of February 8, 2000. As far as Easley could tell, these employees were no longer drinking on the job after that date. On May 12, 2000, Easley was interviewed by an investigator from L&I about Fletcher's WISHA complaint. An attorney for Morrill was present during the interview. Easley told the investigator that, although he did not have any proof that Fletcher was laid off because of his safety complaints, "[t]hat's just what he figured." (Ex. R-2 p. 7). Easley also told the investigator that Morrill had not retaliated against him for his involvement in any safety complaints. *Id.* Easley continued working for Morrill until May 26, 2000, when he was told that he was being laid off. Easley contends that he was separated from his employment because he talked to Thody about employees drinking on the job and, to a lesser extent, because he told the L&I investigator that he "figured" that Fletcher was laid off because of his safety complaints.

Mr. Harting testified that Easley's termination was not a result of his phone conversation with Thody about drinking on the job or by his statement to the L&I investigator. Harting and Gibbs testified that he was terminated because Morrill was dissatisfied with his skills as a mechanic.* Specifically, they testified that after Easley became the chief mechanic for the crusher, the crusher was down for repairs more frequently than when Warren Smithers was the chief mechanic. Morrill attributed this increased down time to Easley's lack of skill.

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* At the hearing, counsel for Easley objected to the testimony of Gibbs because he was not included in Morrill's list of witnesses provided in response to the notice of hearing. (Tr. 102-05). Counsel for Morrill responded that the omission was an oversight. The parties did not conduct any discovery in this case. I allowed Gibbs to testify, but I scheduled the lunch break immediately following his direct examination so that Easley could prepare for cross-examination during the break.

Harting and Gibbs also testified that Morrill's mechanics are required to bring basic tools for use at the crusher. Because Easley did not bring any tools to the crusher, he had to borrow Harting's tools. Harting testified that Easley used his tools every day and lost some of them. Harting testified that he had warned Easley that he must bring his own tools for use at the crusher if he wanted to continue working for Morrill.

Harting testified that when Easley talked to him about employees being intoxicated at work, he discussed the matter with Drinkwater. Harting also testified that he could not smell alcohol on Drinkwater's breath and that Drinkwater denied that he had been drinking. Harting stated that after he told Gibbs about the incident, the February 8 meeting was set up to discuss alcohol abuse with crusher employees. Harting also testified that he made arrangements for a drug and alcohol testing program with the hospital in nearby Enumclaw, Washington, so that if an employee at the crusher was suspected of substance abuse, he could be sent there for immediate testing.

Gibbs testified that he made the ultimate decision to terminate Easley. (Tr. 133). He testified that the "straw that broke the camel's back" with respect to Easley's employment was an event that occurred a few days before he was terminated. (132). Harting told Gibbs that Easley failed to properly tie off when he was removing an electric motor from the cone screen. Jim Lyon, an equipment operator at the crusher, testified that Easley was wearing a safety harness as he was attempting to remove the motor which weighed more than 100 pounds and was about 20 feet above the ground. (Tr. 111). Lines from a crane were supporting the motor which would then lower it to the ground once it was detached from the cone screen. Apparently, Easley had tied off to the motor itself rather than to the frame of the cone screen so that he would have gone down with the motor, if someone else had not noticed the mistake. (Tr. 112). Gibbs testified that this unsafe act was not the direct cause of Easley's dismissal but is illustrative of his poor work performance and contributed to his decision to terminate him. (Tr. 132). Gibbs stated that he "structured it as a layoff" so that Easley could collect unemployment compensation. (Tr. 133). Gibbs testified that Easley was not really laid off for lack of work, but was terminated because of his poor job performance.

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Mr. Easley

Easley argues that it clearly established a *prima facie* case of discrimination. Easley engaged in a protected activity when he complained about employees being under the influence of alcohol at work and he suffered an adverse action as a result of these complaints. Easley contends that Morrill knew that Easley had engaged in these protected activities; Morrill was hostile to these activities; there was a coincidence in time between the protected activities and the adverse action; and Easley was disparately treated.

Easley further argues that Morrill failed to meet its burden of establishing that his termination was not motivated by his protected activities. Easley maintains that Morrill did not provide a credible explanation why it terminated him. Morrill told Easley and the state employment security department that he was laid off. Easley was never told by Harting or anyone else that his performance was not acceptable. At the hearing in this case, on the other hand, Morrill maintained that Easley was terminated because he was responsible for increased down-time in production at the crusher. Easley contends that this post hoc rationalization should not be given any credibility. Easley points to the fact that under Washington law, unemployment benefits will not be denied for "mere incompetence, inefficiency, erroneous judgment, or ordinary negligence." (Easley Br. 5) (citation omitted). Thus, Morrill would not have put Easley's unemployment benefits at risk by telling the department of employment security that he was terminated for not properly maintaining the crusher. The only inference that can be drawn from Morrill's actions is that it had no real reason to terminate Easley other than to retaliate for his protected activities. Morrill's explanation that the crusher was shut down for repairs more frequently when Easley was the mechanic cannot be verified because Morrill's records for the crusher are "conveniently missing." *Id.* Easley points to the fact that Morrill was aware of his MSHA complaint long before it permanently shut down the crusher and it could have easily preserved these records. Fletcher and Partridge credibly testified, on the other hand, that Easley was a good mechanic.

Finally, Easley points to the fact that Morrill has a history of making up reasons for terminating employees. Its post hoc explanation of why it discharged Easley is simply pretext seized to cloak its discriminatory motive. The events in this case make sense only if discriminatory animus is added in as the motivating factor.

B. <u>Morrill Asphalt</u>

Morrill argues that its evidence demonstrates that Easley's termination was not tainted by Easley's single complaint that a co-worker smelled of alcohol on the job. It maintains that the evidence shows that Easley's termination, which occurred three months after his complaint, was the result of Morrill's continuing concerns regarding Easley's work performance. Thus, Morrill contends that it successfully rebutted Easley's *prima facie* case.

Morrill contends that Harting discussed Easley's work performance with him in April 2000 and on subsequent occasions. Morrill also relies on evidence that other employees complained to management about Easley's work performance. Gibb made the decision to terminate Easley after Easley had failed to secure himself safely when he removed the motor from the cone screen. Morrill contends that its evidence should be credited.

Morrill also argues that Easley did not present evidence showing that Morrill's stated reason for terminating Easley was pretextual. Morrill took immediate action to respond to Easley's complaint that a co-worker smelled of alcohol. Crusher employees were advised that a drug and alcohol screening program had been established at a nearby medical facility and

that any employee who tested positive would be terminated. Easley admitted that he did not smell alcohol on anyone's breath after this program was established. In addition, Easley admitted in his L&I interview that Morrill did not take any action against him because he complained about alcohol use at work.

In his attempt to establish discriminatory animus, Easley relies on two statements made by Harting: Harting's admonition to Easley that he must bring his tools to work and his comment to Easley that "this back stabbing better stop." (Morrill Br. 7). First, all mechanics were required to use their own tools at work. In addition, Harting's "back stabbing" remark should be given little weight because it was an isolated event that occurred several months before Easley was terminated.

Finally, Easley's contention that he was discharged for talking to the L&I investigator about Fletcher's complaint in May should not be considered. This charge is contradicted by Easley's own testimony. Morrill maintains that there is no evidence to support this argument in any event.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). "Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 624.

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.*;

Robinette, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Easley engaged in protected activity.

Mr. Easley engaged in protected activity when he complained about alcohol use by his fellow employees. This complaint was safety related because he feared that these employees could injure him as they operated heavy equipment. To the extent that he discussed safety issues, Easley's statements to the L&I investigator were also protected.

B. Easley established that Morrill's decision to dismiss him was motivated, at least in part, by his protected activity.

In determining whether a mine operator's adverse action was motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991).

There can be no dispute that Harting was aware of Easley's complaints about Syria and Drinkwater. Harting was also aware that Easley was interviewed by an L&I investigator on May 12, 2000, although he did not know what Easley said during this interview. Because counsel for Morrill was present at the interview, I conclude that Morrill was aware that Easley told the investigator that he "figured" that Fletcher was fired for making safety complaints. Easley's discrimination complaint in this case includes references to this interview so it is within the scope of my jurisdiction.

In *Fletcher*, I found that Morrill had demonstrated animus toward Fletcher's protected activities. 24 FMSHRC at 239-40. I specifically determined that "[c]ircumstantial evidence shows that Harting did not welcome the safety activities of Thody and Fletcher." *Id.* I concluded that Fletcher was terminated from his employment because of his safety activities. Easley's safety activities were much more limited, however. He raised concerns with Thody about employees drinking during a phone call in January 2000, after he had discussed the issue with Harting. Fletcher had initiated this call and Easley spoke only briefly about what he had observed during the evening shift. Unlike Fletcher, Easley did not have a prior history of reporting safety deficiencies and he did not have an ongoing relationship with Thody. The only safety complaint that Easley ever made was about drinking in January 2002.

I believe that Easley established that Morrill was hostile toward employees who reported safety problems to Mr. Thody. No animus was established with respect to employees discussing safety issues with Harting but, based on my findings in *Fletcher*, I find that Morrill was hostile toward employees who reported safety problems to Thody. Easley's contact with Thody was quite limited.

Easley established a coincidence in time between Easley's safety complaints and his layoff. The four month gap between his safety complaint and the adverse action is not significant in this instance. In reaching this conclusion, I also take into consideration Easley's testimony before the L&I investigator on May 12.

I also find that Easley submitted evidence that he was treated differently from other similarly situated employees. Although Morrill did not have a very extensive history of layoffs and dismissals, the fact that both Fletcher and Easley were singled out for termination establishes a *prima facie* case of disparate treatment in this instance. Although other employees complained about Syria and Drinkwater, including Partridge, only Fletcher and Easley discussed the issue with Thody.

I find that Easley established a *prima facie* case of discrimination. The circumstantial evidence establishes that the termination of Easley may well have been motivated at least in part by his safety activities. The motivation behind a termination is subjective and direct evidence is rarely encountered. I note, however, that Easley's *prima facie* case is not nearly as strong as the case established by Mr. Fletcher in his discrimination case.

C. Morrill established that it would have terminated Easley for his unprotected activities alone.

As stated above, Morrill presented evidence that Easley was terminated because his supervisors had become dissatisfied with his work as a mechanic. In addition, Harting previously warned Easley that he was required to bring his own tools to work for use on the crusher. Finally, Morrill argues that the incident in which Easley failed to properly tie off when he was working 20 feet above the ground also contributed to the company's decision to terminate him. Morrill maintains that it told Easley that he was being laid off so that he could be paid unemployment compensation benefits. I credit the testimony of Morrill's witnesses that Easley was not laid off but was terminated for cause.

I credit the testimony of Harting and Gibbs that Morrill was in the process of taking steps to address the drinking problem following the complaints made by Fletcher, Easley, and Partridge. Harting did not immediately discuss the matter with Easley because, when he approached Drinkwater after Easley's complaint, he could not detect any evidence that Drinkwater had been drinking. Harting did not want to make false accusations or create discord among the crusher employees. Gibbs believed that he could not take action against Drinkwater or Syria because he did not have objective proof that they had been drinking and

they denied that they had been drinking. (Tr. 152-53). As a consequence, Morrill set up a program to test employees who are suspected of drinking rather than further investigating these particular incidents.

Given the series of events that occurred at the crusher, including the termination of Fletcher, I find that Morrill did not affirmatively establish that the termination was not motivated in any part by the protected activity. Harting's statement to Easley that "this back stabbing better stop," indicates that he was hostile to an employee going over his head to discuss safety issues with someone in the corporate office, such as Thody. (Tr. 46, 80, 175).

If a mine operator cannot establish that the protected activity played no part in its decision to terminate the complainant, it may nevertheless defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. I must analyze whether Morrill would have terminated Easley if he had not engaged in any protected activity.

I must carefully analyze the reasons given by Morrill for the adverse action to determine whether such reasons are simply a pretext. In *Chacon*, the Commission explained the proper criteria for analyzing an operator's business justification for an adverse action:

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak the discriminatory motive.
>
> The Commission and its judges have neither the statutory charter not the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgement our views on "good" business practice or on whether a particular adverse action was "just" or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis . . . , then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather the

> narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner.

Chacon, at 3 FMSHRC 2516-17 (citations omitted). The Commission further explained its analysis as follows:

> [T]he reference in *Chacon* to a "limited" and "restrained" examination of an operator's business justification defense does not mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgment or a sense of "industrial justice" for that of the operator. As we recently explained, "Our function is not to pass the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed."

Haro v. Magma Copper Co., 4 FMSHRC 1935, 1938 (Nov. 1982) (citations omitted).

I find that Morrill's justification for dismissing Easley is credible and that Morrill would have taken this action even if Easley had not engaged in any protected activity. Both Harting and Gibbs believed that Easley was not competently maintaining the crusher. Lyon testified that Easley was not properly maintaining and repairing the crusher and he discussed Easley's poor work with Harting on several occasions. (Tr. 109-10). Lyon was especially critical of Easley's performance at welding. Lyon also believed that the crusher had to be shut down for repairs more frequently after Easley became the head mechanic. I agree with Easley that the disappearance of records that would have established whether the crusher had to be shut down more frequently may be viewed with suspicion. Nevertheless, the fact that Morrill permanently shut down and sold the crusher provides a rational explanation.

Morrill's concerns about Easley's workmanship is corroborated by the evidence. Whether Easley was, in fact, not a good mechanic is not nearly as important as whether Morrill management believed that he was not. I find that Harting and Gibbs genuinely believed that Easley was not maintaining the crusher as well as a head mechanic should have been. Once Easley became chief mechanic, Gibbs received phone calls "virtually daily" reporting that the crusher was down for repairs. (Tr. 125). Gibbs testified that he sent Roger Dagget, a mechanic at the Wenatchee shop, to the crusher in Maple Valley on a regular basis because he was concerned about Easley's ability to maintain the crusher. Gibbs testified that Dagget told him that he was "very unimpressed with
Mr. Easley's performance." (Tr. 157). Gibbs developed a maintenance check list for Easley to use specifically because of his concerns that Easley was not performing all of the required

maintenance and was not reporting all of the work that needed to be done. (Tr. 129). Gibbs testified that the checklist was not properly completed much of the time with the result that he could not determine whether the maintenance was being properly performed. Unknown to Gibbs, Easley gave the checklists to Drinkwater to fill out. (Tr. 181). This fact tends to confirm Gibbs's concerns that Easley was not performing his work in a professional manner because he was not taking personal responsibility to keep Morrill management informed about the condition of the crusher through the maintenance check list.

Harting discussed his work performance concerns with Easley in April. For example, Harting reported that on April 19, 2000, Easley left the crusher packed with mud with the result that the production crew had to delay starting the crusher until they could clean it out. (Tr. 166; Ex. R- 3). Harting testified that he warned Easley on a number of occasions that he needed to improve his performance, but that he "tried not to overdo it." (Tr. 167). Harting testified: "I tried to promote, well, you're doing a good job more than bad, because I'd like to get him to try a little harder and do a little better." *Id.* I credit the testimony of Harting that he attempted to counsel Easley rather than bark at him. Easley denies that these conversations ever took place, but I believe that he simply did not understand what Harting was trying to communicate. I do not credit Easley's testimony on rebuttal that he was never advised that he had to improve his job performance. (Tr. 182-84).

Morrill required each mechanic to bring and use his own tools at the crusher. Morrill supplied specialty tools. Easley consistently failed to provide his own tools. All the other mechanics used their own tools, including Drinkwater. (Tr. 170). Harting believed that Easley owned a set of tools but that he did not want to use them. (Tr. 164). Harting testified that Easley was the only mechanic who consistently borrowed his tools and he believes that he lost a number of them. *Id.* Harting advised Easley that he must furnish his own tools several times before Easley complained about alcohol abuse. *Id.* Easley's refusal to bring in tools to use on the job contributed to Morrill's decision to terminate him. I do not credit Easley's rebuttal testimony on this issue. (Tr. 180-81).

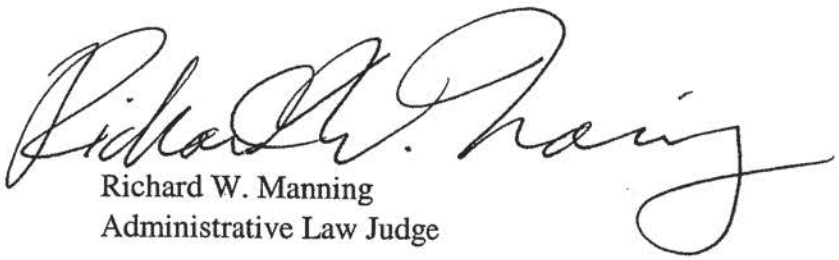
The events of May provided the immediate impetus for Easley's dismissal. As stated above, Easley did not properly tie off when he was attempting to remove a motor from the cone screen. Although this event was not the reason for his discharge, it was a contributing factor and it led Gibbs to the conclusion that he was not an effective mechanic and should be let go. Gibbs made the decision to terminate Easley. At that time, he was not aware that Easley had been interviewed by the L&I investigator. (Tr. 133, 139). I reject any claim that Easley's friendship with Fletcher contributed to his discharge.

I find that Gibbs terminated Easley based on his perception that Easley's work performance and job skills were not acceptable for the job. Gibbs would have taken this action if Easley had not engaged in any protected activity. The fact that Gibbs labeled the termination as a layoff does not alter my findings. Gibbs did not have any "malice towards Mr. Easley" so he wanted to make sure that he would be entitled to unemployment

compensation. (Tr. 133). He rarely terminated anyone and was not knowledgeable of the requirements for obtaining unemployment compensation.

IV. ORDER

For the reasons set forth above, the complaint filed by Cord Easley against Morrill Asphalt Paving under section 105(c) of the Mine Act is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001
Telephone No.: (202) 434-9958
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December 24, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-242-M
Petitioner	:	A.C. No. 41-03882-05515
v.	:	
	:	Mine: Arnold Crushed Stone
ARNOLD CRUSHED STONE,	:	
INCORPORATED,	:	
Respondent	:	

ORDER DENYING MOTION TO REOPEN PENALTY ASSESSMENT
ORDER TO PAY
ORDER OF DISMISSAL

Before: Chief Judge Barbour

On July 18, 2002, I issued an order to Arnold Crushed Stone, Inc. ("Arnold"), to submit more information as to why it failed to timely file a notice of contest in the above captioned case. Arnold was required to file the information within 20 days of the date of that order. When I received no response, on October 24, 2002, I issued an Order to Respondent to Show Cause, in which I required Arnold to either file the required information or show cause for its failure to do so within 20 days of the date of that order. Finally, on December 12, 2002, I issued a Second Order to Respondent to Show Cause, in which I required Arnold to file a response within 15 days of the date of that order. The record includes return receipts indicating Arnold received all three orders.

Subsequently, on December 19, 2002, Arnold faxed three letters to the Commission, which include explanations of why it seeks to contest the citations. However, the letters fail to address the issue of why the company did not timely file a notice of contest despite the fact that all three orders required the company to do so. Therefore, I conclude that Arnold has failed to establish adequate cause to reopen the penalty assessment.

Accordingly, the request to reopen the proposed penalty assessment is **DENIED**, and Arnold is **ORDERED TO PAY** the proposed penalty assessment of $3,412.00 within 30 days of the date of this order.

This case is **DISMISSED**.

David F. Barbour
Chief Administrative Law Judge

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/mvc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

December 31, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 2002-61 A.C. No. 33-01159-04192
v.	:	
THE OHIO VALLEY COAL COMPANY, Respondent	:	Powhatan No. 6 Mine

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Michael O. McKown, Esq., General Counsel, The Ohio Valley Coal Company, Pepper Pike, Ohio, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against The Ohio Valley Coal Company, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges two violations of the Secretary's mandatory health and safety standards and seeks a penalty of $50,000.00. A hearing was held in Wheeling, West Virginia. For the reasons set forth below, I vacate one citation, affirm the other as modified and assess a penalty of $5,000.00.

Background

The parties stipulated to the facts in this case. (Jt. Ex. 1.) They are set out below in narrative fashion.

The Ohio Valley Coal Co. owns and operates the Powhatan No. 6 underground coal mine in Belmont County, Ohio. The Ohio Valley Resources, Inc., a subsidiary of Murray Energy Corporation, is the parent company of The Ohio Valley Coal Co.

At about 5:15 p.m. on April 19, 2001, the pre-shift examiners examining the 2nd Main North belt heard a flapping noise somewhere around the stationary take-up roller at break 62. The plastic mesh guarding the belt drive and take-up unit was in place and they were unable to

determine the cause of the flapping noise. The examiners did not report the noise in the pre-shift examiners book.

Later that evening, at about 8:30 p.m., Randy Brunner and Dennis Miller, two belt repairmen, parked their jeep at break 61 so that they could repair the 1st Main North belt wings, located near break 60. During the repairs, Brunner returned to the jeep to get some parts. While there he observed a jeep park at break 62. He could tell by the cap light that there was only one person, but was unable to identify who it was. As they were finishing the job, the repairmen could see a cap light at the 2nd Main North belt drive take-up unit, about 180 to 200 feet away. The 1st Main North belt was not shut down during the 15 minutes while the repairs were performed.

Approximately one minute after completing the job and returning to their jeep, the repairmen heard a voice calling for help. Looking toward the spur switch, they saw the unidentified miner running and staggering along the track and then falling to the mine floor. They ran to the miner and discovered that it was Thomas Ciszewski, the belt foreman. Ciszewski was missing his left arm and had facial cuts.

While Ciszewski was being tended to underground, Miller went to the accident site to try to find the arm. It was lying outside of the guarding in the walkway on the return side of the 2nd Main North belt conveyor, adjacent to the take-up cart. Miller took the arm back to where Ciszewski was. Ciszewski was carried to the surface where he was pronounced dead at 9:00 p.m.

MSHA was notified of the accident at 9:20 p.m. An initial response team arrived at the mine at 10:15 p.m. A 103(k) order,[1] 30 U.S.C. § 813(k), was issued, preliminary information was collected, an investigation was begun and photographs, measurements and drawings of the accident scene were collected. The team found that the two guard panels adjacent to the take-up unit on the return side had been removed from their top hangers at one end and were hanging down on the mine floor, creating a two inch gap at the top and a six inch gap at the bottom between the panels. In this condition, the panels could be swung inward or outward. There was approximately 26 inches of space between the guarding and the moving belt, which normally

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[1] Section 103(k) provides that:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

operates at 700 feet per minute (about 8 mph). A steel jack handle, measuring 1 x 24 inches, was found partially inside the guarded area and partially in the walkway.

An MSHA Accident Investigation team, as well as investigators from Ohio, arrived at the mine on April 20, to continue the investigation and conduct interviews. The investigators determined that a grease hose, which had gotten wrapped around the shaft of the stationary take-up roller on the track side of the belt, was making the flapping noise heard by the pre-shift examiners. They concluded that the accident had occurred when Ciszewski's left arm contacted and was caught in the pinch point between the moving belt and the stationary roller of the belt take-up unit.

As a result of the investigation, two citations were issued to the company. Citation No. 7088894 alleges a violation of section 75.1722(a) of the Secretary's mandatory health and safety standards, 30 C.F.R. § 75.1722(a), because the guarding on the belt drive had been removed from the hangers, allowing access to the belt and roller.[2] (Jt. Ex. B.) Citation No. 7089484 charges a violation of section 75.1725(c), 30 C.F.R. § 75.1725(c), in that:

> Based on evidence revealed during the accident investigation, Thomas M. Ciszewski failed to comply with the cited regulation, when he attempted to repair or perform maintenance on the belt take-up unit, while the belt and take-up unit were still in operation and not blocked against motion. Thomas M. Ciszewski, foreman, was fatally injured on April 19, 2001, while conducting assigned duties on the 2nd Main North belt conveyor. While attempting to assess or repair a noise problem on the return walkway side of the belt take-up roller, Mr. Ciszewski had displaced two guarding panels installed on hangers around the belt take-up unit so that he could position himself within the confines of the guarding. Evidence indicates that his left arm was detached from his body at the shoulder, when he became caught in the pinch point between the moving belt and the take-up stationary roller causing his death shortly thereafter.[3]

(Jt. Ex. C.)

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[2] This citation originally alleged a violation of section 75.1722(c), 30 C.F.R. § 75.1722(c), but was modified on June 28, 2001, to cite section 75.1722(a) and to raise the level of negligence from "low" to "moderate."

[3] This citation was originally issued as a 104(d)(1) order, 30 U.S.C. § 814(d)(1), but was modified on June 28, 2001, to a 104(a) citation, 30 U.S.C. § 814(a), as well as to substitute a new narrative description of the violation and to lower the level of negligence from "high" to "moderate."

Findings of Fact and Conclusions of Law

The company concedes that the guarding violation occurred. (Tr. 194.) With regard to the second citation, however, Ohio Valley claims that the Secretary has failed to prove that it violated the regulation. The Secretary maintains that the Respondent violated both regulations. However, the Secretary's position, with regard to the second citation, is not supported by a preponderance of the evidence.

Citation No. 7088894

This citation alleges a violation of section 75.1722(a), which requires that: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." The evidence that the guards, which were in place during the pre-shift examination, were found, immediately subsequent to Ciszewski's accident, to have been removed from their hangers so they could be swung open, clearly supports the operator's concession that this regulation was violated.

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, 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 will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

Turning to these criteria, I make the following findings: (1) there was a violation of a safety standard, section 75.1722(a); (2) removing the guarding from the pinch points of an operating belt contributed to the danger of being caught in a pinch point; (3) there was a reasonable likelihood that a miner would be caught in a pinch point which was not guarded, while the belt was running, and suffer an injury; and (4) there was a reasonable likelihood that such an injury would be reasonably serious in nature. Manifestly, the removal of the guarding was a significant contributing cause to the fatal accident, making it "significant and substantial." *Walker Stone Co., Inc.*, 19 FMSHRC 48, 53 (January 1997). Accordingly, I so conclude.

Citation No. 7089484

This citation charges a violation of section 75.1725(c), which provides that: "Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments." The company argues that Ciszewski was performing neither repair nor maintenance, rather he was performing an inspection, and that, therefore, section 75.1725(c) is not applicable to what happened. (Tr. 192-93.) It is the Secretary's position that assessing what repair or maintenance is required is included within the scope of the regulation. (Jt. Ex. C, Tr. 99-105.)

No one knows exactly what Ciszewski did or why he did it. It appears unlikely, however, that he was trying to repair the flapping noise by reaching in to remove the grease hose. Corporate Safety Director Jerry Taylor testified that:

> I don't believe there's no way that Mr. Ciszewski was reaching in to pull out that grease hose. He couldn't even see it vibrate or going around. I was there when we started the belt back up after the fatality, before the grease hose was removed. You could hear the noise, but you couldn't see the grease hose. That belt is running at 700 feet a minute and knowing Tom and the size of that belt, it's 54 inches wide with like one-inch thick rubber.
>
> There's no way that Tom Ciszewski would reach in there to try to pull that hose out. How he got entangled in the belt, sir, I have no idea, but I cannot for the life of me believe that he is – with all the common sense and the experience that that individual has that he would reach in there to try to grab a hold of something that he couldn't see that was making noise. It just – there's no logic to that at all to me.

(Tr. 155-56.) MSHA Inspector Charles Thomas, who was in charge of the investigation of the accident, agreed Ciszewski was probably not trying to grab the grease hose because: "I think with a man with that much experience and worked around belts, and there's probably been some near misses in his career, that it would be a foolish thing to do to grab that grease hose." (Tr. 106.)

Since the evidence does not indicate that Ciszewski was trying to repair the belt, then he must have been assessing the situation to determine what repairs were needed. Consequently, whether his failure to turn off the power and block the belt against motion, when performing that function, was a violation, depends on whether merely assessing the problem is included in "repairs or maintenance." The Commission has held that when "the language of a regulatory provision is clear, the terms of the provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning. *See, e.g. Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984))." *Walker Stone*, 19 FMSHRC at 51.

The Commission has defined the words "repair" and "maintenance," in a similarly worded regulation,[4] as follows:

> The term "repair" means "to restore by replacing a part or putting together what is torn or broken: fix, mend . . . to restore to a sound or healthy state: renew, revivify . . . ." *Webster's Third New International Dictionary, Unabridged* 1923 (1986). The term "maintenance" has been defined as "the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep . . ." and "[p]roper care, repair and keeping in good order." *Id.* at 1362; *A Dictionary of Mining, Mineral, and Related Terms* 675 (1968).

Id. In addition to these definitions, "perform" is defined as "to carry out or bring about: accomplish, execute . . . ." *Webster's Third New International Dictionary* 1678 (1993).

Reading these definitions together, it is evident that the regulation means that fixing, mending or keeping machinery in a state of repair shall not be carried out until the power is off and the machinery blocked against motion. Plainly, it connotes action and deals with the physical acts of fixing, mending or keeping in a state of repair. It follows that it does not include assessing what repair or maintenance is needed. Accordingly, I find that the regulation is plain and unambiguous on its face and that it does not apply to this situation.

This is not to say that Inspector Thomas was incorrect in saying that the proper way for Ciszewski to have investigated the flapping noise was to first shut down the belt line, only that Ciszewski's failure to do so was not a violation of this regulation. Therefore, the citation will be vacated.

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[4] Section 56.14105, 30 C.F.R. § 56.14105, states: "Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion."

Civil Penalty Assessment

The Secretary has proposed a penalty of $15,000.00 for the violation in Citation No. 7088894. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with these criteria, the parties have stipulated that the Powhatan No. 6 mine extracted 4,619,247 tons of coal from February 1, 2001, to February 1, 2002, which makes it a large mine, and that Murray Energy extracted 17,647, 608 tons of coal during the same period, which makes it a large operator. They have also stipulated that payment of the proposed penalty will not affect the Respondent's ability to remain in business. In addition, I find that the company demonstrated good faith in abating the violation in a timely manner.

The parties have also stipulated that the company had 848 violations in the two years preceding the violation. Inspector Thomas testified that the operator had a higher than average history of violations. (Tr. 84.) Based on his testimony and the Assessed Violation History Report, (Govt. Ex.1), I find that Ohio Valley has a worse than average history of violations.

I find the gravity of this violation to be very serious. No more need be said than that a death occurred.

Inspector Thomas determined that this violation was a result of "moderate" negligence on the part of the company. The company argues that Ciszewski's negligence should not be imputed to it based on the so-called *Nacco* defense. The Commission has summarized the imputation of negligence and the *Nacco* defense as follows:

> It is well established that the negligent actions of an operator's foremen, supervisors, and managers may be imputed to the operator in determining the amount of a civil penalty. *See, e.g., Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (August 1982). In *Nacco Mining Co.*, 3 FMSHRC 848 (April 1981), the Commission recognized a narrow and limited exception to this principle. The Commission held that the negligent misconduct of a supervisor will not be imputed to an operator if: (1) the operator has taken reasonable steps to avoid the particular class of accident involved in the violation; and (2) the supervisor's erring conduct was unforeseeable and exposed only himself to risk. 3 FMSHRC at 850. The Commission emphasized, however, that even a supervisory agent's unexpected, unpredictable misconduct may result in a negligence finding where his lack of care exposed others to risk or harm or the operator was otherwise blameworthy in hire,

> training, general safety procedures, or the accident or dangerous condition in question. 3 FMSHRC at 851.

Wilmot Mining Co., 9 FMSHRC 684, 687 (April 1987).

Here the second part of the test is clearly met. Ciszewski's conduct was unforeseeable and he exposed only himself to risk.

Attempting to show that the operator had not taken reasonable steps to avoid this particular class of accident, the Secretary offered the testimony of Randy Brunner, a rank-and-file miner. He claimed that other than his fellow belt repairman, Dennis Miller, no one trained him to do belt repair. (Tr. 27-28.) When asked if he had ever done belt repair work without shutting the belt down, he replied: "Yeah, we've dropped hot rollers out. I have. And other minor stuff on it. We just shut the switches off to cut flappers off and drop rollers to the remote switches. We never tagged them out and locked them out, I never have." (Tr. 29.) He also testified that he had removed a guard from a belt to "look at splices" while the belt was running. (Tr. 30.)

When asked if there were safety procedures the belt repairmen were supposed to follow, Brunner said: "If it was splices and stuff like that, they're supposed to lock them out. You're supposed to have your own lock. They always had one boss or somebody go lock them out, you know." (Tr. 32-33.) He later stated that he guessed there were safety procedures, but he was not aware of them. (Tr. 39) When asked if anyone had ever discussed safety procedures with him, he stated: "No, not to me. Not that I know of. I mean, I'm not saying they didn't because I'm not 100 percent sure." (Tr. 39.) Finally, he admitted that he had received new miner training and annual refresher training. (Tr. 40.)

To rebut this evidence, the company offered the testimony of Jerry Taylor and Roy Heidelbach, mine superintendent. Taylor described the training offered at the mine as follows:

> In their initial training when they're brought on board, they're explained all the hazards of working around conveyor belts, around the drives and so on, and about maintaining the guards in place and that the guards have to be – the belt has to be de-energized before the guards can be removed. They're explained all the things, the remote switches, how they can turn the belts off and on temporarily. And that they're not to rely on remote switches as a means, excuse me, to de-energize the belt. We want them to go to the breaker and de-energize it.
>
> They're explained the procedures for removing structures on the longwall, if they work on the lo[n]gwall tailpiece. It has a different set of guidelines than the other ones do. And also not only on belts, they're also given the procedures on de-energizing

> any type of equipment before they work on it doing repairs and maintenance to the equipment.

(Tr. 134-35.) He also testified that safety meetings were held "biweekly, sometimes more often" y the mine safety director or a foreman. (Tr. 136.) Finally, he testified that "awareness meetings" were periodically held for the entire workforce on a shift and that safety was covered at those meetings. (Tr. 137.)

Heidelbach testified concerning training that:

> Well, there's a wide variety of subjects that are covered. There are several different types of training. There's annual retraining, which all employees have eight hours annually. There's also task training, which involves any time an employee is working on a new task, the supervisor or an experienced employee in that task may train him as to the hazards and the things to look for on the job. And we also have regular safety meetings that also discuss hazards and the proper work procedures.

(Tr. 165.) He also testified that miners had been disciplined for failing to follow safety procedures. (Tr. 166-67.)

I find that the operator was neither blameworthy in its hiring, training, and general safety procedures, nor was it answerable with regards to the accident or dangerous condition in question. Ciszewski had close to 20 years experience in underground coal mines and was a very experienced belt foreman. (Tr. 161.) There was no reason for the company to expect him to remove the guarding while the belt was running and place himself in a position where he could fall into the pinch point.[5] Further, the testimony of Taylor and Heidelbach is entitled to more weight concerning the general safety procedures at the mine, than the inconsistent testimony of a single rank-and-file miner, who was not "100 percent sure."[6] Finally, while the company has a worse than average history of violations, it does not appear that they had an inordinate amount of guarding violations.

Consequently, I find that Ciszeski's conduct in removing the guarding was unforeseeable and only he was exposed to risk and that the operator had taken reasonable steps to avoid the type of accident involved in the violation. The citation will be modified to show that the operator was not negligent in the commission of this violation.

---

[5] I find from the evidence that this is the most likely explanation of what happened.

[6] The Secretary subpoenaed another miner, Dennis Miller, who was present at the hearing, but elected not to call him.

Taking all of the penalty criteria into consideration, I conclude that a $5,000.00 penalty is appropriate for Citation No. 7088894.

Order

Accordingly, Citation No. 7089484 is **VACATED** and Citation No.7088894 is **MODIFIED** by reducing the level of negligence from "moderate" to "none" and is **AFFIRMED** as modified. The Ohio Valley Coal Company is **ORDERED TO PAY** a civil penalty of **$5,000.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

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/hs

Federal Mine Safety & Health Review Commission
Calendar Year 2002 Index

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