

APRIL 2003

THERE WERE NO COMMISSION DECISIONS OR ORDERS

ADMINISTRATIVE LAW JUDGE DECISION

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ADMINISTRATIVE LAW JUDGE ORDERS

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APRIL 2003

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

Secretary of Labor, MSHA v. Laredo Paving, Inc., Docket No. CENT 2003-35-M. (Unpublished Order of Default issued March 3, 2003 by Chief Judge Barbour).

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

Jason C. Sheperd v. Black Hills Bentonite, LLC, Docket No. WEST 2002-466-DM. (Judge Manning, March 13, 2003)

Secretary of Labor on behalf of Andrew J. Garcia v. Colorado Lava, Inc., Docket No. WEST 2001-14-DM. (Judge Weisberger, remand decision of March 21, 2003. Mr. Garcia filed this appeal pro se.)

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 15, 2003

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 2002-144-M |
| Petitioner | : | A.C. No. 13-00691-05518 |
| v. | : | |
| | : | |
| HIGMAN SAND & GRAVEL, INC., | : | |
| Respondent | : | IA Portable #1 |

DECISION

Appearances: Jennifer A. Casey, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of Petitioner;
Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, Sioux City, Iowa, on behalf of Respondent.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815. The petition alleges that Higman Sand & Gravel, Inc. ("Higman") is liable for three violations of mandatory safety and health standards applicable to surface metal and nonmetal mines. A hearing was held in Sioux City, Iowa. The parties submitted briefs following receipt of the transcript. The Secretary proposes civil penalties totaling \$1,800.00 for the alleged violations. For the reasons set forth below, I find that Higman committed one of the alleged violations and impose a civil penalty of \$350.00.

Findings of Fact - Conclusions of Law

On August 14, 2001, MSHA inspector Christopher Willet conducted an inspection of Higman's facility in Plymouth County, Iowa. Higman mines and processes sand and gravel at the site, which includes a crusher, sand plant, shop, and truck scales. Willet had been an inspector for two and one-half years and had eight years of prior experience in the mining field.

The first step in the mining process, "stripping," entails removal of the overburden. An excavator and two Euclid "belly" dump trucks are used to remove the topsoil and other materials covering the sand and gravel deposit. The Euclid trucks have a tractor/trailer configuration and carry a load of approximately 25 tons. The load is "dumped" from the bottom of the trailer through a clamshell-like mechanism. They are powered by 12 - cylinder Detroit diesel engines,

and have six-gear automatic transmissions, which shift when the driver moves the gear selector into each gear. They have “off-road,” knobby tires that are over six feet in diameter. The service brake systems operate on air pressure. A compressor pumps air into a surge tank or accumulator. When the brake pedal is depressed, the compressed air flows to an actuator mechanism which forces brake shoes into contact with brake drums mounted on the rear axle.

The parking brake system is entirely separate from the service brake. It is activated when the driver pulls up on a lever, which is connected by a cable to a mechanism that activates brake shoes mounted in a drum on the rear of the transmission. The brake is adjusted by turning a knob on the lever, which varies the tension on the cable. The trucks are also equipped with an air-activated mechanism that can lock the rear drive wheels on either side of the tractor. It is typically used when tire traction is lost on one side. By pushing a floor-mounted pedal to the right or left, the driver can lock the wheels that are slipping and, presumably, move the truck forward with the wheels that have traction. The trucks are also equipped with a “retarder” device, which is used to slow the truck as it descends lengthy slopes. It operates through the re-routing of transmission fluid within the transmission.

On the day of the inspection, stripping was being done on the east end of the property. After being loaded by the excavator, the trucks traveled a looped path to the dumping area on the west side of the property. They exited the field being stripped, entered the facility’s entrance roadway, and traveled past the scalehouse/office, shop, stockpile, crusher and sand plant. A concrete plant, owned by another entity, was also located across the entrance road from the shop. Secretary’s exhibit S-3 is a rough sketch of the facility layout, showing the path that the trucks traveled. The surface of the path traveled by the trucks varied considerably. On the east and west end of the property it was soft, essentially unimproved farmland. The roadway near the shop and other buildings was at least part gravel and was well-compacted. As noted on the sketch, Willet estimated that there was a five - ten percent grade for a short distance near the excavator and a five percent grade in the area of the crusher.¹

In the course of the inspection, Willet, who was accompanied by Harry R. Haneklaus, Higman’s mechanic, determined to inspect one of the Euclid trucks, Co. # NW 23, that was emerging from the stripping area and approaching the roadway leading from the highway to the scalehouse/office area. Haneklaus waived to the driver of the truck, who brought it to a stop. Willet determined that the service brakes and the parking brake on the truck were defective and issued the three citations at issue in this case. He also issued an oral imminent danger order, pursuant to section 107(a) of the Act, prohibiting further use of the truck until the service brakes were repaired. The citations/order are discussed below in the order that they were presented at the hearing.

¹ Willet had difficulty explaining what he meant by percentage slope. Tr. 135-36. Considering the pictures and other evidence on this issue, he was most likely referring the slope’s angle from horizontal, rather than the ratio of rise or fall to horizontal distance.

Citation/Order No. 7845474

Citation/Order No. 7845474 was issued by Willet on August 14, 2001, and alleged a violation of 30 C.F.R. § 56.14101(a)(1) which requires that: "Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels." The conditions he observed were noted on the citation as:

An employee was observed operating a Euclid haul truck, Co. # NW 23, stripping dirt. When the service brakes were tested the brakes did not work at all. This truck was operating around several customer trucks, company owned equipment and people on foot around the shop area. This exposes all persons in the area where the truck is operating to being over-traveled by a truck unable to stop which could result in fatal injuries. The emergency/parking brake was not maintained in functional condition, see Citation # 7845477. Paperwork to follow. An oral 107(a), imminent danger order was issued to Ray Haneklaus, service man, at 1000 hours on this date. (Typographical and other errors corrected).

He concluded that it was highly likely that the violation would result in a fatal injury, that the violation was significant and substantial, that ten persons were affected and that the operator's negligence was moderate. The citation was subsequently modified to reflect that two persons were affected. The imminent danger order directed that the haul truck not be used until the service brakes were operational.

The Violation

Willet testified that when he advised the driver that he intended to inspect the service brake system, the driver stated that the brakes didn't work. Tr. 34. He then held the brake pedal down, put the truck into first gear, throttled it and it "took off." Willet noted that the service brake actuator mechanism was not moving and that there was no air pressure in the system. The service brakes were totally ineffective. He determined that the condition of the truck violated the regulation and that, because the driver was aware of the condition, the brakes "had not been working for some time." Tr. 86. He determined that the "operator," i.e., Higman, was not aware of the condition and rated its negligence as "moderate."

His conclusions that the violation was significant and substantial and posed a high likelihood of a fatal injury, were based upon a number of factors.² For a portion of the looped path, the truck traveled briefly on the entrance road and past the cement plant, scalehouse, stockpile and sand plant, where there was other vehicular traffic, i.e., customers' trucks and, possibly, employees' private vehicles. In addition, he testified that he observed foot traffic in the

² He first evaluated the probability of injury as "reasonably likely." However, after determining that the parking brake was also defective, he raised the probability of injury to "highly likely." Tr. 150-51.

area of the scalehouse and saw pedestrians crossing the road from the shop area to the cement plant. Most employees parked their personal vehicles across the roadway from the shop area and crossed the road to reach those buildings and/or Higman vehicles that were parked near the shop. He estimated that there was a "small" five-ten percent grade for 30 - 40 feet of the truck's path near where the excavator was located and an approximate five percent downhill/uphill grade for about 200 yards near the crusher. Although the truck traveled at a relatively low speed of 10 - 20 mph, it made 30 - 40 trips per day. He also considered that the driver might lose control of the vehicle in the event of a tire blowout or failure of the steering mechanism.

Haneklaus, who accompanied Willet, was very familiar with the Euclid truck, having driven and serviced it. He testified that the truck was inspected and serviced that morning and that no one was aware of any problem with the brakes. Tr. 240-41, 247, 275. He was standing next to Willet when the inspection was performed and did not recall the driver saying that the brakes didn't work. Tr. 243-44. He confirmed that the service brakes were not functioning after the truck had come to a stop, and noted that the air pressure gauge on the dashboard of the truck showed that there was no air pressure in the system. The service brakes were repaired by replacing the compressor, which was found to have a non-functional valve.

Haneklaus disagreed with Willet's gravity assessment for a number of reasons. The truck, particularly when loaded, is very heavy and mostly travels on soft ground. The large knobbed tires sink into any but the most compacted of surfaces. As a consequence, it takes a good deal of power to move the truck and it stops fairly quickly when power is not applied. Tr. 250. He has driven the truck for extensive periods of time and never had occasion to use the service brakes at all, because the normal operations of de-throttling and down-shifting provided all of the stopping force needed. Tr. 271. If additional stopping power were needed, the wheel locking mechanism and/or the retarder could be engaged. If the truck was loaded, dumping the load so that the rear tires and axle had to be pulled through it, would bring the truck to a prompt halt. Tr. 262, 307-08. He testified that he would have been "comfortable" operating the truck in the condition that it was in at the time of the inspection. Tr. 309.

Haneklaus also disagreed with Willet's estimate of the slopes in the roadway and the frequency with which the truck might encounter other vehicular and pedestrian traffic. He and Harold Higman, vice president for operations, measured the slopes with a transit used for surveying and layout in Higman's construction business. The slope of the roadway near the shop was two inches in 100 feet, and the slope near the crusher was four inches in 100 feet. Tr. 304, 349-53. Haneklaus and Higman also testified that there was virtually no pedestrian traffic anywhere that the haul truck traveled, and that other vehicles would be encountered infrequently and only in the area of the scalehouse and stockpile. Tr. 252-53, 291, 299-302, 341-46, 368-69. Higman described company policy as requiring that trucks be inspected during the first hour of the day, 7:00 - 8:00 a.m., that they operate in no higher than third gear, and that the movement of traffic at the facility is designed to provide "a smooth, continuous flow at low speed." Tr. 329, 333, 337. Drivers are paid for all hours of the day and eat lunch in their trucks. Neither they nor other employees cross the truck's path on foot. Higman also testified that the truck could be driven all day without using the service brake, that he couldn't imagine any possibility of an injury occurring because the service brake was non-functional, and that there has never been a

loss of control experienced by Higman drivers due to a tire blow out or a steering failure.
Tr. 332, 346, 356.

In an enforcement proceeding under the Act, the Secretary has the burden of proving an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd*, *Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987).

There is no dispute that the service brakes on the truck were not functional when the truck was inspected. The availability of other mechanisms and procedures to bring the truck to a stop cannot negate the fact that the standard was violated. *See Missouri Rock, Inc.*, 11 FMSHRC 136 (Feb. 1989).

Significant and Substantial

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially 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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *See also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g, Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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., Inc.*,

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 Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. 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 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (Dec. 1987).

Virtually all of the factors that entered into Willet's imminent danger and significant and substantial determinations are in dispute. Respondent contends that operation of the truck with non-functional service brakes posed no possibility of an injury, because of the extremely low incidence of the truck encountering other traffic and the driver's ability to stop it without using the brakes. If the truck's operation had been confined to the soft fields where the stripping and dumping were done, Respondent's position might have merit. However, the truck regularly crossed the facility's entrance road and traveled past the shop, stockpile and crusher areas, where there was pedestrian and vehicular traffic. Customers' trucks used the entrance road, weighed in and out at the scalehouse and traveled to the stockpile/crusher/plant area to load products. Tr. 298, 344. Employees occasionally crossed the path used by the truck to reach the shop area or company vehicles. Tr. 301, 368-69. Haneklaus and Higman also acknowledged that service brakes would be needed in an emergency situation. Tr. 277, 332, 379. The roadway where the truck was most likely to encounter other traffic was also highly compacted, which would significantly reduce the rolling friction that tends to slow the truck in the absence of power.³

A mandatory safety standard was violated, creating a discreet safety hazard – a large heavy vehicle with inoperable service brakes traveling at speeds of 10 - 20 mph in close proximity to occasional vehicular traffic and somewhat rare pedestrian traffic. Any injury inflicted by the haul truck would most likely be serious. The issue is whether there was a reasonable likelihood that the hazard would result in an injury. Haneklaus and Higman believed that there was no possibility of an injury. However, both conceded that the truck encountered some vehicular and pedestrian traffic on part of its route. While drivers of other vehicles and

³ I accept Respondent's evidence that there was virtually no slope in the roadway. Willet did not measure the "slopes" recorded on the sketch, though he had an instrument with him that he could have used for that purpose. Higman was experienced in use of the transit and made precise measurements of the slopes. The various pictures introduced as Secretary's exhibit S-4 are of marginal value. They were taken in October 2002, and do not purport to show the actual areas traveled by the truck, except on the flat ground near the shop area. The Secretary also called another MSHA inspector, Kevin Legrand, as a witness. Legrand had last inspected the facility in December of 1999, and was able to state only that the sketch and pictures looked familiar and that he recalled a "gradual slope" near the crusher.

pedestrians would most likely yield to the large haul truck, driver error and misjudgments are certainly possible. In evaluating the risk of injury in other situations, the Commission has emphasized that the vagaries of human conduct cannot be ignored. *See, e.g., Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). While I disagree with Willet's assessment that the probability of injury was "highly likely," I find that there was a reasonable possibility that the hazard contributed to by the violation would result in a serious injury. The Secretary has carried her burden on this issue. I find that the violation was significant and substantial. I also affirm the imminent danger order.⁴

I also disagree with Willet's assessment of the operator's negligence as being moderate. He determined that the driver was aware of the violation, based upon his alleged admission, but that the operator, i.e., Respondent, was not. Haneklaus did not believe that the driver had made the statement, and directly contradicted Willet with respect to a nearly identical alleged statement regarding the parking brake. A direct statement by the driver that he knew that the braking system was defective would most likely be regarded as a very important admission by an inspector, and would have prompted inquiries as to how long the driver had been aware of the problem and whether he had told anyone about it. Yet, Willet, admittedly, did not note the alleged statements in the body of the citations or in his field notes. Tr. 121. I find that the driver did not tell Willet that the service brakes were not functional prior to testing them. There is no evidence as to how long the condition existed. Willet apparently made no inquiries regarding the duration of the violation and there was no evidence that it had been noted during preshift inspections or in any other manner. Haneklaus, to whom such problems should have been reported if they were discovered during the preshift examination of the truck, denied knowledge of the condition. In short, there is no evidence indicating that Respondent was, or should have been, aware of the problem. I find that Respondent's negligence was no more than "low."

Citation No. 7845477

Citation No. 7845477 alleged a violation of 30 C.F.R. § 56.14101(a)(2) which requires that: "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." The conditions he observed were noted on the citation as:

The emergency/parking brake was not maintained in a functional condition. This exposes all persons in the area to being over-traveled by a truck that is unable to stop which could result in fatal injuries. Service brakes were not in functional condition, see Citation/Order # 7845474.

⁴ An imminent danger order need not be based upon a violation of a mandatory standard or a condition that poses an immediate danger. It is sufficient that the condition could reasonably be expected to cause serious physical harm if normal mining operations were permitted to proceed before the dangerous condition is eliminated. *Cyprus Empire Corp.*, 12 FMSHRC 911, 918-19 (May 1990).

He concluded that it was highly likely that the violation would result in a fatal injury, that the violation was significant and substantial, that ten persons were affected and that the operator's negligence was moderate. The citation was subsequently modified to reflect that a fatal injury was reasonably likely and that two persons were affected.

The Violation

Willet tested the parking brake in the same manner as the service brake. He instructed the driver to apply the brake and put the truck in gear. Willet testified that the driver told him that the parking brake did not work, and that the truck moved forward when it was placed in gear. He was of the opinion that if the parking brake worked effectively, the truck should not have moved. He, therefore, determined that the parking brake was defective and issued the citation. The citation was abated by simply turning the knob on the activating lever in the cab of the truck, thereby adjusting the brake. Haneklaus testified that the driver did not state that the parking brake did not work, and that he "throttled" the truck when he put it in gear, causing the truck's powerful engine to override the parking brake, which it would have done regardless of how the brake was adjusted. For the reasons discussed with respect to the previous alleged violation, I find that the driver did not state that the parking brake was not working.

I find that the Secretary has failed to carry her burden of proof with respect to this citation. The violation alleged is that the truck's parking brake would not "hold the [truck] with its typical load on the maximum grade it travels." I have found that the maximum grade traveled by the truck was a four inch elevation change in 100 feet. Even on well-compacted roadway, the truck had significant rolling friction. While the parking brake adjustment may not have been set at high tension, there is no evidence that it was not capable of holding the truck on the virtually flat ground over which it traveled. In fact, it is highly likely that the sheer weight of the truck, with its compression of the tires and road surface, would hold it in the absence of any braking mechanism.

I find that Respondent did not commit the violation alleged. The citation will be vacated.

Citation No. 7845478

Citation No. 7845478 alleged a violation of 30 C.F.R. § 56.14100(a) which requires that: "Self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift." The conditions he observed were noted on the citation as:

A proper pre-shift operational check was not done by the operator of the Euclid haul truck, Co. # NW 23. It was operated with no service brakes or emergency/parking brake, see Citation/Order # 7845474 and Citation # 7845477. This exposes all persons in the area of the truck to being over-traveled by a truck that is unable to stop which can result in fatal injuries.

He concluded that it was highly likely that the violation would result in a fatal injury, that the violation was significant and substantial, that ten persons were affected and that the operator's negligence was high. The citation was subsequently modified to reflect that two persons were affected.

The Secretary's Motion to Amend the Citation/Petition

On January 6, 2003, three days prior to the scheduled hearing, the Secretary moved to amend the petition to allege, in the alternative, that Respondent violated 30 C.F.R. § 56.14100(b), which requires that equipment defects affecting safety be timely corrected. Respondent filed a written opposition to the motion. The motion was denied, without prejudice, at the commencement of the hearing on grounds of timeliness, possible duplication of charges and the uncertainty of its effect on the special assessment of the originally alleged violation. The Secretary has renewed the motion in her brief.

Guided by Fed. R. Civ. P. 15(a), motions to amend pleadings in Commission proceedings are to be freely granted unless the moving party has been guilty of bad faith, acted for purposes of delay, or a hearing on the merits would be unduly delayed. Prejudice to the opposing party may also bar an otherwise permissible amendment. *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289 (Aug. 1992); *Cyprus Empire Corp.*, *supra*, 12 FMSHRC at 916. Respondent's opposition to the motion was based on timeliness, potential prejudice of having to deal with newly disclosed facts and duplication of charges. While the timeliness of the motion is a concern, there is no suggestion that it was the product of bad faith.

Respondent's claims of prejudice in having to defend against newly disclosed facts and potential duplication in alleged violations have more merit. In the course of the argument on the motion, after the commencement of the hearing, Respondent's counsel learned that the Secretary anticipated testimony from the inspector that the truck's driver told him that the service and parking brakes did not work before they were tested. As noted above, those were significant facts that were not recorded in either the citations or the inspector's notes, which had been provided to Respondent in discovery. The only indication of notice in the citation and notes was that the "operator" was not aware of the problems. As to duplication, the Secretary has presented viable allegations that the truck was being operated with non-functional service and parking brake systems. It is not clear that a violation alleging a failure to correct either of those defects would not be duplicative of the violation alleging that the defect existed.

For all these reasons, the Secretary's renewed motion to amend the citation/petition to allege violation of an alternative standard is denied. In any event, I have found that the Secretary has failed to carry her burden of proof as to the alleged non-functional parking brake and that the truck's driver did not make the statement attributed to him by Willet. The Secretary has, therefore, also failed to establish the factual predicate for her proposed amendment.

The Violation

Willet testified that he did not recall whether the driver of the truck stated that he had conducted a preshift inspection of the vehicle. Tr. 101. His belief that a proper preshift inspection had not been done was premised upon the alleged admissions by the driver that he knew the service and parking brakes were not functional and the limited likelihood that both systems would have failed in the two hours that had elapsed since the truck should have been inspected.

Haneklaus and Higman described Respondent's policy that during the first hour of the work day, 7:00 - 8:00 a.m., operators are to conduct inspections of the equipment they will operate on the shift. All operational elements of haul trucks are checked, from engine oil and transmission fluid to tire air pressure. Tr. 240, 266-69, 329-30, 337. The trucks are parked near the shop and the inspections are performed there, under the watch of Haneklaus, who testified that the truck in question was examined by the driver that morning and that oil was added, air was put into the tires and the brakes were working. Tr. 241, 275.

The foundation for Willet's conclusion that a preshift inspection was not performed by the driver of the truck has been substantially undermined. The Secretary has established only that the service brakes were non-functional. I have found, as noted above, that the truck's driver did not make the admissions attributed to him by Willet. Consequently, there is no evidence that he, or any other Higman employee knew of the problem prior to its being checked by Willet. Tr. 86, 96, 125. Although Willet concluded that the driver knew of the problem, he conceded that the driver might have learned of it when he stopped for the inspection. Tr. 125. The defect in the service brake system was a failed valve in the compressor, which could have been caused by any number of things, including fatigue or a foreign body. Tr. 242, 260, 338-40. It is the type of failure that could have occurred immediately prior to Willet's inspection. Moreover, the compressor might have been functioning marginally for some time without the driver's knowledge. The service brakes were seldom used and, as long as there was adequate time between braking for the compressor to restore pressure in the system, the service brakes would have functioned effectively.

The only direct evidence regarding the preshift inspection is Haneklaus' testimony that it was performed. The Secretary's case rests entirely on an inference that the defect existed, and should have been discovered, at the time of the preshift examination. However, there is virtually no credible evidence that the defect existed, or that the driver or anyone else was aware of it, before Willet performed his inspection.

I find that the Secretary has failed to carry her burden of proof with respect to this alleged violation. The citation will be vacated.

The Appropriate Civil Penalty

There is no evidence as to the size of Higman's mining operation or its controlling entity. It appears to be a relatively small operation. The parties have stipulated, and I so find, that

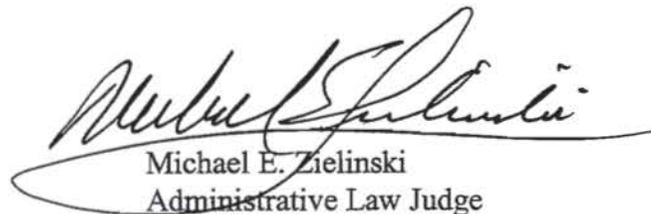
Respondent demonstrated good faith in abatement of the violation and that payment of the proposed civil penalties would not threaten its ability to continue in business. I also find that the civil penalty imposed below is appropriate to the size of Higman's business. Higman has a relatively good history of violations, with three paid assessed violations having been issued in the course of eight inspection days in the 24 months preceding August 14, 2001.

The civil penalty proposed for Citation/Order No. 7845474 was \$700.00. The violation is sustained as significant and substantial. However, the probability of a reasonably serious injury resulting was "reasonably likely," rather than "highly likely," and the operator's negligence was "low," rather than "moderate." Taking into consideration all of the factors required to be addressed under section 110(I) of the Act, I impose a civil penalty of \$350.00 for that violation.

ORDER

Citation No's. 7845477 and 7845478 are hereby **VACATED** and the related Petition for Assessment of Civil Penalties is **DISMISSED** as to those citations.

Citation/Order No. 7845474 is **AFFIRMED**, as modified, and Respondent is directed to pay a civil penalty of \$350.00 within 45 days.



Michael E. Zielinski
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 15, 2003

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|----------------------------|---|--------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 2002-52 |
| Petitioner | : | A.C. No. 46-08593-03529 |
| v. | : | |
| | : | |
| | : | |
| BAYLOR MINING, INC. | : | |
| Respondent | : | Jim's Branch No. 3A |

DECISION APPROVING SETTLEMENT

Appearances: Toye A. Olarinde, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Petitioner;
David J. Hardy, Esq, Spilman, Thomas & Battle, PLLC, Charleston, WV, for the Respondent.

Before: Judge Schroeder

This matter is before me on a Petition by the Secretary for the assessment of a Civil Penalty for the alleged violation of mine safety regulations. The Petition alleged three violations for which the Secretary proposed a total Civil Penalty of \$1,800.00.

Pursuant to notice, a hearing was convened in Charleston, West Virginia on April 2, 2003. Testimony was taken from the MSHA Inspector whose citation of violations began this case. During the testimony, I was advised that the parties had reached agreement on a settlement. Terms of the settlement were read into the record at the hearing. This order is intended to summarize, approve, and implement the terms of their agreement.

For the violation identified by Citation 7201627, it was agreed the allegation will be modified to a 104(a) citation with moderate negligence. The penalty to be paid will remain \$400.00. For the violation identified as Order 7201628, it was agreed the allegation will be modified to a 104(a) citation with high negligence. The penalty to be paid will remain \$500.00. For the violation identified as Order 7201633, it was agreed the allegation will be modified to a 104(a) citation with moderate negligence and restated to identify the violation as a failure to properly record an onshift examination. The penalty to be paid will remain \$900.00. The total Civil Penalty to be paid is \$1,800.00.

I have reviewed the settlement agreement of the parties and I find the agreement to be consistent with the Mine Safety Act and in the public interest. Therefore, it is

ORDERED that the joint motion of the parties to approve settlement is granted. The Respondent is directed to pay within 30 days of the date of this Order a Civil Penalty of \$1,800.00, upon the appropriate modification of the citation documents which formed the basis for this Petition. The parties are to bear their own costs, including any attorney fees. Upon receipt of the Civil Penalty directed by this Order, the Petition is **DISMISSED**.



Irwin Schroeder
Administrative Law Judge

Distribution:(Certified Mail)

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Toye A. Olarinde, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd.,
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
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April 22, 2003

| | | |
|-------------------------------------|---|-----------------------------|
| THOMAS P. DYE II, | : | DISCRIMINATION PROCEEDING |
| Complainant | : | |
| | : | Docket No. WEST 2002-408-DM |
| | : | RM MD 02-11 |
| v. | : | |
| | : | Mine I.D. 05-01732 |
| | : | Cotter Mill |
| MINERAL RECOVERY SPECIALISTS, INC., | : | |
| Respondent | : | |

DECISION

Appearances: Thomas P. Dye II, Cañon City, Colorado, pro se;
David Tierney, Mineral Recovery Specialists, Inc., Johnson City,
Tennessee, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Thomas P. Dye II against Mineral Recovery Specialists, Inc., (“MRSI”) 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. Dye alleges that he was fired by MRSI because he refused to perform a task that he considered to be unsafe. An evidentiary hearing was held in the Commission’s courtroom in Denver, Colorado. For the reasons set forth below, I find that Mr. Dye did not establish that MRSI discriminated against him in violation of section 105(c) of the Mine Act.

I. BACKGROUND AND SUMMARY OF THE EVIDENCE

Cotter Corporation (“Cotter”) operates a uranium mill in Fremont County, Colorado. Daniel Dilday, who had no affiliation with Cotter, helped design a new process to extract pure zirconium from radioactive ore. He discovered an ore body that could be run through this process to determine whether zirconium and uranium could be economically produced. He approached CMS Enterprises Development, LLC (“CMS”) with this idea. CMS agreed to finance the construction of the necessary facilities and to underwrite the initial production costs. CMS entered into an agreement with Cotter so that the facilities necessary to produce zirconium using this new experimental process could be constructed at the Cotter mill. This zirconium recovery project (the “project”) was constructed at the Cotter Mill in several buildings in an area that was set apart from the existing uranium mill. CMS contracted with MRSI to provide the

technology for the project and to guide the operation of the process. CMS had a project manager and a project engineer on the site and MRSI employed people to run the project. As the project progressed, Cotter's hourly employees were trained and began taking over the production work. Several other contractors were involved in the project as discussed in more detail below. If the project was successful, Cotter planned to purchase the patent and run the project on its own with some technical guidance from MRSI.

Dye was hired by MRSI as a temporary, full-time employee in October 2000. He was terminated by MRSI on February 26, 2002. He held several positions at the project and at the time of his termination he was the lead man over several elements of the project. He did not directly supervise Cotter hourly employees working in his areas, but he had some control over their work. At about 6:00 a.m. on February 26, 2002, Dye attended the turnover meeting. At that meeting, plans were made for the oncoming day shift. Mr. Dilday, who was MRSI's project manager, asked Dye what his plans were for the day. Dye responded that he "was going to get the candle filter lid back on candle filter 2A, get it hydro-tested, pressure tested, so we could run product." (Tr. 116). Dilday responded "sounds like a good idea." *Id.*

The zirconium recovery project involved a rather complex process. The raw ore went through several stages of milling and preparation in different buildings. At or near the final stage of production, prepared material was processed in candle filters to further purify the product. The candle filters were large, pressurized vessels. The project was designed so that material could be processed through two sets of candle filters, each set consisting of a large and small candle filter. All of the candle filters were in operation except candle filter 2A. It had been purchased used and needed to be repaired before it could be placed in service. The lid for this candle filter had been sent to an outside contractor for repairs and had been returned to the project a few days prior to February 26.

At about 7:00 a.m. on February 26, there was another meeting known as the contractors' meeting. This was a meeting among MRSI management, CMS management, Cotter representatives, and the other contractors working at the project. Dye did not attend this meeting. William Ganyard, who was the foreman for the mechanical contractor at the site, attended the meeting. He worked for a contractor known as Vision Air. At this meeting, Dilday announced that he wanted candle filter 2A up and running by noon that day. Ganyard told Dilday that this request "was just a completely impossible directive." (Tr. 133). It was Ganyard's understanding that, after he told Dilday it would be impossible to install the lid on the candle filter that day, "that was the end of the directive." (Tr. 134). When Ganyard left the meeting, he knew that he would not be trying to put the candle filter together that day. (Tr. 138). He also testified that Dilday understood that "it was not going to happen." (Tr. 147-48).

Ganyard testified that, as the mechanical contractor at the site, it would have been the responsibility of Vision Air to reassemble the candle filter, not Mr. Dye. (Tr. 137). Getting the candle filter into operation was essentially a three step process. First, the lid would need to be put on the vessel and bolted down. Ganyard estimated that the lid weighed about 10,000 pounds.

(Tr. 136). Ganyard testified that, because the lid was so heavy, he would need to rent a large forklift and get it to the project before work could even begin. (Tr. 138-39). Getting a forklift to the project would take at least a day. (Tr. 139). Ganyard estimated that it would take a crew of people several days to get the lid assembled on the vessel. The second step in getting the candle filter into production would be to pressure test it to see if it was functioning properly. Michael Jeffris, an engineering technician with MRSI, would have been the individual to pressure test the vessel. (Tr. 183-85, 222). If the vessel passed the in-house testing, then an appointment would be made to have it certified by the State of Colorado. (Tr. 141). Because it is a pressurized vessel, it could not be used in production until it was state-certified. This certification would be the third necessary step.

Later in the day on February 26, Ganyard ran into Dye and told him about the “ridiculous nature of [Dilday’s] directive.” (Tr. 136). Ganyard told Dye about this directive because it was “the most ridiculous request we could possibly imagine,” rather than to advise Dye that Vision Air was going to proceed with the work. (Tr. 139). Ganyard thought that the “point was moot” and stated that he did not tell Dye to get working on it. (Tr. 138).

Dye interpreted this conversation differently. He testified that Ganyard approached him when he was on a cigarette break and told him that “Dilday said get the candle filter up and running by noon.” (Tr. 117). Dye testified that he estimated that the entire process of getting the candle filter into production would take about six days. *Id.* Dye further stated that he called Dilday on the radio to tell him that he could not get the candle filter up and running by noon. Dye stated that Dilday responded, “I don’t care, just get it up and running.” (Tr. 118). Dye said that he told Dilday that “it is not going to happen.” (Tr. 119). Dye testified at the hearing that it was impossible to get the candle filter up and running that day. (Tr. 126). He interpreted Dilday’s instruction to mean that he had to get it into operation “at all costs.” (Tr. 127).

Dye believed that he was being required by Dilday to get the candle filter into production without having it tested and certified. Dye believes that his refusal to comply with Dilday’s direct order to have the candle filter in operation by noon was protected under section 105(c) of the Mine Act. As Dye states in his discrimination complaint, “the unit HAD to be hydro-tested, pressure-tested, and certified first as this was the only way to confirm that the unit was repaired properly and wouldn’t erupt. . . .” He goes on to state, “[i]f not repaired properly, the unit could cause serious harm &/or injury to several people.” Dye testified that after lunch that day, Dilday told him that his attitude had deteriorated to such an extent that he did not want him working for MRSI any more. (Tr. 121).

Mr. Dilday testified that Dye was not the individual with MRSI who would oversee the installation of the subject candle filter. (Tr. 223). James Miller, Dye’s supervisor and Dilday’s assistant, was the individual who had assumed that responsibility when the other candle filters were installed and certified. Dilday had no recollection of the discussion during the contractors’ meeting on the morning of February 26, but he remembers that getting all of the candle filters into operation was frequently discussed at these meetings. (Tr. 223, 234). Dilday denied that he

ever told Dye or Ganyard to put the candle filter into production without having it tested and certified. (Tr. 224). Dilday stated that getting a candle filter “up and running would include all of those prerequisites.” (Tr. 245). Dilday did not recall discussing the candle filters with Dye on the radio that day. (Tr. 230).

Dilday testified that it is possible that he could have asked to have the candle filter running by noon at the contractors’ meeting on February 26. (Tr. 234). If he did, he stated that it is quite likely that Ganyard would have objected because “Billy [Ganyard] and the guys would not hesitate to tell me [that] we have [an] issue.” (Tr. 235).

In the late morning or early afternoon of February 26, Dilday was asked to meet with Davis Tilton, Cotter’s general mill foreman. Tilton told Dilday that Cotter’s hourly employees were starting to file written complaints about Dye’s conduct at the project. (Tr. 235-36). Tilton testified that he had been receiving oral complaints about Dye from Cotter employees and that he had now received several written complaints. (Tr. 156; Exs. R-1, R-2). These complaints were filed by Genelle Duran and Tom Salas, who worked in a different area of the project from the candle filters. Ms. Duran, who was an operator in the product building, complained that Dye demanded that she place her hand between two screws of a running auger to get a grab sample. (Tr. 157; Ex. R-1). When she refused, Dye became angry with her. Tilton testified that Duran came to him “in tears” because of the way Dye treated her. (Tr. 170). Mr. Salas apparently became frustrated with Dye’s hostile attitude toward Cotter employees. (Tr. 158; Ex. R-2). Salas believed that the product line in that area should be shut down until a plugged chute was cleared, but Dye would not let him shut it down. When Tilton heard of these complaints, he discussed them with James Miller. Miller testified that several Cotter hourly employees complained that Dye was “bossy, belligerent, forceful at times.” (Tr. 191). Tilton told Miller that “we were not going to work this way” and he ordered production shut down in that area until the matter was corrected. (Tr. 159). Tilton told Dilday that the problem needed to be “fixed” to “adjust attitudes” at the project. (Tr. 160). Dye did not work for Cotter but did have the authority to indirectly control the work of hourly Cotter employees. Because Dye did not work for Cotter, Tilton left it to Dilday to take the appropriate action. *Id.*

After this discussion with Tilton, Dilday and Miller looked for Dye, who was taking a cigarette break near the gate at the fence line. (Tr. 236). When Dilday told Dye about these complaints, Dye responded that Cotter’s employees were lazy. (Tr. 237). When Dilday said, “I am not sure who really has the attitude here, it seems to me you may,” Dye responded by saying something to the effect of “damn right, I have a bad attitude.” (Tr. 237). Dilday told him that his attitude had to change, but Dye said he would not change. According to Dilday, Dye started “ranting” that nobody at the project knew what they are doing and that he was the only person who knew how to make zirconium. *Id.* When he continued “ranting,” Dilday decided that he had to immediately terminate Dye’s employment with MRSI. (Tr. 238). Mr. Dye believes that this final meeting took place in the MRSI trailer. Dye testified that Dilday complained about his attitude at this meeting and told Dye that he did not want him working at the project any more. (Tr. 120). Miller testified that the meeting occurred at the gate and that Dye angrily told them

that he knew what was going on with the project but people would not listen to him. (Tr. 195). Dye did not mention the candle filter at this meeting and it was not discussed.

In the summer of 2002, CMS decided to extricate itself from the zirconium recovery project. (Tr. 252-54). CMS is primarily involved in electricity generation and had little knowledge of chemical processing. Cotter took over the project and unspecified changes were made. Dilday and Miller were laid off in August 2002. MRSI, which was created for this project, represents that it is no longer in business, it has filed articles of dissolution with the State of Tennessee, and it is in the process of winding down its affairs.

II. 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. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

The Commission and the courts have recognized the right of a miner to refuse to work in the face of perceived hazards. *See Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990); *Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 520 (Mar. 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985). A miner refusing work is not required to prove that a hazard actually existed. *See Robinette*, 3 FMSHRC at 810-12. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous

condition.” *Id.* at 812; accord *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. See *Robinette*, 3 FMSHRC at 809-12; *Secretary of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). A good faith belief “simply means honest belief that a hazard exists.” *Robinette*, 3 FMSHRC at 810.

A. Protected Work Refusal

Mr. Dye contends that he was terminated because he refused to perform a task that he believed to be hazardous to himself and others. He maintains that he was ordered to have the 2A candle filter up and running by noon of the day he was terminated without having it tested and certified. He believes that complying with this order would have exposed himself and others to a serious hazard because the untested and uncertified pressurized vessel could erupt or explode if it was not properly repaired. I find that although his concern appears to have been made in good faith, it was not reasonable. I credit the testimony of Ganyard and Miller that it would have taken several days just to install and bolt down the lid. A large forklift or crane would need to be rented and brought to the property to lift the 10,000 pound lid into place. It was not within the realm of possibility that the candle filter would be operated that day. Consequently, Dye would not have been required to operate an untested, uncertified candle filter. I credit Ganyard’s testimony that it was completely “ridiculous” to believe that the candle filter could be put back together and put into operation that day. It was unreasonable for Dye to believe that he was being asked to put himself or others in danger because he testified that he knew that it was an impossible task. At the most, all Dye would have been able to do that day was to coordinate with Ganyard to start organizing the work.

I also credit the testimony of Ganyard, Miller, Tilton, and Dilday that Vision Air, the mechanical construction contractor at the project, would be the entity to install the lid. Miller and Dilday testified that Mr. Jeffris, an engineering technician with MRSI, would have been the individual to supervise the testing and certification of the candle filter. He tested and arranged for the certification of the other candle filters at the project that were already in operation. Although Dye may have had some involvement in reassembling the candle filter, it is clear that he would not have been a major participant. He would have started working with the candle filter only after it had been assembled, tested, and certified. When the lid was actually installed in May 2002, a crew of six people completed this task in about two days under Ganyard’s supervision. (Tr. 135). The candle filter was never put into production because it did not pass MRSI’s in-house pressure testing. The vessel leaked badly whenever the test was performed.

I also credit the testimony of Dilday, Miller, and Tilton that the candle filter would not have been operated until it had been tested and certified. The other candle filters had been tested and certified. Tilton, as the mill manager for Cotter, testified that he would not have allowed his employees or MRSI to operate the candle filter without first getting it certified. He stated that he kept all vessel certificates in his office. (Tr. 151). It was not reasonable for Dye to believe that

he would be required to run product through the candle filter “at all cost” without having it tested and certified.

Dye testified that he had a conversation with Dilday on the radio that morning, after he spoke with Ganyard, in which Dilday directly ordered him to get the candle filter up and running by noon that day. (Tr. 118). Ray Houston, a former Cotter employee, testified that he overheard Dilday order Dye to get the candle filter operating by noon, “no matter what.” (Tr. 57). No other witnesses could recall overhearing such a conversation. Dye admitted that it was physically impossible to get the lid installed on the candle filter by noon. (Tr. 126). Dye’s safety concern was that he would be required to operate the candle filter before it was tested and certified. It is clear that this could not have occurred that day. I find that Dye did not engage in a protected work refusal because his belief that MRSI was requiring him to place himself in danger was entirely unreasonable.

B. Adverse Action

If I credit the testimony of Dye and Houston that Dilday directly ordered Dye by radio to have the candle filter in operation by noon “no matter what,” it can be argued that MRSI failed to address Dye’s fears. MRSI was under the obligation to address his initial safety concerns “in a way that his fears reasonably should have been quelled.” *Gilbert*, 866 F.2d at 1441. Neither Dilday nor Miller told Dye that, given the work involved in getting the lid back on the vessel, he did not have to get the candle filter into operation that day. In addition, no one from MRSI specifically told Dye that he would not be directed to operate the candle filter until it had been tested and certified. Given the conflict in the testimony concerning this radio conversation, I will assume for this part of my analysis that Dye established that he engaged in a protected work refusal and that MRSI did not adequately address his concern that he would be required to operate the candle filter before it was tested and certified.

I find that MRSI’s decision to terminate him from his temporary position was not motivated in any part by his work refusal. I credit the testimony of Ganyard that he had convinced Dilday at the contractors’ meeting that the candle filter could not be put back together that day. Dilday understood that the candle filter would not be reassembled. (Tr. 147-48). I find that the evidence establishes that Dye was terminated because, in the days prior to February 26, Cotter management received a number of complaints from its union employees about Dye’s manner of directing the work at the project. When Dilday and Miller asked Dye to try to “lighten up” when dealing with Cotter employees, Dye refused. Miller testified that he had discussed this issue with Dye several times in the past, without success. (Tr. 210). I credit the testimony of Dilday that Dye told him that Cotter employees were lazy and that he would not change his attitude about them or the project. Tilton, the mill foreman for Cotter, felt compelled to shut down part of the project until certain complaints that had been raised by his employees concerning Dye’s actions were addressed. Given these circumstances, Dilday felt that he had no choice but to terminate Dye’s employment with MRSI. I find that MRSI terminated Dye’s

employment for this reason alone. Dye's refusal to undertake to bring the candle filter into production on February 26 played no part in MRSI's decision to terminate Dye.

Dye introduced evidence to show that he was a safe and knowledgeable employee who had a competent practical understanding of the zirconium recovery project. I credit this evidence. Dye believed that Dilday, on the other hand, was not safe and Dilday did not understand the project as well as he did. Dye pointed to instances in which Dilday gave orders that were unsafe. For example, in one instance Dilday ordered that a rotating kiln be heated to 500 degrees before starting to rotate it. Dye believes that this was very unsafe. Dilday stated that he took this action on the recommendation of a consultant who stated that "we would get some benefit" if we "cook [the ore] before we start rotation." (Tr. 231-32). The tube inside the kiln bent when heated in this fashion, but MRSI was able to straighten it out again. *Id.* The kiln was not used in the process after that date. Dye offered this evidence to show that Dilday was not a safe or competent manager. As a consequence, Dye believes that Dilday's direction that he get the candle filter into operation by noon was entirely in character and Dye took his order seriously with good reason. I accept Dilday's explanation for this incident.

Dye also offered into evidence the decision of the hearing officer of the Colorado Department of Labor and Employment in which Dye was awarded unemployment benefits. (Ex. P-2). The hearing officer determined that Dye was provoked by Dilday when he was accused of violating safety rules. The hearing officer held that Dye's attitude was poor because he was criticized for doing something he did not do. *Id.* Although Dilday was present at the unemployment compensation hearing, MRSI did not present any evidence. The decision of the hearing officer is not binding on me; the proof needed to obtain unemployment benefits differs from the proof necessary to prevail in this discrimination proceeding; and hearing officer did not have any evidence before him except that presented by Dye. Consequently, I do not give the unemployment compensation determination much weight.

Dye attempted to present evidence that Dilday ordered him to take actions that were unsafe in order to damage equipment so that Dilday or MRSI could recover the insurance proceeds. Several witnesses mentioned that there were rumors that the project was being sabotaged. (*See* Tr. 25, 97-98). He offered the testimony of Christina Smith, owner of a bar in Cañon City, to the effect that it was MRSI's intention all along to sabotage the project and destroy equipment so that MRSI could file the patent for the zirconium recovery process and collect the insurance money. (*See* Tr. 215-18; Attachment 7 to Dye's Motion to Amend Complaint dated 01/09/03; Order Denying Motion, 25 FMSHRC 83, 84 (Feb. 2003)). Ms. Smith would have testified that she overheard Dilday, Miller, and others talking about this plan in her bar. I did not permit Dye to present this evidence at the hearing because it is highly unreliable hearsay and only marginally relevant to the issues in the case. Dye did not question Dilday or Miller about these alleged conversations during cross-examination.

In determining whether a mine operator's adverse action is motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely

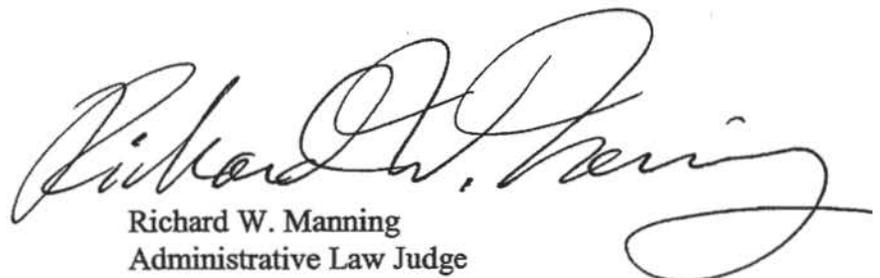
encountered; more typically, the only available evidence is indirect.” *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir 1983). “Intent is subjective and in many cases the discrimination can be proven only 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 toward 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).

It is not clear whether MRSI management knew that Dye had engaged in protected activity. Dilday and Miller knew that the candle filter was not being reassembled, but Dilday believes that he made that decision on his own after the contractors’ meeting. He may not have understood that Dye believed that he was “refusing” to perform that task out of concern for his safety. There is no evidence of hostility or animus toward the protected activity. All of the other candle filters were tested and certified before they were placed into production. After candle filter 2A was reassembled in May 2002, MRSI began pressure testing it. When it failed the tests, it was never placed into production. Thus, refusing to operate a pressurized vessel prior to having it tested and certified would not provoke a hostile reaction from MRSI. There was a coincidence in time between the protected activity and the adverse action.

With respect to disparate treatment, Dye alleges that Dilday did not follow the MRSI employee handbook which includes a provision for verbal and written warnings. Dilday testified that the manual gave him the discretion to skip these steps “depending on the severity of the situation.” (Tr. 238). Dilday considered Dye’s behavior toward Cotter employees to be serious enough to warrant immediate dismissal after Dye stated that he would not change his attitude at their meeting on February 26. I conclude that Dye was not treated in a disparate fashion given his conduct.

III. ORDER

For the reasons set forth above, the discrimination complaint filed by Thomas P. Dye II against Mineral Recovery Specialists, Inc., under section 105(c) of the Mine Act is **DISMISSED**.


Richard W. Manning
Administrative Law Judge

Distribution:

Mr. Thomas P. Dye II, 1428 South 4th Street, Cañon City, CO 81212-9664 (Certified Mail)

David Tierney, President, Mineral Recovery Specialists, Inc., 200 E. Main Street, 6th Floor,
Johnson City, TN 37604 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

601 New Jersey Avenue, N.W., Suite 9500

Washington, D.C. 20001

April 29, 2003

| | | |
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| SECRETARY OF LABOR, | : | DISCRIMINATION PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 2001-23-D |
| on behalf of MARK GRAY, | : | BARB-CD-2000-13 |
| Complainant | : | |
| v. | : | |
| | : | |
| NORTH STAR MINING, INC., | : | |
| MIKE CAUDILL and JIM BRUMMETT, | : | No. 5 Mine |
| Respondents | : | Mine ID 15-17437 |

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of Complainant;
John W. Kirk, Esq., Kirk Law Firm, Paintsville, Kentucky, on behalf of Respondent, NorthStar Mining, Inc.;
Hugh Richards, Esq., London, Kentucky, on behalf of Respondent, Mike Caudill;
Jim Brummett, Arjay, Kentucky, *pro se*.

Before: Judge Bulluck

DECISION

This case is before me on a Discrimination Complaint filed by the Secretary of Labor (“the Secretary”) on behalf of Mark Gray, against North Star Mining, Inc. (“North Star”), Mike Caudill and Jim Brummett, under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(c)(2).¹ The Complaint alleges that North Star, through its employees, Caudill and Brummett, forced Gray to quit his job as roof bolter, in retaliation for his involvement in a federal grand jury investigation of safety issues at North Star.² The Secretary seeks back pay with interest, employment benefits and seniority for Gray, and civil penalties in

¹ Section 105(c)(2) provides, in pertinent part, that “Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.”

² The Complaint was also brought on behalf of Roscoe Ray Young. Young declined to pursue his cause of action and withdrew his Discrimination Complaint prior to the hearing.

the amount of \$50,000.00 against North Star, \$10,000.00 against Caudill and \$10,000.00 against Brummett, for their respective violations of the Act.³

A hearing was held in Kingsport, Tennessee. Prior to convening the hearing, the Secretary and Brummett negotiated a settlement agreement, the terms of which were read into the record by the Secretary's representative:

The agreement that's been reached between the Secretary and Mr. Brummett - - Mr. Brummett is no longer represented by counsel. At one point, he had been. Mr. James Wren, his attorney, had been called for National Guard duty in Italy . . . and the Secretary and Mr. Brummett have agreed that Mr. Brummett is admitting liability, and pursuant to his Plea Agreement, he has cooperated with the government and he has showed [sic] remorse and regret for his actions. He is currently employed but is not making a salary that would allow him to pay a \$10,000.00 civil money penalty. In light of that, the Secretary has agreed to reduce his civil money penalty to \$1,000.00.

Tr. 9-11. The parties presented testimony and documentary evidence, and filed post-hearing briefs. For the reasons set forth below, I find that the Secretary has failed to prove a violation of section 105(c) of the Act and, therefore, I dismiss the Discrimination Complaint against all Respondents. Furthermore, because I find that Jim Brummett did not threaten Gray, as alleged, I disapprove the settlement agreement between the Secretary and Brummett.

I. Factual Background

North Star, co-owned by Carl Kirk and Harold Porter, performs contract mining for larger companies and operates the No. 5 and 6 Mines, situated on opposite sides of a mountain approximately 1/4 mile apart, in Leslie County, Kentucky. Mark Gray was employed as a roof bolter in the No. 5 Mine on the second shift, 3 p.m. to 11 p.m., from December 21, 1999, to August 16, 2000, upon referral of his friend and former co-worker at other mines, Jim Brummett. Tr. 24-25, 28, 58-59, 150-51. Mike Caudill was superintendent of the No. 5 and 6 Mines, Thomas ("Eddie") Spurlock was assistant superintendent of No. 5 and Brummett, initially section foreman on Gray's shift in No. 5, transferred to No. 6 as assistant superintendent on May 1, 2000. Tr. 24-25, 148-49, 225.

At some point in late July 2000, due to an injury sustained by day shift roof bolter Terry Roark, Gray was afforded the opportunity of transferring to the first shift, 7 a.m. to 3 p.m.; his

³ Under the plain language of the Act, individuals may be held liable for violations of section 105(c). Section 105(c)(1) provides, in pertinent part, that "No *person* shall discharge or in any manner discriminate against or otherwise interfere with the exercise of the statutory rights of any miner . . ." 30 U.S.C. § 815(c)(1) (emphasis added). "Person" is defined in the Act as "any *individual*, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." 30 U.S.C. § 801(f) (emphasis added).

pinning partner was Ray Young. Tr. 26-28. Gray commuted with Young to work each day from their homes in Harlan County, and when they had previously worked together on the second shift, they had ridden together during those times. Tr. 29.

In May of 2000, MSHA special investigator Gary Harris interviewed Gray at his home pursuant to an investigation of alleged roof support, ventilation and smoking violations at North Star. Tr. 17, 29, 128-29. Young was also interviewed. Tr. 30. As a result of its investigation, MSHA referred the matter to the United States Attorney for the Eastern District of Kentucky, and it was assigned to Assistant U.S. Attorney H. Davis Sledd. Tr. 128-29. On July 22, 2000, Gray and Young were subpoenaed to testify before a federal grand jury on July 27, 2000, in London, Kentucky. Tr. 17-18, 30-31. While Gray and Young were the only two miners subpoenaed in July, several others were subpoenaed and testified on August 31, 2000. Tr. 130.

After their next shift ended at 3 p.m., Gray and Young took their subpoenas to Mike Caudill in the No. 5 Mine office, with Eddie Spurlock and "parts man" James also present, and obtained permission to take leave to testify on July 27th. Tr. 30-33, 235-37, 260, 263-64, 275-76, 281. Prompted by questions from Gray and Young as to what the subpoenas were about, Caudill telephoned Sledd, who was referenced at the bottom of the subpoenas. Tr. 22, 202, 260. Caudill either identified himself as Gray or stated that he was inquiring about the nature of Gray's subpoena. Sledd responded that the grand jury was investigating unsafe mining practices at North Star's No. 5 Mine. Tr. 32-33, 191-93, 235, 260, 314-15, 324.

On July 27, 2000, Gray and Young traveled together and reported to the courthouse in London, Kentucky. Sledd and Harris were at the courthouse and took charge of the miners' activities. Young was called first to testify, while Gray sat outside the courtroom with Harris. At the conclusion of Young's testimony, Sledd determined that Gray's testimony would be essentially the same as Young's and decided not to call him to testify. Tr. 35-36.

Upon returning to work on the next day shift, and being asked by several co-workers, aware of the grand jury investigation, what had happened in London, Gray declined to say anything about his experience at the courthouse. Tr. 36-40. At some later date, which is unclear from the record, Spurlock told Gray that Brummett wanted to talk with him at the No. 6 Mine at the end of his shift, but Gray and Young went directly home. Tr. 41-42.⁴ When Gray reached home and discovered a telephone message to call Brummett at No. 6, Gray summoned Young

⁴ Gray testified that his telephone conversation with Brummett occurred a couple of days after he appeared in London to testify on July 27, 2000. Tr. 40-41. However, Exhibit G-4, the transcript of that conversation, is marked August 15, 2000. Both dates are inconsistent with Gray's other accounts of the sequence of events. Working backwards from the date he worked his last shift, a reasonable construction is that the telephone conversation occurred on or around Friday, August 11th; Gray and Young visited Brummett at No. 6 on Saturday, August 12th; Gray was informed that he would be returning to the second shift sometime around Tuesday, August 15th; and he worked his last day on Wednesday, August 16th.

back to his house. Tr. 40-42. After Young returned, Gray taped Brummett's second call because, in Gray's words, he "just had a feeling that [Brummett] wanted to discuss the grand jury - - just a feeling." Tr. 42-45; ex. G-3, G-4. During the conversation, Brummett made numerous inquiries about what happened in London and whether Gray or Young had testified against him. Gray, clearly nervous and upset, described the experience as a horrible ordeal, and repeatedly assured Brummett that he hadn't said anything about him. Gray told Brummett that he "[didn't] want no hard feelings over it," and Brummett responded, "No, they ain't no hard feelings, unless you put the screws to me, then I'll kill you." Ex. G-4. The conversation concluded with Brummett asking Gray to stop by No. 6 with Young the next day, and he assured Gray that he need not worry about losing his job or anything else. According to Gray, it was then that he began to seek other employment. Tr. 54.

After they finished working the following day, around 3 p.m. on Saturday, Gray and Young drove to No. 6 to see Brummett. Tr. 157. Due to a recent roof fall at the mine, two MSHA inspectors were in the mine office, and Brummett spoke to Gray and Young out in the yard. Tr. 157-58. During this conversation, Brummett is alleged by Gray to have sought assurances that Young had not testified against him, and to have threatened that if "anyone laid the screws to him that he would whip their ass." Tr. 49-50. Thereafter, Gray and Young left the mine in Young's truck, without incident, and Gray and Brummett had no further contact with each other until the hearing in this matter.

According to Gray, a couple of days after he and Young had visited Brummett at No. 6, Gray was informed by either Caudill or Spurlock that he was being transferred back to the second shift, because Roark was returning to his roof bolter position. Tr. 52. After returning to the second shift for one day, without notice to anyone at North Star, Gray quit his job and went to work for Cumberland Valley Resources. Tr. 52-54. According to Gray, he was unemployed only one day between jobs. Tr. 56. Gray filed a Discrimination Complaint at the MSHA field office in Harlan, Kentucky on August 31, 2000, alleging that he "was forced to quit because of constant harassment and required to go to second shift because of [his] Grand Jury involvement in an MSHA investigation," and named Caudill, Spurlock and Brummett as responsible management officials. Ex. G-2. At the time he filed his Complaint, Gray turned over the taped conversation with Brummett to MSHA officials who, upon Sledd's recommendation, turned the matter over to the Federal Bureau of Investigation ("FBI"). Tr. 19-20, 127-28, 200. There is no evidence that the FBI took any action respecting the Gray/Brummett tape.

As a result of criminal indictments brought by the U. S. Attorney, Caudill and Brummett entered into Plea Agreements with the United States. On July 13, 2001, Caudill pled guilty to knowingly and willfully violating a mandatory health and safety standard under the Mine Act, by failing to follow the approved ventilation plan at the North Star No. 5 Mine, was sentenced to probation, and nominally fined. Tr. 198-99; ex. G-6. Brummett pled guilty on October 25, 2001, to knowingly and willfully violating a mandatory health and safety standard under the Mine Act, by failing to follow the approved ventilation plan at the North Star No. 5 Mine, was sentenced to one year probation, fined \$250.00, and prohibited from directly supervising any crews of miners

in any coal mine while serving his probation. Tr. 160-61, 175-77, 196-97; ex. G-5. The Plea Agreements required that Caudill and Brummett “fully cooperate with the United States in the further prosecution and/or investigation of the matters set forth in the Information herein and any and all related matters, including but not limited to testifying truthfully in any and all proceedings related thereto if called as a witness therein.” Ex. 5, 6. Each Plea Agreement also provided that, in the event of Defendant’s breach, the United States could declare the Agreement null and void and could reinstate the charges then pending and/or seek an indictment for any and all violations of federal laws, including perjury or giving false statements. Ex. 5, 6.

II. Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act,⁵ a complaining miner bears the burden of establishing that 1) he engaged in protected activity and 2) the adverse action of which he complained was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (April 1998); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981).

The operator may rebut the *prima facie* case by showing that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner’s unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Co. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987). While the operator must bear the burden of persuasion on its affirmative defense, the ultimate burden of persuasion remains with the complainant. *Pasula*, 2 FMSHRC at 2800; *Schulte v. Lizza*, 6 FMSHRC 8, 16 (January 1984).

In determining whether a mine operator’s adverse action was motivated by the 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 sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). “Intent is subjective and in

⁵ Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he “has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;” (2) he “is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;” (3) he “has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;” or (4) he has exercised “on behalf of himself or others . . . any statutory rights afforded by this Act.” 30 U.S.C. § 815(c)(1).

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). The Commission has also held that an “operator’s knowledge of the miner’s protected activity is probably the single most important aspect of a circumstantial case” and that “knowledge . . . can be proved by circumstantial evidence and reasonable inferences.” *Secretary of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (September 1999) (citing *Chacon*).

Gray claims that, as a result of his grand jury involvement, he was transferred back to the second shift, constantly harassed, threatened, and forced to quit his job, i.e., constructively discharged. Tr. 52.

It is well settled Commission precedent, by application of an objective standard, that “[a] constructive discharge is proven when a miner engaged in protected activity shows that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign.” *Dolan v. F & E Erection Co.*, 22 FMSHRC 171, 176 (February 2000); *Secretary of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265, 272 (March 1999); *Simpson v. FMSHRC*, 842 F.2d 453, 461-63 (D.C. Cir. 1988). This reasonable person test focuses on the impact of the employer’s actions, whether deliberate or not, upon a “reasonable” employee. *Levendos v. Stern Entertainment, Inc.*, 860 F.2d 1227, 1230 (3rd Cir. 1988). A forced resignation, then, is converted to a legally constructed discharge because “[c]onstructive discharge doctrines simply extend liability to employers who indirectly effect a discharge that would have been forbidden by statute if done directly.” *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2210 (November 1994) (citing *Simpson*, 842 F.2d at 461). Moreover, under any of the approaches used by the courts, it is not easy to meet the requirement that conditions be “intolerable,” and “[m]inor or technical violations of the Mine Act, or those that do not endanger health and safety, ordinarily will not support a finding of constructive discharge.” *Simpson*, 842 F.2d at 463. Whether conditions are so intolerable as to cause a reasonable person to feel compelled to resign is a question for the trier of fact. *Id.* The Commission has directed that, in resolving that question, factors be viewed in terms of the cumulative effect they could have on a reasonable employee alleging such conditions. *Bowling*, 21 FMSHRC at 276 (citing *Stephens v. C.I.T. Group/Equipment Financing, Inc.*, 955 F.2d 1023, 1027-28 (5th Cir. 1992); *Levendos*, 860 F.2d at 1230-31; *Williams v. Caterpillar Tractor Co.*, 770 F.2d 47, 50 (6th Cir. 1985). Finally, while an employee has a right to abandon a hostile work environment because he reasonably believes there is no chance of fair treatment, “an employee must give an employer a reasonable opportunity to work out a problem before quitting.” *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 574 (8th Cir. 1997) (citing *West v. Marion Merrell Dow, Inc.*, 54 F.3d 493, 497 (8th Cir. 1995)); see *Dolan*, 22 FMSHRC at 176 (in explaining that the key inquiry in a constructive discharge case is whether intolerable conditions existed such that a reasonable miner would have

felt compelled to resign, the Commission emphasized that it is the operator's failure to reasonably remedy such conditions that converts the resignation into an adverse action); *see Simpson*, 842 F.2d at 459 (where reasonably possible, a miner refusing work should ordinarily communicate, or attempt to communicate, to some representative of the operator, his belief in the safety or health hazard at issue, unless unusual circumstances excuse a failure to communicate). This qualified communication requirement, then, is fundamental to claims arising under anti-discrimination statutes, because their protective "policies are best served when the parties, if possible, attack discrimination within the context of their existing employment relationships." *Levendos*, 860 F.2d at 1232 (citing *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987)).

Section 105(c)(1) of the Act specifically prohibits discrimination against miners who have "testified or [are] about to testify" in any proceeding under or related to the Act, and the parties have stipulated that Gray's involvement with the federal grand jury in London, Kentucky, was protected activity. Tr. 104. Caudill and Spurlock obviously had knowledge of the protected activity when Gray and Young took their subpoenas to the mine office seeking permission to be excused from work. The evidence indicates that Caudill's telephone inquiry to Sledd was made at the request of Gray and Young and, irrespective of the manner in which he introduced himself, he did not learn appreciably more from Sledd's general response - - the grand jury was investigating unsafe mining practices at North Star No. 5 - - than was obvious from the subpoenas on their face. Moreover, there is no indication from that encounter that Caudill attempted to influence or inhibit their testimony in any way. The unrebutted testimony is that, when asked by Gray and Young what they should do when they appeared before the grand jury, Caudill told them to go and "tell the truth." Tr. 260, 263-64, 315-16.

Gray must prove, therefore, that his transfer to the second shift was an adverse action and that it was motivated in any part by his protected activity or that, as a result of his protected activity, his work environment became so intolerable that he was forced to resign, i.e., constructively discharged.

II. A. Shift Change

While Gray has established that he engaged in protected activity, he has failed to establish a *prima facie* case because he has not shown that North Star took an adverse action against him when he was returned to the second shift.

North Star hired Gray for the second shift in December 1999, and he pinned on that shift until day shift roof bolter Terry Roark became disabled. While it has not been established exactly when that occurred, Gray was pinning with Young on the first shift when they were subpoenaed on July 22, 2000. According to Gray, when Caudill told him that he could transfer to the day shift, he inquired whether it was "full-time," and Caudill said that it was. Tr. 26-27. Assuming that this exchange took place exactly as Gray described, Gray asked the wrong

question, since it is obvious now that he wanted to know whether the transfer was permanent, rather than full-time. In any case, there is ample evidence that Gray was told that he would be filling in until Roark returned to duty. Spurlock testified that when Roark got injured, he and Caudill told Gray that he could work the day shift until Roark returned. Tr. 230-31. When he informed Gray that Roark would be returning to his job, Spurlock testified, Gray was upset at the prospect of going back to his original shift. Tr. 231-32, 261. Spurlock further stated that, because Gray was regarded as a good roof bolter, he had told Gray that if Roark could not handle the job, they would put him back on the day shift. Tr. 262-63. According to Spurlock, when Roark could not perform his full-time duties on the day he returned, North Star had planned to return Gray to the day shift, except that Gray had quit, without notifying anyone at North Star. Tr. 232-35. It is North Star's policy, Spurlock testified, to return injured workers to their positions. Tr. 233. This testimony was un rebutted by the Secretary, who has failed to show that Gray was treated any differently than other miners transferred as fill-ins for temporarily disabled miners. Caudill testified that Gray was a good worker, that when Roark got injured, Gray was "next in line," and that both he and Spurlock had told Gray that the assignment was temporary. Tr. 335-36. The decision had been made by him and Spurlock to put Gray back on the second shift, Caudill stated, because Roark was returning to full duty. Tr. 335.

I credit Caudill and Spurlock's testimony that Roark retained entitlement to his position while he was injured, and that Gray had been told that his transfer was only temporary. I also credit Spurlock's testimony that, had Gray stayed on the job instead of quitting, he would have been assigned permanently to the day shift. On the other hand, for lack of any supporting evidence, whatsoever, I reject Gray's assertions that he was transferred back to the second shift because of his grand jury involvement, and that North Star wanted to separate him from Young. Tr. 53. While Gray may have preferred the earlier shift, the Secretary has not shown an entitlement by Gray to the day shift while Roark encumbered that position, or that Gray suffered an adverse action when he was returned to the shift to which he had been assigned when he took the job. Assuming, *arguendo*, that Gray's transfer had been shown to constitute an adverse action, North Star has proven that its actions were in no way based on Gray's grand jury involvement, but solely on legitimate business concerns, respecting seniority rights of its workforce.

Although Gray's transfer to the second shift did not constitute an adverse action, it will be revisited in the constructive discharge analysis in combination with his allegations of harassment, in order to determine whether his working conditions were intolerable.

II. B. Harassment and Constructive Discharge

1. Constant Harassment

Gray alleges that, following his grand jury involvement, he was subjected to constant harassment. On direct examination, he specified what he meant by this allegation:

Q. When was the next time you went to work at North Star after you had gone to London

to testify?

A. The following day.

Q. When you returned to work, what happened?

A. It was just, "What'd you say in court," and stuff like that.

Q. Who said that to you?

A. Well, mainly employers [sic]. You know, the employees - - the employees and stuff like that the next day. Mainly, employees - - harassment by them Just harassment by the employees, you know. The employees was . . . wanting to know what was going on because they'd say, "Well, we were supposed to be interviewed," and stuff like that. So they wanted - - I guess, wanted to be prepared or something. I don't know.

Q. And did that bother you in any way?

A. It did, but you know, I didn't say anything.

THE COURT: You didn't tell them that you didn't testify?

A. No, ma'am, I didn't say a word I didn't say anything.

Q. Were there any supervisors who spoke to you about your testimony?

A. Mr. Spurlock was the only one that discussed it with me. He said that what I needed to do was just tell them that I'm a bolt man, not a curtain man, or anything like that.

A. Mr. Spurlock's a nice guy.

Q. Other than Mr. Spurlock, were there any other mine supervisors or supervisors at the mine who spoke to you about your testimony?

A. Mr. Brummett.

Tr. 36-40. By his own testimony, the constant harassment to which Gray referred amounted to inquiries made by his co-workers, who were anticipating being called to testify, themselves. There is no evidence that Gray seriously protested. Spurlock's comment does not establish that Gray had complained to him of harassment, but suggests that Spurlock appreciated Gray's discomfort and offered a mechanism by which Gray could minimize friction between himself and

the crew. Therefore, I do not find that the questioning to which Gray was subjected amounted to harassment. There are no other instances of “constant harassment” cited by Gray, except for the threats alleged to have been made by Brummett, which are discussed in detail below.

By all accounts, Brummett and Gray had been friends since they had worked together for several years at Calvary Coal and Good Coal, where Brummett had been superintendent. In fact, Brummett was responsible for getting Gray hired at North Star. Much has been made by North Star about the affection and comradery between Gray and Brummett at the hearing, both inside the courtroom and during lunch recess, but personal observation of their behavior simply corroborates what is amply established by the record - - that they were good “buddies.” Tr, 163-64, 270-72. It is abundantly evident that they highly regarded one another and harbored no animosity respecting the incidents giving rise to the “threat” allegations. Tr. 58-60, 112-13, 156, 214, 302-03. It is against the backdrop of this friendship that perhaps the most serious allegation, i.e., that Brummett threatened Gray with bodily harm, must be evaluated.

2. Phone Call and Visit to No. 6

Brummett’s testimony is unclear as to whether Caudill *suggested* that Brummett call Gray if he wanted to ask his friend about the grand jury proceeding, or *directed* him to make the call. Tr. 152-53, 156, 185-86. Brummett testified that he would have made the call anyway, because Gray was his friend. Tr. 156. Caudill, on the other hand, testified that he does not remember telling Brummett that Gray and Young had been subpoenaed, or requesting that Brummett call Gray. Tr. 311-12. On this point, neither gave reliable testimony.

There are some compelling factors which most likely had a chilling effect on Caudill and Brummett giving truthful testimony. Both witnesses were questioned about their Plea Agreements and, at the time of the hearing, neither had completed his probation. Recapping a pertinent part of the Plea Agreements, they mandated full cooperation with the government in all matters related to the unsafe practices at North Star, including testifying truthfully in all related proceedings, under penalty of indictment for violation of federal laws, including perjury. The Secretary’s representative even incorporated Brummett’s “cooperation with the government” into their proposed settlement agreement in the instant case. Moreover, Assistant U.S. Attorney Sledd and MSHA investigators Harris and Brock, all involved to some degree in the investigation and ultimate indictments of Caudill and Brummett, were present in the courtroom and testified at the hearing. Caudill faced the dilemma of appearing *uncooperative* had he denied responsibility for Brummett’s call to Gray or that he had wanted to get rid of Gray, and incriminating himself by admission. He tried his best to straddle the fence by claiming lack of memory; otherwise, his testimony was credible. Brummett, on the other hand, unrepresented and extremely nervous, did a poor job of attempting to *cooperate* with the government, while defending himself at the same time. His statements to the effect that Caudill transferred Gray back to the second shift to separate him from Young, and that Caudill commented, “there’s trouble gone,” after Gray had quit, are inconsistent with the balance of the evidence and transparently self-serving. Brummett had been backed into a corner. After all, he had already

been indicted, fined and was serving probation. Furthermore, from his vantage point, he had just avoided a \$10,000.00 penalty by admitting that he had made the threatening statement, appearing remorseful, and agreeing to pay \$1,000.00 to settle the matter. At this juncture, because Caudill provided no insight into the scenario, I find that Caudill suggested that Brummett call his friend for information. Had he directed that Brummett do so, however, there is no indication that he instructed Brummett to threaten or otherwise intimidate Gray; nor was there any reason for Caudill to believe that Brummett would do so.

I have thoroughly reviewed the tape and transcript of the telephone conversation between Brummett and Gray. It is noted at the outset that the tape begins with the conversation already in progress, and portions of some statements are inaudible.

Brummett, obviously concerned that he would be held legally responsible for the alleged violations under investigation, and anticipating being called to testify, himself, sought general information about the grand jury proceedings, and reassurance that Young and Gray had not told the grand jury anything that would incriminate him. Tr. 170. Because Gray's charges of harassment by Brummett are so egregious, it is important to view the alleged threat in the context of the broader conversation:

BRUMMETT: Hey, what did you'uns talk about down there?

GRAY: Ah, buddy, I, I didn't say nothing, Jim.

BRUMMETT: Did Ray put the fucking to me?

GRAY: Buddy, I don't know, buddy. Jim they [took] us in . . .

BRUMMETT: . . . in separate?

GRAY: Yeah.

BRUMMETT: You didn't put the fucking to me, did you?

GRAY: Ah buddy, I, I didn't say nothing to them, Jim.

BRUMMETT: You should have told them what, how safe a miner I was.

GRAY: (Laughter) I didn't say nothing, buddy. Buddy, that place flipped me out down there.

BRUMMETT: What's that mean?

GRAY: Shit, you've [sic] got frisked, handcuffed and everything else.

BRUMMETT: They didn't handcuff you, did they?

GRAY: No, it was probably next - - that's what I was afraid they were going to do next thing.

BRUMMETT: (Laughter) I bet you was scared to death, I bet . . .

GRAY: Yeah.

BRUMMETT: . . .you spilt your guts on me, didn't you?

GRAY: Naw, I didn't say nothing.

BRUMMETT: What all did they ask you?

GRAY: Buddy, just a bunch of stupid questions, you know? About five seconds worth of questions.

BRUMMETT: Did they ask you anything about me?

GRAY: Buddy, not really, Jim.

BRUMMETT: Just about North Star?

GRAY: Mainly. Mainly, Jim.

GRAY: I don't see why they put me in this position, you know what I'm saying?

BRUMMETT: Ah, you can't pay no attention [to] the mother fuckers . . .

BRUMMETT: . . . you didn't break no law.

GRAY: Shew. They just worry me, buddy.

BRUMMETT: (Laughter).

GRAY: (Laughter).

BRUMMETT: They want a man to say something so they can get a big lot of money out of somebody. That's all it's about.

BRUMMETT: Yeah, you don't want to go, but I'll be a going, I'd say.

GRAY: Well, it shocked me that when they gave me that summons there . . .

BRUMMETT: You should have brought it to me.

BRUMMETT: (Laughter) Hey, tomorrow, tell Ray to stop over, hear me? You'uns

working tomorrow?

GRAY: Yeah.

BRUMMETT: Tell him to, I'd like to talk to him about five minutes.

GRAY: Well.

BRUMMETT: I mean, it ain't no, I ain't going to say what you tell me.

GRAY: Yeah.

BRUMMETT: If I was to go down there You know what I'm going to tell them? When they call me down, I'm going to tell them to kiss my ass, if they say much to me.

GRAY: Buddy, they're scary down there, Jim.

BRUMMETT: They don't scare me.

BRUMMETT: You know, they're not investigating you'uns. I know, me's the one they're after.

GRAY: I don't know what they're after, buddy.

BRUMMETT: I know what they're after. They're after every man that's got foreman's papers

BRUMMETT: You ain't no boss. They can't fine you.

GRAY: They just scare me to death, Jim.

BRUMMETT: Don't worry about that shit. They can't, they can't bother you.

GRAY: You know, they all think, you know, that I'll wind up losing my job over there.

BRUMMETT: No.

GRAY: I don't want no hard feelings over it.

BRUMMETT: No, they ain't no hard feelings, unless you put the screws to me, then I'll kill you.

GRAY: (Laughter).

BRUMMETT: (Laughter) You know how I always try to treat everybody right, try to do the safest thing I know how.

GRAY: Yeah.

GRAY: You all working tomorrow?

BRUMMETT: Yeah, yeah, you'uns are too, ain't you?

GRAY: Yeah, I'd say, we'll have to run coal tomorrow.

BRUMMETT: Yeah, I'd say you're right.

GRAY: I finally, I, I tell you, I just need a break from all this, buddy.

BRUMMETT: (Laughter)

GRAY: I'm serious, I need a break. All this stuff's got me nervous as a cat, buddy. I'm as nervous as a long tail cat in a house full of rocking chairs.

BRUMMETT: You tell Ray to stop over here and talk to me a minute.

GRAY: Well, I will.

BRUMMETT: I'd like to know what's going on 'for I have to go down there. You know, I don't want to be surprised when I walk in that room.

GRAY: Shew (laughter)

BRUMMETT: You don't have to worry about losing your job or getting screwed over. That ain't going to happen.

GRAY: Well, I didn't, I, it, it shocked me having to go down there. Jim, I didn't even know.

BRUMMETT: That's strange, getting the bolter men and not the one that told them which place to bolt, isn't it.

GRAY: I, I asked them, I said, how come me and my buddy got picked here? He said, well, it's this way, said you all were at the top of the list.

GRAY: But I don't know, Jim, I swear I don't.

BRUMMETT: Why don't you stop over here at the mine tomorrow?

BRUMMETT: You know, I'll be outside here.

GRAY: Well, we will.

BRUMMETT: Don't worry about it.

GRAY: Whew, okay.

BRUMMETT: Okay.

GRAY: Okay, we'll see you later, Jim.

BRUMMETT: See you.

GRAY: Bye.

BRUMMETT: Bye.

Ex. G-4 (emphasis added).

The question presented by this conversation is whether Brummett meant the literal meaning of the words, "I'll kill you," or whether he was speaking figuratively, as in, "I'll *really* be upset with you." A good starting point in resolving this question is the declarant's explanation of what he meant or, in this case, did not mean, by his choice of words. One consistent thread running throughout Brummett's testimony was his insistence that he never meant to threaten Gray, he "wasn't going to kill him," and he used the words only as a "figure of speech." Tr. 168. On the other hand, Gray testified that fear for his life and the lives of his family shocked, frightened and worried him. He also attested to having been confused by Brummett's comment. Tr. 47-48, 55, 67, 89-90, 112-13, 292-93, 302-03. For example, when asked on direct examination whether Brummett's laughter lessened the impact of the words, Gray had this to say: "In a way, yes; but, yeah, in a way, because . . . I was kind of shocked at - - you know, because he would say that, you know, because he never had before." Tr. 48.

Gray acknowledged that the grand jury experience in London had been intimidating and highly stressful. Tr. 70, 90-93, 298-301. His behavior, recalling Young to his house and running the tape when Brummett called, establishes that he was already distraught before the

conversation began. Talking about the London experience seemed to have worsened matters, especially since Brummett broached one of the subjects that Gray feared most - - that he was being regarded as a snitch. Gray repeatedly told Brummett that he was "all shook up" over the trip to London and used figures of speech, himself, e.g., "frisked, handcuffed and everything else," to describe how the courthouse had "flipped him out." In response, Brummett devoted considerable effort to assuaging Gray's fears by reassuring him that he was not in danger of losing his job and that he was not a target of the government. Because of Brummett's protective behavior toward Gray, along with fits of interspersed laughter on both parts, I am convinced that Brummett's statement amounted to no more than an exaggerated expression, commonly used between friends who expect loyalty from one another. This would explain why Gray made no protest or defense, whatsoever, and gave Brummett no indication that he had taken offense to his comment. Tr. 291-92. Moreover, Gray admitted that he told no one about the alleged threat. Tr. 62-63. While Gray was observed to have a quiet manner, he did not impress me as totally passive. In fact, in that same discussion, Gray agreed to visit Brummett at No. 6 the next day. It strains credulity that Gray would voluntarily seek out the person to whom he attributed threats to his life, especially since that person had no supervisory authority over him. In any case, although I find that Brummett did not threaten Gray over the telephone, given Gray's fragile emotional state after his trip to London, I give him the benefit of the doubt and accept, for the sake of argument, that he *believed* Brummett had threatened him.

Brummett told Gray to stop by No. 6 with Young because he did not want to be surprised when he had to testify before the grand jury. It is reasonable to surmise that he wanted Young's version of what had transpired in London. Brummett testified that two MSHA inspectors and a few other miners were at No. 6, and that he spoke with Young and Gray together in the mine yard, mostly about the recent roof fall and, maybe, what was said to the grand jury. Tr. 157-58. He stated that he did not threaten Gray. Later in his testimony, Brummett completely changed his story. According to him, his request had been an invitation that Gray and Young attend an Employee Appreciation Day dinner, catered by his wife, at the mine. Not only did they attend, Brummett asserted, but they sat down and ate along with the MSHA inspectors. Tr. 165-68. Mary Ann Brummett gave credible, detailed testimony about the dinner she had catered for the miners, but was unable to specify the Saturday on which the event occurred or whether Gray and Young had attended, since she had never met either miner. Tr. 268-74. Therefore, I ascribe no weight to her testimony. Gray testified that he did not observe a dinner being held at No. 6 and gave a different account of the meeting. Tr. 213, 276-77. He testified that Brummett spoke with him and Young separately in the yard. According to Gray, Brummett questioned whether Young had said anything negative about him and threatened that "if [he found] anybody laid the screws to [him] . . . [he'd] whip their ass." Tr. 77-80, 283. Gray did not testify that he questioned Brummett about the remark, protested or made any response. Thereafter, he and Young left the mine. Brummett's altered recollection so late in the proceeding defies reason and, therefore, his testimony on this issue is wholly unreliable. From Gray's own testimony, it appears that Brummett's apprehension about Gray had been quieted, but that he still had concern about Young. Because Brummett called the meeting to grill Young about his grand jury testimony, I find that he made the "whip ass" statement, as alleged. I am persuaded, however, that it was

directed at Young, not Gray, and that it was no more than an exaggeration like the telephone "threat," rather than an intent to harm anyone. It would have been helpful to have heard from Young as to what had been said between him and Brummett, but he was not called as a witness. While I find that Brummett did not threaten Gray, it is also my finding that Gray *believed*, once again, that he had been threatened and, as in the case of the phone conversation, he did not report the incident.

3. The Work Conditions

The seminal question is whether North Star created or maintained conditions so intolerable that it was reasonable for Gray to quit his job. Gray makes no claim that anyone at North Star attempted to influence his testimony before he went to London. That Caudill told him and Young to go and tell the truth was un rebutted. Gray testified that being subpoenaed to testify had been extremely upsetting and stressful. Tr. 90-93. He explained that he had not wanted to testify and had worried about his reputation, because the code among coal miners is that what happens underground stays underground. Tr. 299-302. Over a relatively short period of less than three weeks, but on the heels of his grand jury involvement in London, Gray claims that queries by his coworkers, threats over the telephone and at No. 6 by Brummett, and transfer back to the second shift constituted compelling reasons for him to walk off the job. Curiously, he told no one that he felt harassed or that he planned to leave. Gray admitted that North Star's management, with the exception of Brummett, treated him fairly, and that he had no reason to believe that Caudill or other company officials were involved in Brummett's actions. Tr. 296-97. He also acknowledged that there was no basis for assuming that bringing the alleged harassment to North Star's attention would have been futile. Tr. 80, 293-94. When asked why he had failed to complain about being harassed to anyone at North Star, or to an MSHA inspector when the incident occurred at No. 6, Gray responded that he had no reason, he wasn't thinking straight - - that he had decided to diffuse it by getting away from it. Tr. 290-95. He also admitted that, because he had not brought his concerns to North Star's attention, it could not have "fixed" the problem. Tr. 295. Apparently, he focused his attention elsewhere, considering that, by his own account, it took him only three to four days after the call from Brummett to find another job. Tr. 54. Clearly, he had an alternative to searching for employment; he could have chosen to apply his efforts to the job he held.

Viewing Gray's work environment in terms of the cumulative effect of the alleged harassment, I do not find that conditions were so intolerable that it was reasonable for him to quit his job. Assuming that they were, however, Gray has failed to establish that the circumstances surrounding the incidents, taken individually or cumulatively, prevented him from effectively communicating to management his belief that he was being harassed, so as to afford North Star the opportunity to resolve the problem. Based on Gray's own testimony, there is every indication that North Star would have taken appropriate action to protect him from any perceived threat to his health or safety, had it been given the opportunity. There is no evidence that North Star supported any harassment or that it would have been tolerated by the company. Moreover, Gray's effectiveness in securing other employment persuades me that he was capable of

effectively communicating with North Star, had he wished to remain employed. Therefore, his failure to communicate is not excused.

Based on the record in its entirety, I find that Gray's resignation from North Star, without notice, was entirely voluntary, and that the Secretary has failed to establish, by a preponderance of the evidence, that he suffered any adverse action or was constructively discharged. Therefore, the Secretary has not proven that North Star discriminated against Gray.

III. Motion to Approve Settlement

The issue of Brummett's alleged threats was fully litigated in the Secretary's claim against North Star, and I have found that no threat occurred. I have also found that Gray voluntarily resigned from North Star and that he was not constructively discharged. In the absence of an adverse action, no finding of discrimination can be made. *See Dolan*, 22 FMSHRC at 175. Accordingly, I disapprove the settlement agreement, consistent with my finding of no discrimination in this case.

ORDER

Accordingly, inasmuch as the Secretary has failed to establish, by a preponderance of the evidence, that Gray was transferred to the second shift for engaging in activity protected under the Act, or that he was constructively discharged, it is **ORDERED** that the motion for approval of settlement agreement between the Secretary of Labor, on behalf of Mark Gray, and Jim Brummett is **DENIED**, and this Discrimination Complaint against North Star Mining, Inc., Mike Caudill, and Jim Brummett, under section 105(c) of the Act, is **DISMISSED**.


Jacqueline R. Bulluck
Administrative Law Judge

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Background

These cases involve the application of regulations on the very important subject of respirable dust in the work area of miners. These regulations are found at 30 C. F. R. Part 71, Subparts B, C and D. Respirable dust is a problem which must be evaluated from the perspectives of both concentration of dust during the work day and the type of material included in the dust. The standard's established in the regulation limit the amount of any dust and the amount of particularly harmful dust that a miner may encounter in a work day. Monitoring of exposure to dust is conducted by a meter operated in the work space of a miner to sample the air. Sampling is done initially on a spot basis and, if problem areas are identified, on a specific work station basis. This sampling of respirable dust at a specific work station is the gist of the present controversy.

MSHA has regulations on the subject of monitoring for compliance with respirable dust standards at a specific work station. These regulations are found at 30 C.F.R. §71.208. It is clear from even a quick reading of the regulation that MSHA intended the District Manager to have substantial authority and discretion in imposing a sampling plan for individual mines to suit the particular conditions encountered. The limits of the District Managers authority and discretion define the outcome of this case.

Before turning to the particular District Manager's actions which are the subject of this case, it is necessary to examine in greater detail the language of the regulations under which the District Manager must act. The regulations provide in pertinent part as follows:

71.208(c) Upon notification from MSHA that any respirable dust sample . . . exceeds the applicable standard . . . the operator shall take five valid respirable dust samples from that designated work position within 15 calendar days. . . .

71.208(e) The District Manager shall designate the work positions at each surface coal mine and surface work area of an underground coal mine for respirable dust sampling under this section. . . .

71.208(f) The District Manager shall withdraw the designation of a work position for sampling upon finding that the operator is able to maintain continuing compliance with the applicable respirable dust standard

71.208(g) Unless otherwise directed by the District Manager, designated work position samples shall be taken by placing the sampling device as follows: . . .

71.220(b)(3)(iii) Status Change Reports - Designated work Position: Abandoned - the dust generating source has been withdrawn and activity has ceased.

My task is to determine whether the record created at the hearing supports a conclusion

that the Respondent violated one or more of these regulations and, if so what the appropriate penalty should be for such violation.

Factual Findings

Respondent operates a surface mine in Eastern Kentucky known as Elswick Fork Mine #1. The mine is subject to MSHA regulations concerning concentrations of respirable dust in the workplace. Compliance with these regulations begins with a process of sampling air in the workplace with small vacuum pumps worn by workers. These pumps take in a known quantity of air in a prescribed period, typically an eight hour work day. The air is filtered by media that can be sent in a sealed cassette to a laboratory for testing. The media should contain all the dust that was in the air pumped by the meter. The laboratory results are compared to criteria established in the regulations. There are several stages in the process of determining whether the air meets these health related criteria. There is periodic sampling (biannual) to determine whether a dust problem is present, and there is follow-up sampling to determine whether the problem has been solved. It is undisputed that the dust samples conducted on equipment substituted by the Respondent on demand by the Secretary complied with the applicable standard.

This case does not involve an issue of whether a dust problem is present. It is undisputed that the Elswick Fork Mine #1 was monitored sufficiently and appropriately to determine a dust problem is present so as to require further more specific dust monitoring to determine whether the problem was solved. It is interesting to note MSHA regulations do not specify what actions a mine operator must take to solve the dust problem but implicitly provide that the operator must take whatever steps are available to reach the safe dust level. The ultimate sanction for failing to find an appropriate solution to the dust problem is an order closing the mine.

The further sampling of dust levels is directed at determining whether the air in the place where miners work has a dust concentration greater than an established standard, in this instance more than 2.0 mg per cubic meter or greater than 5% silica quartz. The citations at issue in this case are not concerned with whether those standards were exceeded. The citations concern the appropriate place to conduct the sampling, an issue raising the question of what is a designated work position.

Under MSHA regulations, a designated work position (DWP) is an area with the potential to have dangerous working conditions for dust. The regulations are not more specifically helpful in understanding the precise method of identifying a DWP. The regulation in section 71.208(e), noted above, makes designation of a DWP the responsibility of the District Manager. The testimony described two different ways a DWP is created by MSHA.

The first way is the way most of the industry creates a DWP; the way most technicians in the field have been instructed. The second way is the way District 6 has developed to deal with

the perceived problem of wandering equipment; i.e. equipment on this job today and on a different job tomorrow.

General Procedure

The procedure begins with a visit to a mine by an MSHA inspector who places dust meters in appropriate work areas. The meters sample one days exposure to dust for a variety of employees. The meter cassettes are sent to a MSHA laboratory for analysis. When the samples are evaluated, a determination is made as to whether any of the samples show a potential for violation of the applicable dust standard. If a potential violation is found, the mine operator is directed to begin a more representative sampling process on designated work positions (DWP). The mine operator receives a letter from MSHA identifying the DWP as well as the specific mining equipment which is to be used for taking further samples. This step is also important for the creation of an entry in the MSHA computer database on dust standard compliance. This entry makes a connection between the mine, the DWP, and the identifying number for the associated mining equipment.

The mine operator first takes bimonthly samples for each DWP and submits the results to MSHA. If the samples still show a potential violation, the mine operator is required to take five samples in a 30 day period and submit the results. If the result of these samples is above the applicable dust standard, the consequence is a citation and potential penalty, along with a requirement for additional samples. Assuming the samples continue to show dust levels in excess of the standard, the operator will continue to be cited for violations with increasing levels of penalties. Each sample taken is submitted to MSHA , with the computer data points established at the time the DWP was created. Each mine is required to submit dust samples through a person trained by MSHA and certified as qualified to obtain and submit appropriate samples.

If the mining equipment identified as the location of the DWP is removed from the mine or otherwise ceases operation, the DWP is abandoned (cf. Section 71.220(b)(3)(iii)) and a new DWP is established based on the next round of dust sampling.

District 6 Procedure

This procedure also begins with a visit to a mine by an MSHA inspector who places dust meters in appropriate work areas. The meters sample one days exposure to dust for a variety of employees. The meter cassettes are sent to a MSHA laboratory for analysis. When the samples are evaluated, a determination is made as to whether any of the samples show a potential for violation of the applicable dust standard. If a potential violation is found, the mine operator is directed to begin a more representative sampling process on designated work positions (DWP). The mine operator receives a letter from MSHA identifying the DWP as well as the specific mining equipment which is to be used for taking further samples. This step is also important for the creation of an entry in the MSHA computer database on dust standard compliance. This

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If the mining equipment identified as the location of the DWP is removed from the mine or otherwise ceases operation, the District requests the Operator to identify a similar piece of equipment to continue testing for dust levels. The dust samples from the new equipment are considered in determining whether the original DWP is in compliance with the applicable standard. There is no evidence in the record as to a procedure for updating the computer record of the DWP to substitute the new machinery identifying number. There is no evidence in the record of any change in training classes to certify persons as qualified to submit appropriate dust samples.

Significance of Differences

The most notable way in which the two procedures differ is the concluding step which in one procedure results in a loop back to the beginning (General Procedure) while the other procedure continues with new equipment (District 6). Under the General Procedure, when the machine identified with a particular DWP leaves the mine, the DWP is considered abandoned. This result follows from a particular understanding of section 71.220(b)(3)(iii) under which a DWP can be abandoned without the entire mine ceasing operations.

Under the District 6 procedure, when the machine identified with a particular DWP leaves the mine, the District simply requires the mine operator to substitute a similar machine in its place and continue to monitor dust levels as if the original machine were still operating. This result follows from a different understanding of section 71.220(b)(3)(iii) under which a DWP can be abandoned only when "all" activity ceases at a mine. It should be noted the record indicates that when the mine operator in this case finally substituted machines for those which had left the mine the dust measurements taken from the substituted machines were in compliance with the applicable dust standard. (TR 193). Thus if the mine operator had simply complied with the request for substitution instead of objecting and protesting the change in procedures, this case would not have existed. This case involves the alleged failure to perform the demanded dust monitoring at the initial request.

Fair Notice Implications

It is well settled that a regulation has no punitive effect until and unless regulated persons have appropriate notice of the regulation. This is known as the “fair notice” doctrine. With a few exceptions, the doctrine requires publication with opportunity for review and comment. This is the origin of the large collections of regulations such as the Code of Federal Regulations. The doctrine also extends to agency interpretation of a regulation where the interpretation is not obvious from the regulatory language. An agency is entitled to interpret its own regulations but must give “fair notice” of its interpretations to give the interpretation binding effect.

It is undisputed that District 6 never gave anyone formal, written notice of its interpretation of the regulation on abandonment of a DWP when mine equipment leaves a mine. It is also undisputed that MSHA has never given formal notice of an interpretation of the regulation to the effect that the issue is one of local management option.

The Secretary’s position here appears to be that formal, written notice of this interpretation is not necessary in this case because the appropriate officials of Branham and Baker received actual notice of the interpretation through meetings and conversations with District 6 officials. The record does not reflect a particular meeting or the activities of particular officials through which this alleged action notice occurred. My understanding of the testimony is that District 6 witnesses were not certain whether Branham and Baker had been advised of this position prior to the inspector’s initial visit. The witnesses were clear that discussion within District 6 of this position on abandonment of DWPs had occurred for some time prior to that visit to Branham and Baker. (TR 69 - 71, 89 - 90, 162).

The witnesses produced by the Respondent were clear that they, as working members of the mining industry, were not aware of a change in position in District 6 as to abandonment of a DWP until they were directed to choose substitute equipment for dust monitoring. There is no evidence to support a conclusion that the Respondent moved equipment from the mine for the purpose of evading dust sampling requirements.

Legal Conclusions

The test for relief under the doctrine of Fair Notice is well established. The Commission uses a “prudent miner” test to determine whether the regulated person had “fair notice” of the limitations or requirements that the Secretary seeks to enforce. The test is “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov., 1990). The question is not one of whether the operator had the opportunity to read any particular piece of paper, but rather whether the operator (as a knowledgeable and responsible person in the mining business) had reason to know what conduct was expected for compliance with the regulations.

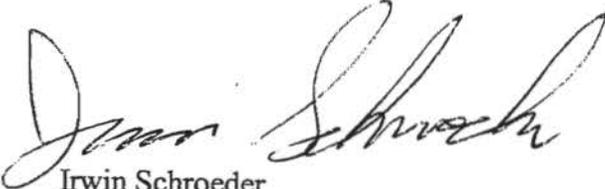
As a prelude to dealing with this "fair notice" issue, the Secretary notes a line of cases limiting the application of estoppel to government agencies where inconsistent positions have been taken in a series of enforcement actions. *U.S. Steel Mining Company*, 15 FMSHRC 1541 (Aug. 1993). These cases actually highlight the weakness of the Secretary's position in this case. In those cases the agency was taking inconsistent positions in succession, i.e. one after the other. The Commission held the Secretary was not precluded by estoppel from correcting a previous error.

This case is different in that the Secretary, through the District 6 Manager, is taking inconsistent positions at the same time but in different parts of the country. It is not a question of correction of error but of fitting interpretations to the needs of the local community. It perhaps would be possible to have such a patchwork system if the implementing regulation reserved this authority to the various District Managers. But I find nothing in the regulation making such a reservation of authority. The authority in §71.208(e) is not a means of transferring DWPs from one piece of equipment to another because it only authorizes creation of a DWP after a dust sampling program is completed. The District 6 transfer of a DWP is not related to a dust sampling program but is related to the movement of equipment on and off a mine.

It is clear to me that a reasonable, prudent person generally familiar with the mining industry would not have understood that a DWP would continue in a different piece of mining equipment after a previously designated piece of mining equipment was removed from the mine. The language of the regulation, as implemented and trained by MSHA, would support the conclusion that the DWP was abandoned (but could be recreated by appropriate testing and monitoring) with the departure of the designated equipment. A contrary position, that the DWP is abandoned only upon cessation of all activity of all equipment at the mine, was not communicated to the Respondent in this case by "fair notice". The attempt to enforce a regulation without "fair notice" is ineffective.

Order

For the reasons stated above, I find in favor of the Respondent. The Petitions are **DISMISSED**.


Irwin Schroeder
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 2003

| | | |
|----------------------------------|---|--------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. SE 2002-126 |
| Petitioner | : | A. C. No. 01-00329-03591 |
| v. | : | |
| | : | |
| U.S. STEEL MINING COMPANY, INC., | : | |
| Respondent | : | Concord Mine |

DECISION

Appearances: Dane L. Steffenson, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, and Terry G. Gaither, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Birmingham, Alabama, on behalf of the Petitioner; Anthony Jeselnik, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for Civil Penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health of 1977, 30 U.S.C. § 801 (1994), *et seq.*, the "Act," charging U.S. Steel Mining Company Inc. (U.S. Steel) with one violation of the mandatory standard at 30 C.F.R. § 77.404(a) and proposing a civil penalty for that violation. The general issue before me is whether U.S. Steel violated the cited standard and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act. Additional specific issues are addressed as noted.

The citation at bar, No. 7672461, charges as follows:

The Granular Coal Injection (GCI) was not being maintained in safe operating condition because there was a ½ inch hole in the side of the enclosed flight conveyor located at the tail of the 250 conveyor right above the foot section, 10 feet above the walkway. This was a location where a bolt that attaches the wear plate to the inside of the conveyor had been sheared. Fine coal was running out of the hole when the hole was exhausting and would stop when the hole was intaking. For this system to operate safely the atmosphere inside must remain inert and separated from the air in the outside atmosphere.

The cited standard, 30 C.F.R. § 77.404(a), provides that “[m]obile and stationery machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.”

U.S. Steel’s Concord preparation plant utilizes a thermal dryer and a granular coal injection (GCI) system to process and transport coal. Coal is dried in the preparation plant in the thermal dryer. The fine coal particles are then entrained as air passes through the coal on the thermal dryer’s fluidized bed. These entrained coal particles are then removed from the air by passing through either of two downstream cyclones. Coal particles drop to the bottom of each cyclone and are discharged through separate rotary airlocks into the enclosed GCI system. This coal is then transported through the GCI system to a retention bin and eventually into rail cars. During this process coal dust and methane are produced. To reduce the explosive hazard the oxygen content in the GCI system is reduced by injecting nitrogen into the system at various locations.

According to U.S. Steel safety procedures for the GCI system, the oxygen concentrations must be maintained well below 12% -- the level necessary for a fire or explosion (Operator’s Exhibit I). Oxygen levels are monitored by gas analyzers at sampling points within the system. When oxygen levels reach 7%, the sensors trigger a warning in the computer control room. When reaching 10% oxygen a higher alarm is signaled and the screw conveyors feeding the coal fines into the GCI system are reversed, thereby preventing additional coal from entering the system.

On March 7, 2002, Larry Richardson, an experienced coal mine inspector for the Department of Labor’s Mine Safety and Health Administration (MSHA), observed that the monitors at the preparation plant showed high oxygen levels at two locations within the GCI, *i.e.*, 7.2% oxygen at the 221 conveyor and 7.5% oxygen at the 250 conveyor. Upon inspection of the GCI system Richardson observed the cited ½ inch hole in the side of the enclosed flight conveyor at the tail of the 250 conveyor 10 feet above the walkway. According to the undisputed testimony of Richardson, this hole was located where a bolt that attaches the wear plate onto the inside of the conveyor had been sheared. Fine coal was running out of the hole when the hole was exhausting and would stop when the hole was intaking. The foreman who was present immediately arranged to have the hole plugged and, indeed, the cited condition was abated within 15 minutes.

Richardson found that the GCI system was not being maintained in safe operating condition because of the hole. He testified that coal dust and methane were contained within the system and that even though oxygen levels were monitored at the sensors, the nearest sensor was 150 feet away. According to Richardson, should oxygen entering through the hole reach a 12% level, the combination of methane, fine coal particles and the ignition source presented by the metal chain within the metal frame could result in an ignition or explosion.

Clete Stephan, MSHA's principal mining engineer and ventilation specialist, is a graduate civil engineer from the University of Pittsburgh, a licensed professional mining engineer and a certified fire and explosion investigator. He has presented over 100 lectures and training sessions in locations as far away as Australia and has authored a number of publications relating to fires and explosions. He has previously testified at trials or depositions 24 times as an expert in fires and explosions. Stephan had evaluated the subject GCI system on a number of occasions and was therefore familiar with it.

As Stephan noted, a fire or explosion can occur when you have the right mixture of fuel, heat and oxygen. He observed that methane and coal dust were present within the GCI system and an ignition source could arise from metal to metal contact exceeding combustion temperatures. He noted that methane needs 12% oxygen and coal dust needs 13% oxygen in order to ignite. He observed that oxygen is present in the system but nitrogen is injected at certain locations to keep those oxygen levels low. The system was enclosed to prevent the 20.9% oxygen content of the surrounding air from entering the system. Thus, Stephan noted that until such time as that oxygen entering the cited hole was diluted, an explosion hazard existed and the system was therefore unsafe.

U.S. Steel first claims in its post hearing brief that it did not have adequate notice of the Secretary's interpretation of the cited regulation. In determining whether notice is adequate the first consideration is whether the regulation is "plain or ambiguous." *Secretary v. Alan Lee Good d/b/a Good Construction*, 23 FMSHRC 998, 1004 (September 2001). When the language of a standard is clear, its terms must be enforced as "written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results." *Secretary of Labor v. Island Creek Coal Co.*, 20 FMSHRC 14, 18 (January 1998).

The standard cited in the present case, 30 C.F.R. 77.404(a), is not ambiguous. The wording of § 77.404(a) is identical to the wording of 30 C.F.R. § 75.1725(a). In examining the language of § 77.1725(a), in *Secretary of Labor v. Alabama By-Products Corporation*, 4 FMSHRC 2128, 2129 (December 1982), the Commission addressed and rejected the same argument, *i.e.*, that the standard was unconstitutionally vague and ambiguous. The Commission held that the fact that the standard is broad and can be applied to a myriad of different circumstances does not render it ambiguous.

In deciding whether machinery or equipment is in safe or unsafe operating condition under the cited standards, the alleged violative condition must appropriately be measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. *Alabama By-Products*, 4 FMSHRC at 2129. Accordingly, the Secretary must prove that a reasonably prudent person familiar with the GCI system and the facts surrounding the allegedly hazardous condition, including facts peculiar to the mining industry, would have recognized that the single half-inch hole in the GCI system was a hazard warranting

corrective action. *Alabama By-Products*, at 2129. In that case, the Commission held that “[t]he danger posed in underground coal mining by a friction source that will lead to a heat buildup in an area where coal accumulations could occur is obvious.” 4 FMSHRC at 2131. “Where such dangers are present due to defects in the operating condition of equipment, that equipment cannot be considered in safe operating condition.” *Id.*

For the reasons set forth below I find similarly that the danger posed by oxygen levels of 20.9% entering the cited hole in the enclosed GCI system in the presence of coal dust, methane and a potential ignition source is also obvious. It is undisputed that the GCI system at issue herein was intended and designed to safely operate only as an enclosed system with an inert atmosphere. Although it is recognized that some oxygen may be present in the system it is also recognized that such oxygen must be controlled to ensure an inert atmosphere. Thus, the GCI system was designed with nitrogen injectors at every point that air was anticipated to enter the system in order to maintain oxygen at safe levels.

In this case there is no dispute that an unintended half-inch hole was created in the GCI system. In addition, I credit Mr. Stephan’s testimony, and it is reasonable for the objective reasonably prudent person to infer, that air containing 20.9% oxygen was entering the GCI system’s internal atmosphere through this hole. I also credit Stephan’s testimony, and it is reasonable for the objective reasonably prudent person to infer, that the air just inside the hole would contain 20.9% oxygen, as it would not immediately be diluted upon entering the internal atmosphere. I further credit his expert testimony, and it is reasonable for the objective reasonably prudent person to infer, that the half-inch hole permitted a sufficient amount of air to enter the GCI system to create an area with greater than 13% oxygen concentration and an area large enough to support a fire or explosion. Thus, a reasonably prudent person familiar with the operation of the GCI system would easily have identified an unplanned hole allowing air containing 20.9% oxygen to enter the system as a hazard warranting corrective action. *See Alabama By-Products*, 4 FMSHRC at 2131. The GCI system was not maintained in a safe operating condition and therefore there was a violation of the cited standard.

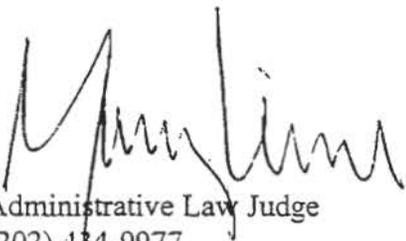
In reaching these conclusions I have not disregarded Respondent’s claims that the Secretary failed to prove that the oxygen at the cited hole was at an unsafe level. While it is true that no actual tests were taken inside the one-half inch hole to determine the oxygen levels inside the GCI system, I find that the inferences made by MSHA’s expert, Cleve Stephan, were rational and were sufficient to prove that unsafe levels of oxygen were in fact entering the GCI system, and that the same inferences would be made by any objective reasonably prudent person. I also note, in response to U.S. Steel’s claims that the oxygen sensors would have detected any excess oxygen, that such sensors were located some 90 feet from the cited hole. It is therefore obvious that such sensors would not have provided sufficient warnings.

Civil Penalty Analysis

In assessing a civil penalty under Section 110(i) of the Act, the Commission and its judges must 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 in the person charged in attempting to achieve rapid compliance after notification of a violation. U.S. Steel does not have a serious history of violations. It is a large size business and achieved rapid compliance (within 15 minutes) of the notice of the violation herein. The Secretary acknowledges that the violation was of low gravity and that U.S. Steel was not negligent in causing the violation. No evidence was presented to show what effect the penalty would have on the operator's ability to continue in business. Within this framework I find that the Secretary's proposed penalty of \$55.00, is appropriate.

ORDER

Citation No. 7672461 is hereby affirmed and U.S. Steel Mining Company Inc., is directed to pay a civil penalty of \$55.00, within 40 days of the date of this decision.



Administrative Law Judge
(202) 434-9977

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001

April 1, 2003

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|---------------------------|---|-----------------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 2002-80-M |
| Petitioner | : | A.C. No. 41-00009-05555 |
| | : | |
| | : | Docket No. CENT 2002-124-M |
| | : | A.C. No. 41-00009-05556 |
| | : | |
| | : | Docket No. CENT 2001-285-M |
| | : | A.C. No. 41-00009-05550 |
| | : | |
| v. | : | Docket No. CENT 2001-286-M |
| | : | A.C. No. 41-00009-05551 |
| | : | |
| | : | Docket No. CENT 2001-363-M |
| | : | A.C. No. 00009-05552 |
| | : | |
| | : | Docket No. CENT 2001-364-M |
| CACTUS CANYON QUARRIES OF | : | A.C. No. 41-00009-05553 |
| TEXAS, INCORPORATED, | : | |
| Respondent | : | Docket No. CENT 2001-379-M |
| | : | A.C. No. 41-00009-05554 |
| | : | |
| | : | Mine: Fairland Plant and Quarries |

**ORDER DENYING CERTIFICATION FOR
INTERLOCUTORY APPEAL**

By a Motion received on March 17, 2003, Respondent seeks to raise procedural and discovery issues before the Commission prior to a hearing on the merits of the allegations of safety violations. Under Commission Rule 2900.76, Respondent seeks immediate review by the Commission of my March 3, 2003 Order denying the Respondent's several motions to dismiss the Petitions for reasons generally related to delays in the initiation of these proceedings. On March 27, 2003, the Secretary filed a detailed Opposition to the Respondent's request. For the reasons briefly discussed below, I decline to certify my Order for interlocutory appeal.

Materially Advance Final Disposition

A Motion to Dismiss, by its very nature, is an attempt to bring a claim to an early disposition. It is an attempt to reach a final disposition without the need for examination of the merits of the asserted claim. Denial of a Motion to Dismiss is not normally appealable separate and apart from an appeal on a decision on the merits.

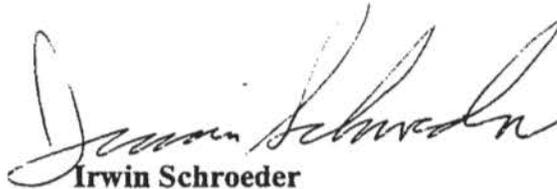
I am not persuaded the Respondent has made a compelling case that the issues raised in its request for interlocutory appeal certification are so decisive as to materially advance the final disposition. It makes no real attempt to assert prejudice from being required to complete a presentation on the merits prior to having an opportunity to present these issues to the Commissioners. Many of the assertions by the Respondent concern factual rather than legal matters and a more complete factual record would undoubtedly be helpful in any eventual appellate review.

Controlling Questions of Law

My order denying the Respondent's Motions to Dismiss states the controlling issues are mixed questions of law and fact. As the Secretary argues at some length, there are a great number of cases illustrating the sensitive balancing process involved in evaluating the argument that delay in pursuing a claim means the claim is lost. The appropriate standard of review on appeal would be a "substantial evidence" test for the factual questions and "clear error" on the legal questions. It is difficult to imagine an interlocutory appeal appropriately addressing the "substantial evidence" issue.

ORDER

For the foregoing reasons, the Motion for Certification of Interlocutory Appeal is denied.



Irwin Schroeder
Administrative Law Judge

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