

MAY

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MAY

The following case was directed for review during the month of May:

Secretary of Labor, MSHA v. Amax Chemical Corporation, Docket No. CENT 84-91-M. (Judge Melick, March 26, 1985)

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

Raymond Copeland v. Agrico Mining Company, Docket No. SE 84-48-DM. (Judge Lasher, April 15, 1985)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 15, 1985

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

SOUTHWESTERN ILLINOIS COAL
CORPORATION

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Docket No. LAKE 82-38

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), involves application of the principles and conclusions announced in Southwestern Illinois Coal Corp., 5 FMSHRC 1672 (October 1983) ("Southwestern I"). The parties and the crucial issues in the present case are the same as those involved in Southwestern I. We find the decision in that case dispositive of the issues before us and conclude that Southwestern Illinois Coal Corporation ("Southwestern") violated 30 C.F.R. § 77.1710(g). 1/ Accordingly, for the reasons explained below, we reverse and remand for a determination of whether the violation was "significant and substantial" and for assessment of an appropriate civil penalty.

1/ 30 C.F.R. § 77.1710(g) provides:

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

*

*

*

(g) Safety belts and lines where there is danger of falling;....

The relevant facts are stipulated. Southwestern owns and operates a large surface coal mine in Perry County, Illinois, known as the Captain Mine. On September 18, 1981, during a regular inspection of the Captain Mine, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") observed a miner working approximately 18 feet above ground on the mine's "lazer tower". One of the miner's knees was wrapped around the vertical leg of the tower, and he was using both hands to reposition the "lazer". The miner was not wearing a safety belt and there were no safety belts in the immediate area. The parties stipulated that the miner was in danger of falling. The inspector ordered the miner down, instructed him to get a safety belt, and issued Southwestern a citation alleging a violation of 30 C.F.R. § 77.1710(g). The inspector further found that the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard. 30 U.S.C. § 814(d)(1). After the miner obtained a safety belt the inspector instructed him in its use and terminated the citation.

During October 1978 Southwestern had implemented a new company safety program at the mine. According to Southwestern's safety director, the safety program included giving a copy of the company's safety rules and regulations to each new employee and explaining the rules in detail to all new employees during a seminar. These rules required all employees to comply with federal mine safety and health standards and specifically provided that "safety belts and lines shall be worn at all times when there is a danger of falling." The rules were explained again to all employees during an annual, MSHA approved, refresher training course. All Southwestern employees who participated in the safety training were informed that violations of any of the safety rules or regulations would warrant issuance of a company notice of safety violation and that the notice would remain in an employee's personnel file for one year from the date it was written. Southwestern's policy also mandated progressive discipline for repeated violations, including suspension without pay or discharge.

Pursuant to this policy, the miner in question had received a copy of Southwestern's safety rules and regulations and participated in the new miner safety seminar. The seminar included one hour of training regarding safety belts and their use. Approximately seven months later, and approximately 15 months before the tower incident, the miner had received refresher training which included instructions in the use of safety belts. Following the tower incident, the miner was issued a notice of safety violation because of his failure to comply with the rule regarding the wearing of safety belts. Because it was the miner's first violation, the notice was placed in his personnel file for one year and no further action was taken.

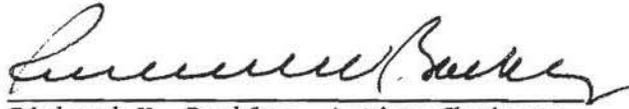
Based on these facts the parties submitted cross-motions for summary decision. The Secretary of Labor argued that the miner violated the standard by not wearing a safety belt while working where there was a danger of falling and that Southwestern should be held liable for the violation. The Commission's administrative law judge held that the fact that the miner was working without a safety belt in a situation posing a danger of falling did not establish a violation of 30 C.F.R. § 1710(g) unless the Secretary also proved that Southwestern had failed to require its employees to wear safety belts. 5 FMSHRC at 1186-87, citing Southwestern Illinois Coal Corp., 3 FMSHRC 871 (April 1981)(ALJ). Because Southwestern instructed its employees to wear safety belts in situations involving a danger of falling and because that instruction was supported by disciplinary action, the judge concluded that the Secretary had not met his burden of proof and vacated the citation. 5 FMSHRC at 1187.

Subsequent to our grant of review in this case, we issued our decision in Southwestern I interpreting 30 C.F.R. § 1710(g). We held that "when an operator requires its employees to wear [safety] belts when needed, and enforces that requirement, it has discharged its obligation under the regulation." 5 FMSHRC at 1675. Thus, the judge in the present case interpreted the standard in a manner facially consistent with our decision in Southwestern I.

We further concluded in Southwestern I, however, that the record did not show that Southwestern had engaged in sufficiently specific and diligent enforcement of the safety belt requirement to discharge its obligation under the standard. We found Southwestern's relevant safety policies and procedures deficient because they left the decision to wear a safety belt largely to the miner and because of a virtual absence of any site-specific guidelines and supervision on the subject of actual fall dangers. 5 FMSHRC at 1676.

We reach the same conclusion in the present case. The affidavit in the record of Southwestern's safety director states that the same safety policies and enforcement procedures in effect in Southwestern I were also in effect at the time of the instant citation. While the record supports the judge's findings that Southwestern had a safety program requiring the wearing of safety belts, and that miners violating this requirement were disciplined, sufficient evidence of Southwestern's specific enforcement actions and its diligence in site-oriented enforcement of its safety belt rule is lacking. As in Southwestern I, the present record reveals a too broad delegation to the miner of the ultimate decision as to whether the wearing of a belt was necessary and too little hazard-specific guidance and supervision by the operator.

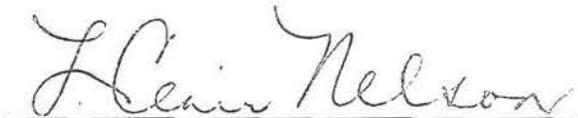
Accordingly, we conclude that Southwestern violated 30 C.F.R. § 77.1710(g). We reverse the judge's vacation of the citation and remand for determination of whether the violation was significant and substantial and for assessment of an appropriate civil penalty. 2/



Richard V. Backley, Acting Chairman



James A. Lastowka, Commissioner



L. Clair Nelson, Commissioner

2/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 16, 1985

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. VA 83-26
	:	VA 83-36
v.	:	VA 83-39
	:	VA 83-44
MINERAL COAL SALES, INC.	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises from four citations issued to Mineral Coal Sales, Inc. ("Mineral"), for regulatory violations alleged to have occurred at its Mineral Siding facility. As its sole contention on review, Mineral argues that its Mineral Siding facility is not a "mine" and that Mineral itself is not an "operator" within the meaning of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). A Commission administrative law judge rejected these arguments, found that the Secretary of Labor had established the existence of the violative conditions, and assessed civil penalties against Mineral for those violations. 6 FMSHRC 809 (April 1984) (ALJ). For the reasons set forth below, we affirm.

Mineral is the owner of Mineral Siding, a facility that consists of a railroad siding, a storage yard, and a trailer that houses laboratory equipment for testing coal. Equipment at the site includes a truck scale, a mobile tipple that crushes coal and conveys it onto railroad cars, a stationary grading tipple, and front-end loaders used to transfer coal from various stockpiles to the tipples. A combination house and office building adjacent to the tract serves as Mineral's office.

At the time of the events at issue, Mineral extracted no coal itself and was not affiliated with any producing mine or transportation company. Rather, the coal handled at its facility was purchased by coal brokers from producing mines or from independent truckers. The brokers arrange for delivery of coal by truck to Mineral Siding and, after loading, for delivery of the coal by rail to their various customers. Mineral charges the brokers a flat rate per ton of coal loaded onto the railroad cars. The coal broker last operating at Mineral Siding was Hubbard Enterprises of Southwest Virginia, Inc. ("Hubbard").

Coal trucked to Mineral Siding is weighed on a truck scale by a Hubbard employee, who then directs the hauler to dump the coal on a specific stockpile. Coal of substantially the same quality is stockpiled together. Once the coal is dumped onto a stockpile, Hubbard tests it to determine BTU, ash, and sulfur content, and its free swelling index. When coal is to be loaded for shipment to a customer, Hubbard informs Mineral as to how many scoops of coal should be taken from particular stockpiles in order to fill the appropriate number of railroad cars comprising the order. Mineral then draws off the proper number of scoops from the stockpiles and dumps them into the hopper of the mobile tipple. Another Mineral employee operates the tipple and oversees the loading of the railroad cars. The coal passes from the hopper of the tipple into the crusher unit where it is crushed to a uniform size. The coal then travels on the tipple's conveyor belt and is loaded onto the railroad car. When each railroad car is full, the mobile tipple is repositioned to load the next car. Once a railroad car is loaded, Hubbard again samples and tests the coal to ensure that the load meets the specifications of the respective order.

A stationary grading tipple is also present at the Mineral Siding facility. Coal passes over various sizing screens to separate "lump", "egg", and "stoker" coal. This tipple is used primarily to produce coal for domestic consumption.

At various times relevant to these proceedings, Mineral leased property interests in Mineral Siding to other business concerns. From January 1982 through June 1982, Mineral leased the facility to Summit Resources, Inc. During the latter part of its leasehold, Summit denied inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA") access to the facility. MSHA obtained a court order allowing the inspection. When the inspectors returned, Mrs. Bobbie Slusher, Mineral's president and sole stockholder, informed them that Mineral had resumed control of the facility and permitted the inspection.

From July 1982 through the end of February 1983, Mineral leased the Mineral Siding facility to a company known as Interwise. Interwise operated Mineral Siding on a trial basis with the intention of purchasing the facility from Mineral. When Interwise was unable to obtain the financing necessary to complete the transaction, Mrs. Slusher terminated its lease and Mineral again proceeded to operate the facility itself.

From June 1982 through at least the time of the hearing, Mineral leased Hubbard that portion of Mineral Siding necessary to conduct Hubbard's operations. While Hubbard did not have exclusive use of the facility, it was entitled to first use to conduct its business. During the time that Interwise operated Mineral Siding, Hubbard paid Mineral a flat rate per ton for use of the loading facility and for the loading of its coal. Mineral, in turn, paid Interwise one-half of that amount for doing the actual loading. When operation of the facility reverted to Mineral from Interwise on March 1, 1983, Mineral realized the full amount for the coal its employees loaded for Hubbard. Hubbard continued to rent an office in the same building where Mineral maintained its office. Hubbard also rented for its exclusive use the trailer and laboratory facilities used for testing coal. None of these leases or contracts were ever reduced to writing.

Each entity operating at Mineral Siding maintained its own payroll and controlled its own employees. Typically, not more than a total of four employees from all the entities were present on the property at any time. When Interwise operated the facility, two of Mineral's current employees, Mrs. Slusher's brother-in-law and her nephew, were on its payroll and were responsible to its management. During Interwise's tenancy, Mineral had no employees. Following termination of the Interwise lease, its two employees were placed on Mineral's payroll.

In December 1982 and January 1983, during Interwise's lease of the facilities, MSHA cited Mineral for two violations of 30 C.F.R. § 50.30 for failure to submit accurate quarterly employment and production reports. On March 1, 1983, the day Mineral terminated the lease to Interwise and resumed operation of the facility, MSHA cited Mineral under 30 C.F.R. § 71.803 for failure to conduct a periodic noise survey for two employees. Prior to that date, the affected employees had been employed by Interwise. Also on March 1, MSHA cited Mineral under 30 C.F.R. § 77.1705 for failure to provide first aid refresher training for a supervisory employee during the previous calendar year. The supervisory employee had been employed by Interwise at the close of the previous calendar year. Mineral contested the four citations arguing primarily that the Mineral Siding facility was not a mine and that it was not a mine operator.

In his decision, the judge rejected both arguments. The judge applied the principles enunciated in Oliver M. Elam, Jr., Co., 4 FMSHRC 5 (January 1982), but distinguished the facts in the present case from those giving rise to Elam's holding that the commercial loading dock involved therein was not a "mine". The judge found that, unlike the operation involved in Elam, "the coal loading process carried out [at the Mineral Siding facility] includes a procedure and practice whereby the coal that is ultimately loaded and shipped to the customers of Hubbard ... is mixed to their particular specifications and standards." 6 FMSHRC at 840. The judge further found that the "operation carried

out by [Mineral] includes the custom blending and loading of coal to meet the ... specifications and needs of Hubbard's customers." 6 FMSHRC at 841. With regard to his finding that Mineral was an "operator" under the Mine Act, the judge commented:

While I consider [Mineral's] "mining operation" to be a rather low key family operation, it does in fact qualify as a "mine" under the Act. My view here is that the operations carried out by Hubbard ... and Mineral ... consist of small family oriented business ventures which may not compare in size and scope with some other mining operations inspected by [MSHA]. However, ... I am constrained to find that [Mineral] is a "mine operator" within the meaning of the Act, and is subject to MSHA's enforcement jurisdiction.

6 FMSHRC at 840. The judge affirmed the citations issued to Mineral and assessed civil penalties.

On review Mineral contests only the judge's findings that the Mineral Siding facility is a "mine" and that Mineral is an "operator". We address first the question of whether the Mineral Siding operation is a "mine" within the meaning of the Mine Act.

Section 4 of the Mine Act, 30 U.S.C. § 803, provides that each "coal or other mine" is subject to the Act. The definition of the term "coal or other mine" provided in section 3(h) of the Act is extremely broad. 1/ A "mine" includes the area of land from which minerals are extracted, roads appurtenant to such areas, lands and facilities used in the work of extracting, milling, or preparing coal or other minerals, and custom coal preparation facilities. The central question in this case is whether coal preparation, or the "work of preparing the coal", is carried out at Mineral Siding. That term is defined in section 3(i) of the Act:

"[W]ork of preparing the coal" means the breaking crushing, sizing, cleaning, washing, drying,

1/ Section 3(h), 30 U.S.C. § 802(h), states:

- (1) "[C]oal or other mine" means (A) an area of land from which materials are extracted in nonliquid form or, if in liquid form, are extracted with workers underground,
- (B) private ways and roads appurtenant to such areas, and
- (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including

(footnote 1 continued)

mixing, storing and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine[.]

30 U.S.C. § 802(i).

In previous decisions, the Commission has discussed the basic framework for determining whether a coal handling operation is engaged in coal preparation. In Elam, the Commission held that under the statutory definition the mere fact that some of the work activities listed in section 3(i) are performed at a facility is not solely determinative of whether the facility properly is classified as a "mine". Rather:

[I]nherent in the determination of whether an operation properly is classified as "mining" is an inquiry not only into whether the operation performs one or more of the listed activities, but also into the nature of the operation performing such activities. ...

footnote 1 end.

impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. ...

(2) For purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities[.]

30 U.S.C. § 802(h).

... [A]s used in section 3(h) and as defined in section 3(i), "work of preparing [the] coal" connotes a process, usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications.

4 FMSHRC at 7, 8 (emphasis in original). In Elam the Commission held that a commercial loading dock that loaded coal, in addition to other materials, was not a "mine". The Commission concluded that Elam's handling of the coal, which included storing, breaking, crushing, and loading, was done solely to facilitate its loading business and not to meet customer's specifications or to render the coal fit for any particular use.

The Commission followed Elam in Alexander Brothers, Inc., 4 FMSHRC 541 (April 1982), a case arising under the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976)(amended 1977). We concluded that an operation that extracted materials from a waste dump and separated coal from the refuse in order to market the coal was engaged in coal preparation. Accord: Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 591-92 (3rd Cir. 1979)(a facility that separated coal fuel from material dredged from a river bottom by another entity was engaged in coal preparation under the Mine Act). The Commission has also emphasized that a preparation or milling facility need not have a connection with the extractor of the mineral in order to be subject to coverage of the Mine Act. Carolina Stalite Co., 6 FMSHRC 2518, 2519 (November 1984); Alexander Brothers, Inc., 4 FMSHRC at 544.

Applying the above criteria, we have no difficulty concluding that the business engaged in at Mineral Siding constitutes "mining" under the Act. At this facility coal is stored, mixed, crushed, sized, and loaded--all activities included in the statutory definition of coal preparation. Furthermore, an examination of the nature of the Mineral Siding operation reveals that, unlike the commercial loading dock in Elam at which coal was crushed merely to facilitate loading and transportation on barges, at Mineral Siding all of the above listed work activities are performed on the coal to make it "suitable for a particular use or to meet market specifications." ^{2/} Thus, coal preparation occurs at Mineral Siding and MSHA properly asserted its inspection authority over the facility.

Mineral further argues, however, that its employees at the Mineral Siding facility merely load coal from two or three different stockpiles and that such activity does not constitute coal preparation, particularly when such selective loading is done under the direction and control of the other entity involved, Hubbard. In effect, Mineral contends that the various activities at the Mineral Siding facility should be analyzed in isolation from one another. We reject this approach. In examining

^{2/} Coal is the sole commodity handled at Mineral Siding. In Elam, only 40 to 60 percent of the tonnage loaded was coal. Elam, 4 FMSHRC at 5.

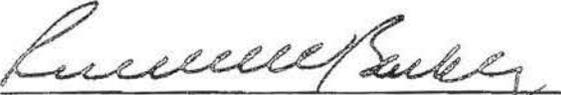
the "nature of the operation" performing work activities listed in section 3(i), the operations taking place at a single site must be viewed as a collective whole. Otherwise, facilities could avoid Mine Act coverage simply by adopting separate business identities along functional lines, with each performing only some part of what, in reality, is one operation. This approach is particularly appropriate in the present case in view of the pervasive intermingling of personnel and functions among entities that sporadically operated at the facility, with little or no apparent regard for business or contractual formalities.

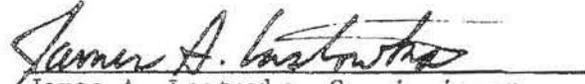
Having determined that the Mineral Siding facility is a mine, we further hold that Mineral Coal Sales was properly found to be an operator of that mine. Section 3(d) of the Mine Act defines the term "operator" as follows:

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

30 U.S.C. § 802(d). Mineral is the owner of the Mineral Siding facility, which, as concluded above, is a "mine". The record reveals that Mineral maintained an active presence at Mineral Siding, retained sufficient control over the facility to terminate leases at will, and before, during, and after the various leaseholds, operated and supervised the facility itself. Given the statutory definition and these facts, MSHA's citation of Mineral as an operator of the Mineral Siding facility must be upheld.

For the reasons set forth above, the decision of the administrative law judge is affirmed. 3/


Richard V. Backley, Acting Chairman


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

3/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 28, 1985

DISCIPLINARY PROCEEDING : Docket No. D-84-1
:

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This disciplinary proceeding arises under Commission Procedural Rule 80, 29 C.F.R. § 2700.80. 1/ In a decision finding Getz Coal Sales, Inc. ("Getz"), in default and assessing civil penalties for violations

1/ Rule 80 provides in pertinent part:

Standards of conduct; disciplinary proceedings.

(a) Standards of conduct. Individuals practicing before the Commission shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.

(b) Grounds. Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that he has engaged in unethical or unprofessional conduct, ... or that he has violated any provisions of the laws and regulations governing practice before the Commission....

(c) Procedure. ... [A] Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission, shall forward such information, in writing, to the Commission for action. Whenever in the discretion of the Commission, by a majority vote of the members present and voting, the Commission determines that the circumstances reported to it warrant disciplinary proceedings, the Commission shall either hold a hearing and issue a decision or refer the matter to a Judge for hearing and decision....

29 C.F.R. § 2700.80.

of mandatory safety standards, a Commission administrative law judge referred to the Commission circumstances concerning the conduct of the operator and its counsel which the judge believed warranted disciplinary proceedings. 6 FMSHRC 1333 (May 1984)(ALJ). By order of July 2, 1984, the Commission accepted the referral and docketed this disciplinary proceeding. On the grounds explained below, we conclude that a cautionary warning is in order, but that no further disciplinary proceedings are necessary at this time.

Getz operates a surface coal mine located near Lisbon, Ohio. On May 16, 1983, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Getz four citations alleging violations of mandatory safety standards involving the presence of uncorrected equipment defects and a lack of required equipment on two bulldozers at the mine. Getz abated the alleged violations and did not file notices of contest with respect to the citations.

On August 15, 1983, the Secretary of Labor filed with this independent Commission a proposal for the assessment of civil penalties seeking penalty assessments of \$20 each for the four alleged violations. By letter to the Commission dated August 30, 1983, Roland A. Getz, president of Getz, "appeal[ed]" the Secretary's penalty proposal and requested "a telephone hearing." As a result of Getz's contest of the proposed penalties, this civil penalty proceeding was assigned to a Commission administrative law judge.

On January 16, 1984, the Commission's administrative law judge issued a notice scheduling a hearing for April 12, 1984, in Youngstown, Ohio, and denying the operator's request for a telephonic hearing:

Respondent [Getz] has contested the civil penalty proposals made by the petitioner [Secretary of Labor] in this case, and requests a "telephone hearing." The [Commission's] rules do not provide for telephone hearings, and respondent's request is DENIED. Respondent is entitled to a personal hearing in this matter, and is entitled to be represented by counsel of its own choosing, or by its President Roland A. Getz. Further, this is not the first time this respondent has appeared in cases docketed before this Commission, and it should be familiar with the procedures. Under the circumstances, a hearing is hereby scheduled in this matter, commencing at 9:30 a.m., Thursday, April 12, 1984, in Youngstown, Ohio, and the parties will be further advised as to the precise hearing location in Youngstown.

* * *

The parties are advised that any proposed settlement concerning this matter shall be filed with me in writing no later than ten calendar days in advance of the scheduled hearing....

Any proposed settlements filed later than the ten day period noted above will be rejected and the parties will be expected to appear at the scheduled trial of the case.

Notice of Hearing dated January 16, 1984 (emphasis in original). The judge's notice was sent by certified mail to Mr. Getz, and the record in this case includes the operator's signed and returned certified mail receipt. By letter to the judge dated February 6, 1984, attorney Neal S. Tostenson advised the judge that he would be representing Getz at the scheduled hearing. On March 22, 1984, the judge issued an amended notice of hearing setting forth the specific location of the hearing site. This notice was sent by certified mail to Mr. Tostenson, and the record includes his office's signed certified mail receipt.

On the afternoon of April 11, 1984, the day before the scheduled hearing, the judge was advised by counsel for the Secretary of Labor that Getz's attorney, Mr. Tostenson, had telephoned him that morning to inform him that Getz wished to settle the case and pay the \$80 in proposed penalties. Tr. at 7, 9; Judge's Memorandum to File dated April 23, 1984. The judge requested the Secretary's counsel to telephone Mr. Tostenson and inform him that the judge intended to proceed with the hearing as scheduled. Tr. at 8, 9; Judge's Memorandum to File dated April 23, 1984. The judge informed counsel for the Secretary that if Mr. Tostenson did not appear, he would treat Getz as being in default and would consider referring the matter to the Commission for possible disciplinary action. Id. A short time later, counsel for the Secretary telephoned the judge and informed him that he had contacted Mr. Tostenson's office, but that Mr. Tostenson had already left for the day. Id. Counsel for the Secretary left instructions with Mr. Tostenson's secretary to relay the judge's message to him. Id.

Prior to convening the hearing on April 12, 1984, the judge telephoned Mr. Tostenson at his office and was advised by a receptionist and a secretary that Mr. Tostenson had received the message left for him by counsel for the Secretary. 6 FMSHRC at 1344; Tr. at 9. Mr. Tostenson was not in his office and neither of his employees could indicate whether he would enter an appearance at the hearing. Id. Mr. Tostenson failed to appear at the hearing and no other appearance was entered on behalf of Getz.

In his final decision, the judge found Getz in default, affirmed the citations, determined that the violations were "significant and substantial," and assessed penalties higher than those proposed by the Secretary. Additionally, the judge noted that Getz had a history of being found in default by Commission judges for failing to appear at scheduled hearings. 6 FMSHRC at 1343. The judge also found that counsel

Tostenson had received notice of the hearing, and that his failure to appear constituted a "flagran[t]" disregard of the judge's notices and orders. 6 FMSHRC at 1344. Accordingly, the judge referred the matter to the Commission for consideration of disciplinary action pursuant to Commission Procedural Rule 80, 29 C.F.R. § 2700.80. By order dated July 8, 1984, the Commission accepted the referral and ordered the parties to submit in writing their respective statements of position regarding the referral. The Secretary submitted his statement through counsel, as did Getz and Mr. Tostenson, who are each represented before the Commission by counsel.

Because in this proceeding Getz retained counsel to represent its interests, the focus of our attention is upon the conduct of Mr. Tostenson in failing to appear at the scheduled hearing on April 12, 1984. Although some minor factual matters may be in dispute, our disposition of this disciplinary matter does not require us to resolve them. The material facts are not in dispute. Mr. Tostenson knew that any proposed settlement of this case was subject to the judge's approval. He also received the message relayed through the Secretary's counsel on the day prior to the hearing that the judge was not going to cancel the hearing and that a failure to appear by Mr. Tostenson would subject Getz to default and could result in disciplinary proceedings. Despite this notice, Mr. Tostenson failed to appear at the hearing as scheduled or otherwise attempt personally to advise the judge of his intent.

The judge's January 16, 1984 notice of hearing stated unambiguously that any proposed settlement filed later than ten calendar days prior to the April 12, 1984 hearing would be rejected and that the parties would be expected to appear at the hearing as scheduled. Having entered his appearance on behalf of Getz on February 6, 1984, Mr. Tostenson had ample time to evaluate the case and negotiate a proposed settlement with the Secretary. Instead, he elected to wait until just before the hearing to propose a settlement. (Section 110(k) of the Mine Act mandates Commission approval before a contested penalty can be accepted). Mr. Tostenson also relied on the Secretary's counsel to submit his proposed settlement to the judge for approval the day before the hearing. The statement of position filed with us on Mr. Tostenson's behalf avers:

[Mr. Tostenson] left his law office in Cambridge, Ohio on April 9 and spent the rest of the week in Columbus on business....

He left knowing that: (1) his offer of payment of \$80 in full settlement of the case was subject to [the judge's] approval, (2) [the Secretary's counsel] was to discuss his offer with [the judge] and (3) he had unequivocally informed [the Secretary's counsel] that he would not attend the hearing in Youngstown.

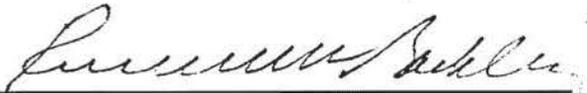
He subsequently learned that [the Secretary's counsel] did call his office to tell him that [the judge] was not going to cancel the hearing.

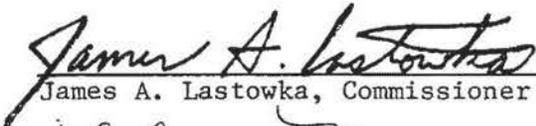
Thus, Mr. Tostenson decided unilaterally that he would not attend the hearing, despite the judge's prior notice that any settlement proposal submitted within 10 days of the hearing would be rejected. Mr. Tostenson also ignored the message relayed to his office by the Secretary's counsel the day prior to the hearing that the hearing would go forward as scheduled and that a failure to appear by Mr. Tostenson would subject Getz to default and could trigger disciplinary proceedings. Mr. Tostenson's failure to appear flouted the judge's orders and his authority to regulate the course of proceedings under Commission Procedural Rule 54, 29 C.F.R. § 2700.54.

The Commission does not condone and will not tolerate such conduct by an attorney practicing before it. Considerable time, effort, and expense were expended in affording a forum in which the mine operator could pursue its contest of the civil penalty assessments proposed by the Secretary of Labor. Dockets had to be managed, hearing space reserved, and a court reporter provided. The Commission judge had to travel to Youngstown, Ohio, from Falls Church, Virginia, for the hearing. And, of course, the Secretary also incurred time and expense in preparing the government's case. Having entered an appearance before this independent adjudicatory agency, Mr. Tostenson, as an "officer of the court", was obliged to conduct his affairs in accordance with all applicable rules, procedures, and codes of conduct. His conduct in the present case falls short of acceptable standards. In mitigation, however, we note that to our knowledge this is the first display of such conduct by Mr. Tostenson before the Commission. Largely because of this consideration, we conclude that no disciplinary action against Mr. Tostenson is warranted presently. We must warn Mr. Tostenson, however, against any repetition of this or similar conduct. ^{2/} Further incidents will result in a disciplinary referral before this Commission and other appropriate bodies.

^{2/} Due to the appearance entered on behalf of Getz Coal Sales by an attorney, Getz's history of defaults, described by the judge in his decision, is not squarely before us in the present proceeding. However, we also serve notice on Getz that any continuing course of conduct evincing a refusal to comply with the duly issued orders of Commission judges could subject it to injunctive sanctions instituted by the Secretary of Labor under section 108 of the Mine Act, 30 U.S.C. § 818, and to the contempt provisions set forth in section 113(e) of the Act, 30 U.S.C. § 823(e).

For the reasons set forth above, this disciplinary proceeding is terminated. 3/


Richard V. Backley, Acting Chairman


James A. Lastowka, Commissioner


E. Clair Nelson, Commissioner

3/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 28, 1985

ROBERT K. ROLAND	:	
	:	
v.	:	Docket No. WEST 84-46-DM(A)
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case involves a complaint of discrimination filed by a miner, Robert K. Roland, against the Secretary of Labor and the Department of Labor's Mine Safety and Health Administration ("MSHA"). The complaint alleges that the Secretary violated section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act") by withdrawing his representation of Mr. Roland in an action against Mr. Roland's former employer, Oil Shale Constructors ("OSC"). The Secretary filed a motion to dismiss the complaint against the Secretary and MSHA, asserting the failure of the complainant to state a claim upon which relief could be granted. A Commission administrative law judge denied the Secretary's motion, concluding that the Secretary and MSHA were susceptible to suit under the provisions of section 105(c) of the Mine Act, 30 U.S.C. § 815(c), and that the complainant, therefore, had stated a cause of action. We granted the Secretary's petition for interlocutory review. 1/ For the reasons that follow, we reverse the judge's decision and dismiss Mr. Roland's complaint.

On May 2, 1981, Mr. Roland suffered serious injuries to his head, shoulders, and back as a result of a ground fall at OSC's Parachute Creek Mine near Parachute, Colorado. After a period of recuperation,

1/ The Commission solicited the participation of amici curiae at the review level. The United Mine Workers of America ("UMWA") responded and filed a brief that assisted the Commission in resolving the important issues presented in this case brought by a pro se miner.

Mr. Roland returned to light work at various OSC job sites. He was working in the Wheat Ridge Office Shop in Denver, Colorado, when he was discharged on February 9, 1982. Mr. Roland filed with MSHA a 26-page complaint of discrimination against OSC, pursuant to section 105(c)(2) of the Mine Act. 30 U.S.C. § 815(c)(2). Mr. Roland alleged that, among other things, OSC had wrongfully discharged him because he had questioned the safety procedures of OSC and had been in contact with MSHA regarding his accident.

After investigating Mr. Roland's complaint, the Secretary of Labor, on June 13, 1983, filed with the Commission a complaint of discrimination on Mr. Roland's behalf against OSC. On December 15, 1983, however, the Secretary filed a motion seeking to withdraw the discrimination complaint. The motion provided no reasons for the requested withdrawal. The motion was granted by Commission Judge John Carlson in an order issued on December 22, 1983. Secretary of Labor on behalf of Robert K. Roland v. Oil Shale Constructors, 5 FMSHRC 2221 (December 1983)(ALJ). In his order, Judge Carlson indicated that previously he had informed Mr. Roland that he had "fifteen days, if he wished them, in which to file formal objections to the Secretary's motion to withdraw. Mr. Roland indicated an understanding of what was involved and affirmatively waived his right to object." 5 FMSHRC at 2222. The judge advised Mr. Roland in the decision that he had thirty days to refile a complaint with the Commission on his own behalf pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). Id.

On January 20, 1984, Mr. Roland filed a letter with the Commission expressing dissatisfaction with the Secretary's withdrawal from the case and indicating a desire to know why the complaint had been withdrawn. In the letter, Mr. Roland reasserted his claim of discrimination against OSC, as well as his request for temporary reinstatement. The Commission's Chief Administrative Law Judge treated this letter as a section 105(c)(3) complaint of discrimination against OSC and styled the matter Robert K. Roland v. Oil Shale Constructors. (The letter did not name the Secretary or MSHA as respondents.) The case was assigned to Commission Judge Gary Melick. Although Mr. Roland's letter made no mention of taking action against either the Secretary of Labor or MSHA, the next order issued by Judge Melick included the Secretary and MSHA as additional party-respondents. That order did not explain the reason for the joinder.

Shortly thereafter, on February 27, 1984, Mr. Roland and counsel for OSC filed with the Commission a Motion to Dismiss, asserting that a written settlement agreement had been executed between Mr. Roland and OSC. The motion requested dismissal with prejudice of Mr. Roland's claim against OSC, but indicated Mr. Roland's intent to maintain any claims he might have against the United States or its agents and representatives. On March 5, 1984, the judge dismissed the case of Roland v. Oil Shale Constructors, but continued Mr. Roland's complaint against the Secretary of Labor and MSHA under a new docket number. Again, no reason was provided as to how the Secretary and MSHA became parties to this action.

In a show cause order issued on March 5, 1984, the judge directed Mr. Roland to explain his claim against the Secretary. In the ensuing months, Mr. Roland submitted to the judge a series of letters that comprised his amended complaint and provided the basis for his claim against the Secretary and MSHA. Essentially, Mr. Roland alleged that the Secretary's decision not to prosecute his discrimination complaint was not based on the merits of the case, but rather was directed by unnamed government officials to avoid setting a precedent that might prove injurious to unidentified mine operators. This, Mr. Roland alleged, was violative of his rights under section 105(c) of the Mine Act. 30 U.S.C. § 815(c). Mr. Roland asserts monetary damages totalling \$79,357,650.

Subsequently, the Secretary filed a motion to dismiss this action, asserting that Mr. Roland had failed to state a claim cognizable under the Mine Act. The judge denied this motion in an unpublished decision issued on July 3, 1984. The judge held that, in the prior proceedings before Judge Carlson, Mr. Roland's waiver of his right to object to the dismissal of his discrimination complaint against OSC was not a knowing waiver. The judge stated that had Mr. Roland known of the Secretary's alleged improper motives for withdrawing from the case, he would not have acquiesced in the dismissal. Additionally, the judge determined that the Secretary of Labor is a "person" within the meaning of section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), and that Mr. Roland's complaint did in fact state a cause of action against the Secretary and MSHA.

We disagree with the judge's determination that Mr. Roland has stated a cause of action under section 105(c) of the Mine Act. 2/ We hold that the Secretary's decision to withdraw his previously filed

2/ Section 105(c) provides:

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

(footnote 2 continued)

discrimination complaint, based on his subsequent determination that discrimination has not occurred, does not constitute a violation of section 105(c) and is subject to limited review by this Commission.

footnote 2 continued.

testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

(2) Any miner or applicant for employment or representative of miners 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. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest.

(footnote 2 continued)

A fundamental purpose of section 105(c) is to encourage miners and their representatives to play an active part in the enforcement of the Mine Act by shielding them from retaliation or discrimination as a

footnote 2 end.

The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation had occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of section 108 and 110(a).

30 U.S.C. § 815(c).

result of their protected activities. See S. Rep. No. 181, 95th Cong., 2d Sess. 36 (1977) ("S. Rep."), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978) ("Legis. Hist."). Section 105(c)(1) prohibits any discrimination against, discharge of, or other interference with a miner for exercising any statutory right under the Act. Section 105(c)(2) provides that a miner may file a discrimination complaint with the Secretary, and that upon receipt of a discrimination complaint, the Secretary:

shall cause such investigation to be made as he deems appropriate. ... If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission.

30 U.S.C. § 815(c)(2). Should the Secretary determine that no discrimination has occurred, the miner, pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3), may file a discrimination complaint on his own behalf before the Commission.

Section 105(c)(2) places on the Secretary certain mandatory obligations. Upon the filing of a discrimination complaint, the Secretary must conduct an appropriate investigation and if his investigation of a miner's discrimination complaint results in a finding of discriminatory conduct on the part of the operator, he must file a discrimination complaint on the miner's behalf with the Commission. This section, however, also endows the Secretary with wide discretion. The phrases in section 105(c)(2) referring to the Secretary's handling of discrimination complaints, i.e., "causes such investigation ... as he deems appropriate" and "[i]f upon such investigation the Secretary determines ...," indicate a clear Congressional intent to grant the Secretary discretion in determining whether the facts underlying a discrimination complaint filed with him require his filing of a complaint with the Commission. Cf. UMWA v. Secretary of Labor, 5 FMSHRC 807 (May 1983), aff'd mem., 725 F.2d 126 (D.C. Cir. 1983) (miners do not have statutory authority under the Mine Act to initiate review of citations issued by the Secretary through the filing of a notice of contest); UMWA v. Secretary of Labor, 5 FMSHRC 1519 (September 1983) (miners have no standing to contest the Secretary's vacation of a section 104(d)(1) withdrawal order.)

This exercise of Secretarial discretion cannot constitute discrimination under section 105(c). The specific language of section 105(c) does not provide that the Secretary's prosecutory and representation determinations are subject to its prohibitions. Such a reading of section 105(c) would place unwarranted constraints upon the discretion Congress intended the Secretary to exercise in determining the validity of miners' section 105(c) complaints, and would frustrate the enforcement scheme of the Act. Instead, section 105(c)(3) provides the miner an independent avenue of adjudication "[i]f the Secretary, upon investigation, determines that the provisions of [section 105(c)] have not been violated." The presence of section 105(c)(3) within the statutory

scheme establishes the appropriate recourse Congress intended the miner to have under the Mine Act, should the Secretary determine that a complaint should not be filed with the Commission.

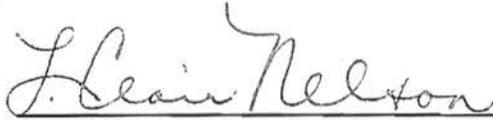
In the instant case, the Secretary reversed his original administrative determination that a violation of section 105(c)(1) occurred and subsequently determined that a violation of section 105(c)(1) in fact did not occur. We have held in previous cases that in view of the unique administrative scheme established in the Mine Act, once Commission jurisdiction attaches, we will not grant automatically motions to dismiss, modify or vacate the pending action. Rather, adequate reasons supporting such a request must be present on the record. See Youghioghny & Ohio Coal Company, 7 FMSHRC 200, 203 (February 1985); Kocher Coal Company, 4 FMSHRC 2123, 2124 (December 1982); and Climax Molybdenum Co., 2 FMSHRC 2748, 2750-51 (October 1980), aff'd sub. nom. Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447 (10th Cir. 1983). In the present case, Commission jurisdiction attached upon the Secretary's filing of a discrimination complaint. We conclude, however, that the Secretary cannot be forced to pursue a discrimination complaint before the Commission after further review of the facts convinces him that his original finding of a violation was in error. Indeed, the Secretary has an ethical obligation at that point to seek withdrawal from the case. Accordingly, we hold that the Secretary may withdraw a discrimination case already filed with the Commission, but the Secretary must support his withdrawal request with a statement of the reason for withdrawal. This requirement strikes an appropriate balance between the need for orderly and proper disposition of cases over which the Commission exercises jurisdiction and of the Secretary's discretion in this area. While no such statement was provided in the present case prior to the judge's dismissal of the Secretary's action on behalf of Mr. Roland, in subsequent pleadings filed with the Commission counsel for the Secretary consistently has represented that withdrawal was sought based on a determination that discrimination, in fact, had not occurred. We accept these record statements as sufficient in the present case, but in the future such statements must accompany motions to withdraw discrimination complaints.

This holding does not in any way hamper realization of section 105(c)'s statutory objectives, i.e., providing an environment free from employer action taken to interfere with or retaliate for a miner's exercise of a statutory right. Our holding simply means that section 105(c)'s objectives must be realized through the specific remedies provided by Congress. Cf. Block v. Community Nutrition Institute, ___ U.S. ___, 81 L.Ed. 2d at 270, 275, 280 (1984); Banzhaf v. Smith, 737 F.2d 1167, 1168-70 (D.C. Cir. 1984). In this case, Mr. Roland had the opportunity to pursue his discrimination action against OSC before the Commission. He did so, but then chose to settle his claim against the operator. He has no recourse against the Secretary or MSHA in these circumstances.

For the foregoing reasons, we conclude that Mr. Roland's complaint against the Secretary and MSHA fails to state a cause of action under the Mine Act. Accordingly, the judge's decision is reversed and Mr. Roland's discrimination complaint is dismissed. 3/


Richard V. Backley, Acting Chairman


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

3/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAY 3 1985

FMC CORPORATION,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 84-118-RM
v.	:	Citation No. 2096468; 6/20/84
	:	
SECRETARY OF LABOR,	:	FMC Trona Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION AND ORDER OF DISMISSAL

Appearances: John A. Snow, Esq., VanCott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Contestant;
 James H. Barkley, Esq., and Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Lasher

Contestant having moved to withdraw its contest on the record on March 8, 1985, pursuant to 29 C.F.R. § 2700.11 the same is approved and this matter dismissed. 1/

Michael A. Lasher, Jr.
 Michael A. Lasher, Jr.
 Administrative Law Judge

Distribution:

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James H. Barkley, Esq., and Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

1/ Contestant withdrew its contest after MSHA vacated the subject Citation, 2096468, on the record at a hearing in Salt Lake City on March 8, 1985.

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 3 1985

JERRY JOSEPH, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 85-74-D
LEECO, INC., : BARB CD 85-05
Respondent : No. 29 Mine

DECISION

Before: Judge Fauver

This proceeding was brought by Jerry Joseph under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The complaint states that Mr. Joseph injured his right knee while working at the subject mine on August 29, 1983, and because of the injury he has been unable to work at the mine, and Leeco, Inc., has refused to pay his medical bills and other compensation he seeks.

Pursuant to section 105(c)(2) of the Act, Mr. Joseph first filed a complaint with the Secretary of Labor (Mine Safety and Health Administration). After investigation, the Secretary found that no violation of section 105(c) had occurred. Mr. Joseph then exercised his right to file a complaint before this Commission.

Leeco, Inc., has moved to dismiss the complaint for failure to state a claim for which relief can be granted under section 105(c)(1) of the Act.

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

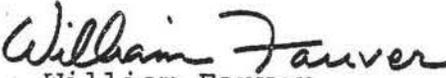
(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the

operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

I agree with the motion to dismiss. The complaint does not allege or indicate that Mr. Joseph was in any manner discriminated against because of an activity covered by section 105(c)(1) of the Act.

ORDER

WHEREFORE IT IS ORDERED that Respondent's motion to dismiss is GRANTED and this proceeding is DISMISSED.


William Fauver
Administrative Law Judge

Distribution:

Mr. Jerry Joseph, HC 64, Box 500, Yeaddiss, Kentucky 41777
(Certified Mail)

Gene Clark, Esq., Reece, Clark & Lang, 304 Bridge Street,
Manchester, Kentucky 40962 (Certified Mail)

Leeco, Inc., 100 Kaneb Drive, London, Kentucky 40741 (Certified
Mail)

Mr. Kenneth Dixon, U.S. Department of Labor, Mine Safety and
Health Administration, P.O. Box 572, Barbourville, Kentucky
40906 (Certified Mail)

/kg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 7 1985

SECRETARY OF LABOR,	:	COMPLAINT OF DISCRIMINATION
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No: KENT 81-162-D
ON BEHALF OF	:	
GEORGE ROY LOGAN,	:	PIKE CD 81-10
Complainant	:	
	:	Mine No. 2
	:	
v.	:	
	:	
BRIGHT COAL COMPANY, INC., &	:	
JACK COLLINS,	:	
Respondents	:	

DECISION ON REMAND

Before: Judge Moore

On July 23, 1982, I issued a Decision in this matter which was favorable to Bright Coal Company and Jack Collins. In that proceeding I had ordered the government, both by subpoena and discovery order to produce any exculpatory material in its files. In doing so, I relied upon Brady v. Maryland, 373 U.S. 83 (1963). ^{1/} Counsel for the government refused to either produce such material or deny that it existed.

As a result, I stated that I was drawing inferences adverse to the government. After discussing complainant's statements in his deposition which were not included in his testimony, I drew the inference that the files might

^{1/} In its brief to the Commission the Solicitor's appellate staff stated that this case was applicable only in criminal cases. See Page 24. Back in 1974 Administrative Law Judge Merritt Ruhlen prepared a "Manual for Administrative Law Judges" for the Administrative Law Conference of the United States. At page 14 of that Manual Judge Ruhlen citing Brady v. Maryland said:

In Jencks v. United States it was held ~~the~~ defendant in a criminal prosecution has the right to examine all reports in the possession of the prosecution that bear upon the events and activities to which a prosecution witness

contain other statements made by Mr. Logan which could not be substantiated by others. In issuing the order that resulted in these inferences, I denied that the exculpatory information was subject to any privilege.

On November 8, 1984, the Commission reversed my decision and held that the informer's privilege is applicable to any "person who has furnished information to a government official relating to or assisting in the government's investigation of a possible violation of law . . ." All of the people who gave statements to MSHA, including Jack Collins, were thus informants. The Commission remanded the case to me with instructions that I require the government to furnish the material for my in camera inspection. After examining the material, I was to decide whether fairness would require that the qualified informer privilege yield. Pursuant to my order, the Secretary did produce the previously excluded material and upon examining it I found that it did not contain exculpatory evidence other than what had already been discussed in my previous decision. I also found no reason to disregard the informers privilege.

The material submitted for my in camera inspection is divided into two distinct sections. Exhibit A is the original investigation file compiled by Inspector Finney and referred to the Solicitor's office. It is not the work product of an attorney. Exhibit B consists of interview reports and notes collected by Inspector Finney after Attorney Taylor had taken control of the case. Inspector Finney received instructions from Mr. Taylor both by telephone and in a memorandum as to who to interview, what questions to ask, and what facts to try to develop.

fn (continued)

testifies at trial. In modified form, this principle has been extended to administrative proceedings in which the agency is adversary and some agencies have adopted procedural rules specifically directed to the "Jencks" situation. The attorney representing the agency in such cases has the responsibility of providing any information in the agency's files that is favorable to the respondent, and the Judge should be sure that the attorney is aware of such responsibility.
[Footnote omitted].

This portion of the file is the work product of an attorney and not discoverable except under special circumstances which have not been shown here. 2/.

I did not at the time of my original ruling, and do not now, interpret the amended motion to compel production of documents as involving "Jencks" statements. The Jencks Act, 18 U.S.C. § 3500 requires that in a criminal proceeding, after a witness has testified for the government, the government must, on request, produce any verbatim statement or written statement taken from that witness. As applied in administrative law cases the disclosure of such statements can be required prior to the testimony of the witness. Section (a) of the amended motion calls for documents to be introduced and witnesses (presumably the names) expected to testify. It clearly does not request any documents such as interview reports of witnesses expected to testify except such documents as the government intended to offer in evidence. Obviously the government did not intend to offer interview reports in evidence. Request (b) refers only to witnesses the government did not intend to call and documents which tended to disprove the allegations of the application. Statements of witnesses who are not expected to testify are not subject to the "Jencks" rule and I have already dealt with the matter of exculpatory information

As stated, all of the people who gave information to MSHA were informers. Once they became witnesses however,

2/

In its brief before the Commission the Solicitor's appellate staff took what I think is an incredible position regarding the attorney's work product privilege. It argued in effect, that if an attorney had to do any work compiling material in response to a discovery production order, the fact that he worked on it would convert it i.e. the material, into an attorney's work product and thus make it not discoverable except under special circumstances. (See page 19 of the Secretary's brief). If the Commission had adopted that argument it would have seriously hampered discovery in Commission proceedings.

the informer privilege was lost and their prior confidential statements became Jencks Act statements. The government says that it did produce such statements. I have resealed the files submitted for in camera inspection and suggest that they be returned to the Solicitor.

After the remand, the parties agreed that no new evidence was necessary, but counsel for the government wanted to file a brief. He filed an exhaustive brief on March 13, 1985. Respondents had announced that they did not think further briefing was necessary but I nevertheless gave them 15 days to respond to the government brief. They did so on March 29.

In Secretary of Labor ex Rel. Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1841, 1846 (August 1984) the Commission summarized the case law in discrimination cases as follows:

In order to establish a prima facie case of discrimination under Section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., v. Marshall, 663 F. 2d. 1211 3rd. Cir. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F. 2d. 194, 195-96 (6th Cir. 1983) and Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984) (specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually

identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., U.S. _____, 76 L. Ed. 2d. 667 (1983).

The key issue in this case is whether or not Mr. Logan was engaged in a protected activity. Was he told to go under unsafe roof and did he refuse to do so? Mr. Logan says yes and Mr. Collins says no, and no one else was present. In order to decide in favor of the government and Mr. Logan I have to find that Mr. Collins gave perjured testimony when he denied that he ordered Mr. Logan to go under unsafe roof. The Solicitor devoted a substantial part of its brief attempting to show that the testimony of Mr. Collins is unbelievable. ^{3/} The Solicitor gives a number of examples of inconsistencies and some are genuine but in my opinion he overstates his case. At page 19 of the brief the Solicitor says:

After Collins learned of the 'threat' on January 15 directed toward Johnson he (Collins) discussed same with Logan at work the next day (Tr. 407). Logan, however, was absent from work on January 16 (Tr. 458; Applicant's Exhibit No. 1).

What Mr. Collins actually said when asked when he had talked to Mr. Logan about the threat was "probably the next day." On the same page of the government brief "Collins also stated Logan threaten [sic] Johnson on January 18 while he (Logan) was at the tail piece (response to second interrogatories, No. 6; Tr. 469). January 18 was a Sunday and the mine did not operate on Sunday (Tr. 470)." What actually appears at page 469 of the transcript is:

Q. Mr. Collins, do you ever remember saying or telling anybody that Eugene Lewis told you on the 18th that Mr. Logan threatened Mr. Johnson?

A. It could possibly have been the 18th.

On page 470 of the transcript Mr. Taylor read an answer that Mr. Collins had given in response to an interrogatory

^{3/} It also attacked the credibility of State Inspector Lewis.

fn (continued)

In footnote 4 on page 16 of the government brief, the following appears:

Lewis also testified to their conversation (Tr. 237). However, Lewis' account lacks any indicia of inherent credibility. Lewis testified that Logan approached him while he was on his way to the entry where the pull-test was to occur, accompanied by both Collins and Celtite representative, Paul Reid (Tr. 235). Neither Collins nor Reid testified that they had seen any conversation between Lewis and Logan. Indeed, it appears highly unlikely that a miner would voluntarily tell a State inspector, whom he did not know well, that he was going to attack his foreman. . .

While I have not previously encountered the phrase "indicia of inherent credibility" I can not imagine why the government would doubt the honesty of a State mine inspector when its own client, Mr. Logan, corroborated Mr. Lewis' testimony. At Tr. 176, the following appears:

- Q. Did you tell Gene Lewis in December or January, 1981 that you were going to whip Scott Johnson?
- A. I don't know. I don't know whether I said I'm going to 'whip him' or said, 'somebody ought to whip him before they leave.'
- Q. How many times did you tell him that?
- A. I told him once.
- Q. Where were you when you told him that?
- A. It was somewhere around the tailpiece.

as follows: "Probably on January 18, 1981, Lewis was at the tail piece of the No. 3 entry when George Roy Logan threatened Scott Johnson to Eugene Lewis."

Again, beginning on page 19 of the brief, counsel states that Collins testified that he fired Logan on January 15 the day of the pull-test, and cites page 471 of the transcript Mr. Collins had been asked how many times he had reprimanded Mr. Logan for not doing his job properly.

A. I talked to him twice.

Q. Two times?

A. Yeah..

Q. When did that occur?

A. I first - - when we was making the pull-test and up at the tail-piece when - I - - that is the day I fired him.

To me, that means that he talked to Logan on the day of the pull-test and on the day that he fired him. Mr. Collins did not say that he fired Logan on the day of the pull-test.

At page 20 of the brief the government says:

Collins claims that Jimmy Cornett told him (Collins) that Logan was asleep in the mine and Cornett almost ran over him (response to interrogatory No. 45). Cornett denied he ever told Collins that Logan was asleep. (Tr. 40-41).

Interrogatory No. 45 is "please provide the name, address, telephone number and job title of the person or persons who told Jack Collins that Jimmy Cornett (scoop operator) almost ran over George Roy Logan because George Roy Logan was asleep in the underground runway No. 2 Mine?" The answer to interrogatory 45 was "Jimmy Cornett, Skyline, Kentucky, Scoop Driver." The answer was half right and half wrong but hardly perjury.

At page 18 of the brief, the government states:

Collins also claimed that Logan had refused to return to work when he was ordered to, following the January 15 pull-test. (Tr. 401). However, both Logan and Johnson agree that Logan did return to work, albeit reluctantly (Tr. 61-62, 146).

What actually appears at page 402 of the transcript referring to the time when Mr. Logan was told to go back to work is:

Q. Did he ever go back to work?

A. [Collins] Not that I know of.

* * *

Q. What did he do, just sit there for 45 minutes?

A. Evidently, but me and Gene and that Celtite man went around and was going to make a pull-test on another bolt and we broke that pulley.

Again on page 18 of the brief "in contrast to Collins' assertion that Logan was found asleep underground, both Jimmy Cornett and Willard Blair confirmed that Logan was never found asleep underground (Tr. 40, 137." All that Mr. Blair and Mr. Cornett actually said was that neither of them had found Logan asleep underground.

These inaccuracies in citations are unfortunate. They were also contained in the material that was filed with the Commission. ^{4/} When an attorney makes a statement of fact in a brief and cites the record, the record cited should support the statement fully. The citations should show that Mr. Collins lied. The ones referred to above do not.

Failing to remember who said exactly what, the dates events occurred, etc., does not constitute perjury. Mr. Collins was not a good witness. He failed to understand questions at times and gave some confusing answers and he changed his story on occasion. But the only evidence that he was lying when he denied that he had told

^{4/}

An example of the Solicitor's appellate staff's misstatement of the record appears on page 33 of its brief to the Commission. The appellate staff states: "further, the judge's statement that Logan's denial of 'both allegations' does not constitute rebuttal evidence makes no sense". What I actually said at page 5 of my decision was "At his deposition Logan denied both allegations although he did not present any rebuttal testimony at the trial".

Roy Logan to go under unsafe roof and fired him when he refused is the testimony of Logan himself.

In his deposition taken on September 8, 1981, Mr. Logan said the preshift examinations were not being made at the mine. See pages 11, 12, 13, 14, 15, 16, 17, 36 and 55 of that deposition. As I mentioned in my earlier decision failure to make preshift examinations is a serious charge and supportive evidence would have been beneficial to the government's case. No such evidence was forthcoming. If the preshift examinations were not in fact being made, the government should have been able to locate and put on the stand a corroborating witness. The fact that it did not is significant.

When Mr. Logan testified that he had been fired because he refused to go under unsafe roof he made out a prima facie case. When Mr. Collins testified that he did not tell Logan to go under unsafe roof and that Logan did not refuse an order to do so, it brought into question the very existence of any protected activity on Mr. Logan's part. If the government has the ultimate burden of persuasion, as the Commission says, then in order to find for the government I have to be persuaded that Mr. Logan was telling the truth as to the existence of the protected activity and that Mr. Collins was not telling the truth with respect to that issue. I am not persuaded of that and must therefore find in favor of Bright Coal Company and Jack Collins.

The case is DISMISSED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

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/db

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 7 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 84-40
Petitioner	:	A.C. No. 44-03506-03515
v.	:	
	:	No. 2 Mine
OLIVER COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Mark Malesky, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington,
Virginia, for Petitioner;
Carl E. McAfee, Esq., Cline, McAfee & Adkins,
Norton, Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Petitioner seeks a civil penalty for an alleged violation of 30 C.F.R. § 75.200 charged in a withdrawal order issued under section 104(d)(1) of the Act on March 21, 1984. Respondent contends that it did not violate that mandatory safety standard charged, and that if a violation occurred, it should not have been charged in a 104(d)(1) order. Pursuant to notice, the case was heard in Abingdon, Virginia, on April 2, 1985. Larry Meade, Ewing C. Rines and Clarence Sloane testified on behalf of Petitioner. No witnesses were called by Respondent. The parties orally argued their positions at the conclusion of the hearing, and waived their right to file posthearing briefs. I have considered the entire record and the contentions of the parties in making the following decision.

FINDINGS OF FACT

1. At all times pertinent to this case, Respondent was the owner and operator of an underground coal mine in Dickenson County, Virginia, known as the No. 2 Mine.

2. Respondent is a small operator, having approximately 14 to 15 employees in one mine and producing approximately 350 tons of coal per day.

3. In the 24-months prior to the alleged violation involved herein, Respondent had 18 paid violations of mandatory standards. This history is not such that penalties otherwise appropriate should be increased because of it.

4. The imposition of a penalty in this proceeding will not affect Respondent's ability to continue in business.

5. The alleged violation involved herein was abated timely and in good faith.

6. Prior to March 21, 1984, the subject mine was engaged in pillar recovery mining. The coal seam was approximately 60 inches high. The roof consisted of fragile shale. It was described as a "slippery roof" which means that it had many slip faults. The roof conditions were generally adverse.

7. At some date prior to March 21, 1984, an unintentional roof fall occurred in the subject mine. The fall trapped the continuous-mining machine which was in the intersection outby the No. 2 and No. 3 blocks in 001 section. Respondent reported this to the local MSHA office.

8. On March 21, 1984, MSHA supervisory inspector E. C. Rines and Inspectors Larry Meade and Clarence Sloane went to the mine. While Rines and Sloane inspected the roof fall between No. 2 block and No. 3 block, Meade inspected the intersection to the right, namely that between No. 3 block and No. 4 block.

9. On March 21, 1984, the A wing of the No. 4 block had been mined out and approximately 1/3 of the B wing (the outby portion) had been mined or "pushed out." The rest of the B wing (toward the gob) was not mined. This was not in accord with the pillar recovery mining sequence prescribed in the approved roof control plan which called for the cut sequence to retreat from the gob.

10. The approved roof control plan in effect at the subject mine on March 21, 1984, required that roadways to pillar splits be limited to a maximum width of 16 feet by the installation of 2 rows of posts or timbers on 4-foot centers.

11. On March 21, 1984, Federal Mine Inspector Larry Meade issued an order under section 104(d)(1) of the Act charging a violation of 30 C.F.R. § 75.200 because the approved roof control plan was not being complied with.

12. On March 21, 1984, the roadway leading to the final push out on the B wing was approximately 28 feet wide. It was approximately 24 feet deep. The distance was determined by counting the roof bolts which were on 4 foot spacing. No posts or timbers had been set. This area had been mined 1 or 2 days prior to the issuance of the citation.

ISSUES

1. Whether the facts show a violation of 30 C.F.R. § 75.200.

2. If so, whether the order properly charged a significant and substantial violation under section 104(d)(1) of the Act.

3. If so, what is the appropriate penalty for the violation.

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

2. The conditions cited on March 21, 1984, constitute a violation of the approved roof control plan, and therefore constitute a violation of 30 C.F.R. § 75.200. The evidence shows that Respondent did pillar recovery mining without limiting the roadway to a maximum width of 16 feet, by the installation of posts or timbers.

3. The violation was very serious. The roof conditions in the mine were adverse according to the testimony and as evidenced by the unintentional roof fall occurring shortly before the inspection.

4. The condition or practice was such that a serious injury was likely to result if normal mining continued. The violation was significant and substantial.

5. The violation was obvious to visual inspection and should have been known to the operator. It resulted from Respondent's negligence.

6. Considering the criteria in section 110(i) of the Act, I conclude that a penalty of \$750 is appropriate.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that Order No. 2276618 issued March 21, 1984, is AFFIRMED as issued.

IT IS FURTHER ORDERED that Respondent pay the sum of \$750 within 30 days of the date of this decision as a civil penalty for the violation found herein.

James A Broderick
James A. Broderick
Administrative Law Judge

Distribution:

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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAY 7 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 84-152-M
Petitioner	:	A.C. No. 24-01700-05503
	:	
v.	:	Nine Mile Mine
	:	
NINE MILE MINES, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Margaret Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Barney Sanders, Esq., Nine Mile Mines, Inc., Park
City, Utah,
for Respondent.

Before: Judge Lasher

The parties have reached a settlement of the single violation involved in the total sum of \$250.00. MSHA's initial assessment therefor was \$500.00.

The compromise settlement is approved since the record reveals the following:

1. The Respondent is a small gold mine (6,450 man-hours worked per annum);
2. No injuries or fatalities resulted from the violation in question;
3. Both the degree of Respondent's negligence and the gravity of the violation were initially overestimated.

ORDER

Respondent, if it has not previously done so, is ordered to pay \$250.00 to the Secretary of Labor within 30 days from the date of this decision.

Michael A. Lasher, Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 8, 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 84-326
Petitioner	:	A. C. No. 46-01968-03584
	:	
v.	:	Blacksville No. 2 Mine
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

On January 18, 1985, the Solicitor filed a Motion for Decision and Order Approving Settlement in the above-captioned case. At issue is one violation originally assessed at \$192. Settlement is proposed for \$175.

Citation No. 2261814 was issued for violation of 30 C.F.R. § 75.1106-5(a) when it was found that two grease guns were stored in a tool box with hoses, gauges and a torch for the acetylene tanks in the 10-G section of the mine. The Solicitor represents that negligence was less than originally thought since the tool box is usually locked to prevent the storage of grease guns with the hoses and torch. He further represents that the operator trains the mechanics who use the said equipment to clean the grease guns and to keep them in separate locations. The Solicitor further asserts that gravity is reduced because further investigation of the parties revealed that no grease was found near the torch and it is the standard practice of the mechanics pursuant to the operator's policy to always clean the hoses prior to use.

In light of the foregoing factors, which the Solicitor asserts mitigate both negligence and gravity, I hereby Approve the settlement of \$175.

ORDER

The operator is ORDERED to pay \$175 within 30 days from the date of this decision.

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

Paul Merlin
Chief Administrative Law Judge

Distribution:

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 7 1985

RUSHTON MINING COMPANY, : COMPLAINT FOR DECLARATORY
Contestant : RELIEF OR FOR ENFORCEMENT OF
: A COMMISSION FINAL ORDER
: :
v. : Docket No: PENN 85-44-R
: Order No: 2255375; 11/1/84
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Rushton Mine
ADMINISTRATION (MSHA), :
Respondent :

ORDER OF DISMISSAL

Before: Judge Moore

Rushton has moved to dismiss its Complaint in the above case. It appears that the parties have worked out an agreement that will be satisfactory for the time being. While I have views as to the meaning of my former decision, I see no point in expressing them. They would not be binding on whatever judge is assigned a similar case in the future.

The Motion is GRANTED and the case is DISMISSED without prejudice.

Charles C. Moore, Jr.
Charles C. Moore, Jr.
Administrative Law Judge

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Mr. Lemuel Hollen, Chairman, UMWA Local 1520, P.O.B. 589, Philipsburg, PA 16866 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 7 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 84-46-M
Petitioner	:	A.C. No. 41-02577-05505
v.	:	
	:	Crusher No. 1
PRICE CONSTRUCTION, INC.,	:	
Respondent	:	

DECISION

APPEARANCES: Allen Reid Tilson, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner; Robert Price, Vice President, Price Construction Inc., Big Spring, Texas, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," for a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 56.12-16. The general issues before me are whether Price Construction Inc. (Price Construction) has violated the regulation as alleged and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. The special "significant and substantial" findings in the citation are not challenged.

The citation at bar (No. 2235106) as modified on February 1, 1984 alleges as follows:

An employee performing welding on a rolls crusher (Pioneer Model Number 33-R Triplex) was seriously injured when the rolls crusher was inadvertently energized. The investigation revealed that a lock-out procedure had not been established also a lock-out device was not available on the master switch.

The cited standard provides in part as follows:

Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked-out or other measures taken which shall prevent equipment from being energized without the knowledge of the individuals working on it.

The evidence shows that Alvin Parrish, a welder for Price Construction with 25 years experience at crusher plants lost one of his legs when he was injured by the rollers of a crusher he was working on. The steel crusher rollers, 18 inches in diameter and 30 inches long, had worn down and were to be rebuilt by welding additional steel over the worn out sections. Parrish was setting up to perform this task and called to the plant foreman Roger Junker to start the generator to activate the welder. The same generator powered both the crusher rollers on which Parrish was to work and the welder to be used for the repairs. In order to activate the crusher rollers however, both a master switch and a roller switch had to be engaged. To activate the welder only the master switch had to be engaged. Although Junkers had worked with Parrish in rebuilding rollers on prior occasions he apparently misunderstood Parrish's command to start only the generator and Junkers also engaged the master switch. Since the roller switch had admittedly not been locked-out and had apparently been left in the "on" position, as soon as the master switch was engaged the crusher rollers began rotating and Parrish's leg was caught and crushed.

Respondent's safety director, James Hill, admitted to MSHA Inspector Charles Price that he knew a padlock had to be used on the roller switch to conform with required lock-out procedures.¹ Plant superintendant Luther Wright also admitted that at the time of the accident he did not require padlocks to lock-out the roller switches. Under company procedures then in effect a "lock-out" was accomplished by merely turning off the generator and cutting the switches. Within this framework of evidence it is clear that the violation at bar was caused by the gross negligence of management personnel. This negligence is imputed to the mine operator. Secretary v. Ace Drilling Co., 2 FMSHRC 790 (1980).

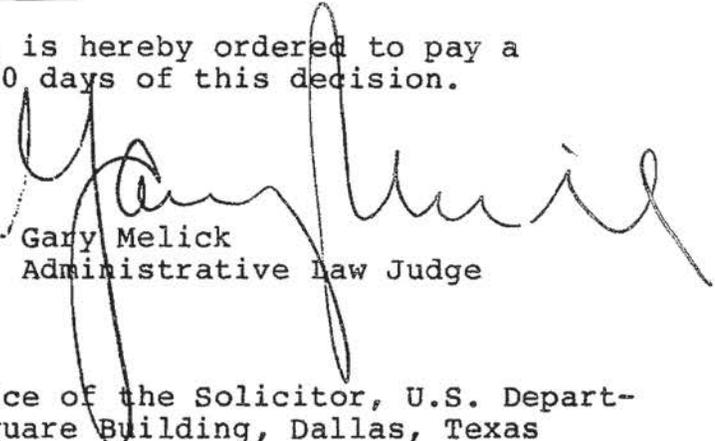
¹The testimony of Inspector Price is undisputed that it is a generally understood practice in the mining industry that a "lock-out" requires the use of a padlock.

By way of defense Price Construction contends that Parrish knew that the rollers could rotate once the generator was started and that he therefore had "knowledge" within the framework of the cited standard that the equipment was thereby being energized. The facts do not however support the proffered defense. Parrish testified that he told Junker to start only the generator and did not expect Junker to also engage the master switch. Parrish further stated that he would not have been standing on the rollers had he expected them to become energized. An out-of-court statement given by Junkers indicates his belief that Parrish wanted him to engage the master switch but this does not contravene Parrish's testimony of his own knowledge and belief.

In determining the amount of penalty to be assessed I am also considering that the operator is of modest size, has no serious history of violations, and abated the violation as required. In light of the seriousness of this violation and the negligence involved I would ordinarily impose a significant monetary penalty. I do not however propose in this case to penalize the mine operator for in effect requesting and participating in a hearing before this Commission. Accordingly I will not assess a penalty greater than that proposed herein by the Secretary.

ORDER

Price Construction Inc. is hereby ordered to pay a civil penalty of \$98 within 30 days of this decision.


Gary Melick
Administrative Law Judge

Distribution:

Allen Reid Tilson, Esq., Office of the Solicitor, U.S. Department of Labor, 555 Griffin Square Building, Dallas, Texas 75202 (Certified Mail)

Mr. Robert Price, Vice President, Price Construction, Inc., P.O. Box 1029, Big Spring, Texas 79720 (Certified Mail)

rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 17 1985

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 84-316-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 2261772; 6/18/84
	:	Humphrey No. 7 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. WEVA 85-129
CONSOLIDATION COAL COMPANY, Respondent	:	A.C. No. 46-01453-03624
	:	Humphrey No. 7 Mine

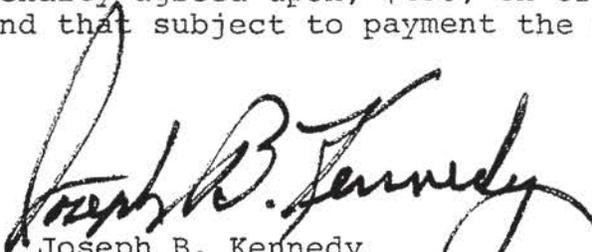
DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

This matter is before me on the parties' motions to approve settlement and withdrawal of the captioned review-penalty proceedings.

Based on an independent evaluation and de novo review of the circumstances, I find the settlement proposed is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motions be, and hereby are, GRANTED. It is FURTHER ORDERED that the operator pay the amount of the penalty agreed upon, \$450, on or before Friday, May 31, 1985, and that subject to payment the captioned matters be DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 16 1985

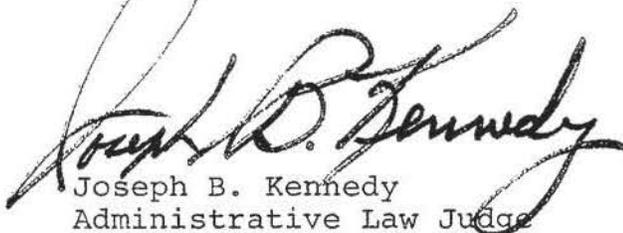
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. PENN 85-99
v. : A.C. No. 36-07045-03501 G6N
FOY BROTHERS, : Barbara No. 1 Mine
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

Based on an independent evaluation and de novo review of the circumstances, the trial judge issued an order to show cause why this matter should not be settled by payment of a penalty of \$150 for Citation 2257061 and Citation 2257062.

In response the parties agreed to settle on the basis proposed. Accordingly, it is ORDERED that the operator pay a penalty of \$150 for Citation 2257061 on or before Friday, May 31, 1985; that Citation 2257062 be, and hereby is VACATED; and that subject to payment of the penalty the captioned matter be DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

Distribution:

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Mr. Dalton R. Foy, Partner, Foy Brothers, Box 150, Shanksville, PA 15560 (Certified Mail)

/ejp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 10 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. CENT 85-13-M
 : A.C. No. 34-0023-05505
 :
v. : Ada Quarry & Plant
 :
IDEAL BASIC INDUSTRIES, INC., :
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This proceeding concerns civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for nine alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent contested the proposed assessments, and the case was scheduled for hearing in Oklahoma City, Oklahoma. However, the hearing was continued after the petitioner advised me that the parties had reached a settlement of the case.

By motion filed May 6, 1985, the parties submitted their proposed settlement pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, and the citations, initial assessments, and the proposed settlement dispositions are as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR §</u>	<u>Assessment</u>	<u>Settlement</u>
2227753	7/24/84	56.11-1	\$ 85	\$ 85
2228751	8/13/84	56.12-16	136	136
2228752	8/13/84	56.12-16	112	112
2228755	9/10/84	56.9-6	112	112
2228757	9/11/84	56.3-5	98	98

2228758	9/11/84	56.11-1	\$ 85	\$ 85
2228761	9/11/84	56.14-1	112	112
2228762	9/11/84	56.9-87	136	vacated
2228763	9/11/84	56.9-87	136	vacated
			<u>\$1012</u>	<u>\$ 740</u>

Discussion

The petitioner has vacated two of the citations on the ground of insufficient evidence to prove the violations. With regard to the remaining seven citations, the proposed settlement is for 100% of the initial penalty assessments proposed by the petitioner for the violations in question. In support of the proposed settlement disposition of these citations, the petitioner has submitted full information concerning the six statutory civil penalty criteria found in section 110(i) of the Act. Petitioner has also submitted a full discussion and disclosure as to the facts and circumstances surrounding the issuance of the violations, and the parties are in agreement that the proposed settlement disposition is in the public interest. I take particular note of the fact that the respondent has no prior history of violations within the 24-month period preceding the issuance of the citations in question, and that abatement was achieved immediately or within a matter of hours.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the petitioner's motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, petitioner's motion is GRANTED and the settlement is APPROVED.

ORDER

The respondent IS ORDERED to pay civil penalties in the settlement amounts shown above for the seven violations in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this case is dismissed.


 George A. Koutras
 Administrative Law Judge

Distribution:

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Mr. Dan E. Northcutt, Plant Manager, Ideal Basic Industries,
Cement Division, Ada Plant, P.O. Box 190, Ada, OK 74820
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slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 10 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v.	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. KENT 84-83
	:	A.C. No. 15-13286-03514
	:	
	:	Docket No. KENT 84-84
M & J COAL COMPANY, INC., Respondent	:	A.C. No. 15-13286-03515
	:	
	:	No. 1 Mine, Shelbiana

DECISION APPROVING SETTLEMENT

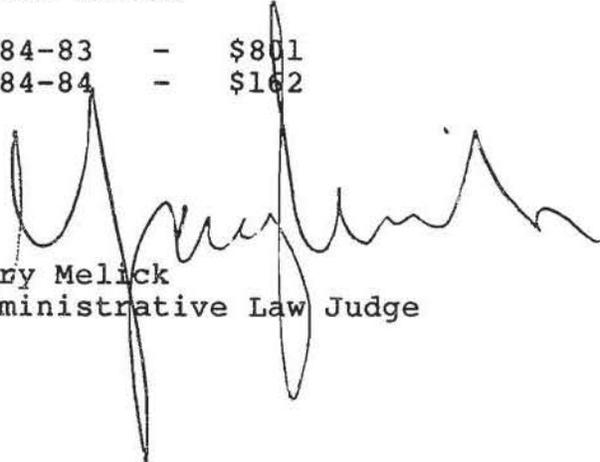
APPEARANCES: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; Michael Fleet Johnson, Esq., Webster, Clark and Johnson, Pikeville, Kentucky, for Respondent.

Before: Judge Melick

These cases are before me upon petitions for assessments of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the cases based on the financial condition of the mine operator. In Docket No. KENT 84-83, a reduction in penalty from \$1,601 to \$801 is proposed. In Docket No. KENT 84-84, a reduction in penalty from \$324 to \$162 is proposed. I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay the following penalties within 30 days of this order:

Docket No. KENT 84-83	-	\$801
Docket No. KENT 84-84	-	\$162


Gary Melick
Administrative Law Judge

670

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 10 1985

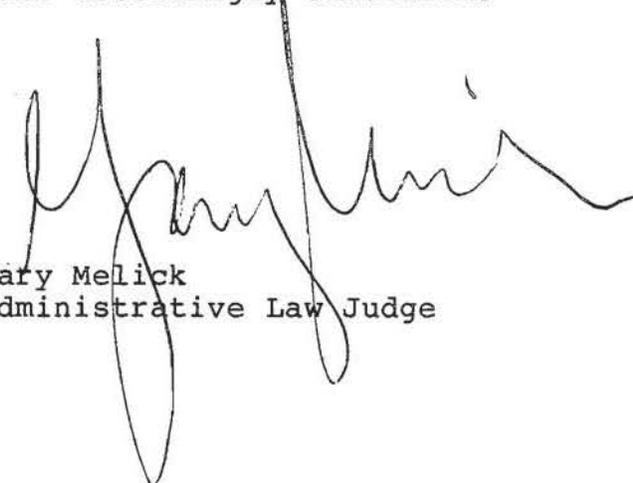
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 84-246
Petitioner	:	A.C. No. 46-06222-03530
v.	:	
	:	Coalburg No. 1 Mine
K C & D MINING CO., INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner's first motion to approve a settlement agreement was denied by the undersigned on the grounds that "full disclosure" of all financial data had apparently not been made. Petitioner has filed a motion for reconsideration and has submitted documentation indicating that full disclosure of relevant financial data has in fact been made. A reduction in penalty from \$534 to \$150 has been proposed. I have reconsidered the representations and documentation submitted in this case, and I now conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$150 within 30 days of this order. The hearings scheduled in this case for May 21, 1985, are accordingly cancelled.



Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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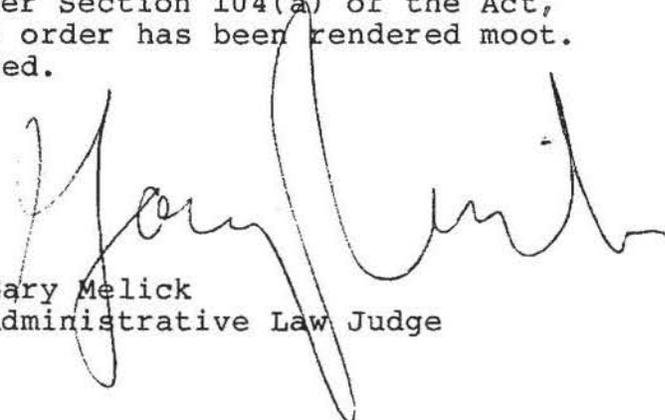
MAY 10 1985

QUARTO MINING COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. LAKE 85-22-R
: Order No. 2331243; 11/15/84
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Powhatan No. 4 Mine
ADMINISTRATION (MSHA), :
Respondent :

ORDER OF DISMISSAL

Before: Judge Melick

In light of the settlement agreement recently approved by the undersigned in Secretary v. Quarto Mining Company, Docket No. Lake 85-51 (Order No. 2331243) in which the subject order was modified to a citation under Section 104(a) of the Act, the Contest herein of the same order has been rendered moot. This case is therefore dismissed.



Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 10 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 84-107-M
Petitioner : A.C. No. 20-00667-05501
v. :
 : Lexis Road Dredge and Mill
ANDERSEN SAND AND GRAVEL CO., :
Respondent :

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the
Solicitor, U.S. Department of Labor, Chicago,
Illinois, for Petitioner;
Frank Andersen, President, Andersen Sand &
Gravel Co., for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

On August 9, 1984, five citations were issued to Respondent alleging violations of mandatory safety standards. Respondent contested the penalties assessed and requested a hearing. Pursuant to notice, the case was heard in Saginaw, Michigan, on April 9, 1985. Frank Penkevich, a Federal mine inspector, testified for Petitioner; Frank Andersen testified for Respondent. The parties waived their rights to file posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

Respondent operates a sand and gravel plant in Tuscola County, Michigan. Its operation includes a dredge, a wash plant and a screening plant. It is a seasonal operation and normally employs three people. It produces approximately 22,000 tons per year. Respondent's operation is generally clean and safe. It has no prior history of violations. All of the conditions cited in this proceeding were promptly abated. Respondent for the most part did not contest the factual findings of the inspector. He argued, however, that because he abated the conditions promptly and has an excellent

safety record, the penalties were unfair. The Federal Mine Safety and Health Act of 1977 requires MSHA and the Commissioner to assess a civil penalty for each violation of a mandatory health or safety standard. Prompt abatement and a good prior record may reduce the penalty but may not eliminate it.

Citation No. 2090096 alleged that guards on the top of six tail pulleys were absent, exposing pinch points. The pulleys were at ground level and were moving. A walkway existed beside the pulleys but was not frequented by employees. The possibility of an injury was unlikely. The condition was abated by extending the guards to cover the pinch points. I conclude that a violation of 30 C.F.R. § 56.14-3 ("Guards at . . . conveyor tail pulleys shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley") was established. The gravity and negligence were low. I conclude that an appropriate penalty for the violation is \$20.

Citation No. 2090097 was issued because a stacker was not guarded over the tail pulley in violation of 30 C.F.R. § 56.14-1 which requires that moving machine parts which may be contacted by persons and cause injury be guarded. Respondent, however, testified that the stacker had been disassembled and the guard taken off prior to its being moved. It was not being operated, and Respondent intended to replace the guard before it was placed back in operation. Under the circumstances, Petitioner has not established a violation. The citation is VACATED and no penalty is imposed.

Citation No. 2090098 alleged a violation of 30 C.F.R. § 56.9-54 because of an inadequate berm on the ramp leading to the hopper. The ramp was 12 feet wide and the elevation was 4 feet on one side and 2 feet on the other. The operator did not dispute the facts relied on by the inspector, but argued that many highways have similar conditions. The violation was abated by replacing the berm with wooden rails on each side of the ramp. The violation was not serious and the inspector believed its negligence was low. I conclude that a violation was shown and the penalty is \$20.

Citation No. 2090099, charged a violation of 30 C.F.R. § 56.11-1 because of a missing portion of railing on the walkways around the dredge. About 10 to 12 feet of the railing was missing. The standard requires that safe means of access shall be provided and maintained to all working places. The walkways were about 1 foot from the water which was deep. Although the machine was down, workers were using

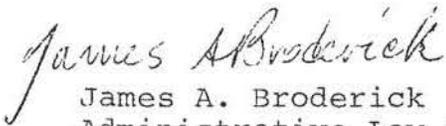
the walkway to repair the pinion shaft. They wore life jackets. The violation was abated by repairing and replacing the railing. I conclude that a violation was shown and that it was moderately serious. I believe an appropriate penalty is \$50.

Citation No. 2090100 charged a violation of 30 C.F.R. § 56.4-27 because of the absence of a fire extinguisher on a front-end loader. The standard requires that self-propelled mobile equipment shall be provided with a suitable fire extinguisher readily accessible to the equipment operator. The loader was used all over the yard moving material from one area to another. It travelled up to about 300 yards from the plant where fire extinguishers were available. The violation was abated by providing a fire extinguisher for the loader. The violation was deemed by the inspector to be non serious and the operator's negligence low. I conclude that a violation was shown and that an appropriate penalty is \$20.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ORDERED to pay within 30 days of the date of this decision the following civil penalties for violations found herein:

<u>CITATION</u>	<u>PENALTY</u>
2090096	\$ 20
2090097	0
2090098	20
2090099	50
2090100	20
Total	<u>\$110</u>


James A. Broderick
Administrative Law Judge

Distribution:

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Mr. F. N. Andersen, President, Andersen Sand and Gravel Co.,
1705 Boxwood Street, Saginaw, MI 48601 (Certified Mail)

/fb

of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute. The minimum quantity of air in any coal mine reaching each working face shall be 3,000 cubic feet a minute. The authorized representative of the Secretary may require in any coal mine a greater quantity and velocity of air when he finds it necessary to protect the health or safety of miners. In robbing areas of anthracite mines, where the air currents cannot be controlled and measurements of the air cannot be obtained, the air shall have perceptible movement.

During an inspection on November 15, 1984 at Quarto's No. 4 Mine a ventilation inspector from MSHA and his supervisor were examining the 9 and 10 Right off 2 North (hereinafter referred to as the "2 North Section") 9, 10 and 11 Right of 2-1/2 North (hereinafter referred to as the "2-1/2 North Longwall Section") of the mine (a map of the affected area is attached as Exhibit "A"). This part of the mine bordered on the abandoned areas and had been a source of chronic ventilation problems. To remedy this condition Quarto had met several times with MSHA officials in the St. Clairsville, Ohio subdistrict office and jointly with officials from the Vincennes, Indiana district office to arrive at a workable plan that would resolve the chronic ventilation problems in their abandoned areas that bordered on active workings.

In late August of 1984 a modification of Quarto's ventilation plan for abandoned areas was approved by MSHA that contained inter alia the drilling of two boreholes from the surface into the abandoned area to alleviate the ventilation problems. The boreholes were to be sunk within sixty (60) days from the date of approval and the modification would be terminated upon the completion of active mining in the 2-1/2 North Longwall Section.

Implementation of the plan was impeded by problems in gaining surface easement rights from the State of Ohio in order to move the drilling machinery onto the land above the abandoned areas. Quarto was monitoring the condition in the 2 North Section at an intake evaluation point (Point 04 on map) where the air from the abandoned areas entered into an active bleeder entry (see map).

Although Quarto would occasionally get oxygen deficient or impermissible methane readings for brief periods at the 04 Evaluation Point from August to November, the condition was not presenting a particularly hazardous problem because poor quality air from the abandoned area would mix with good quality air and bleed off down the 9 right entry.

Prior to entering the mine on November 15, 1984 the inspector checked Quarto's weekly Bleeder Evaluation book and discovered that poor air quality and impermissible methane readings had been recorded on two occasions prior to this inspection. The inspector had not been apprised as to the agency's depth of involvement in working with the operator in attempting to resolve the ventilation problem in this abandoned area or that these conditions had been quickly corrected on each occasion and had not persisted throughout the period.

When the inspector arrived on the 2 North Section he discovered deficient oxygen readings at four locations in the Section. The inspector also discovered impermissible methane levels at five locations in the area (the amounts ranged from 1.07% to 4.67% including readings taken in the abandoned areas). As a result of these findings the inspector decided to issue a § 104(d)(2) order for a violation of 30 C.F.R. § 75.301.

After a close review by MSHA of the operator's ongoing efforts prior to the violation to work with the agency to correct the chronic ventilation problems and the vigilant monitoring by the operator of the area even before it was cited, it is the Petitioner's position that a technical violation of 30 C.F.R. § 75.301 was present on November 15, 1984 but there was no unwarrantable failure and the circumstances merit a modification from a § 104(d)(2) order to a § 104(a) citation.

The probability of the occurrence of an event against which the cited standard is directed was unlikely because the operator was in the process of complying with an MSHA-approved modification to its ventilation plan to eliminate the problem at the time of the inspection. Furthermore, the operator was closely monitoring the affected area. The gravity of projected injury had an incident occurred may have resulted in lost workdays or restricted duty however the cited area was only travelled once a week by a union fireboss and by a supervisory official for the very purpose of checking air quality at the 04 Evaluation Point.

The operator exhibited no negligence because it was aware that the area cited was the subject of ventilation problems; had arrived at a workable solution with the agency and was closely monitoring the area. The operator exhibited good faith by immediately increasing its current of air on the section and changing the 04 Evaluation Point from an intake point to an exhaust point.

A review of Quarto's history at this mine indicates that it had 813 assessed violations during 1,870 inspection days in the preceding twenty-four month period. This results in a average of .43 assessed violations during an inspection day. The agreed penalty of \$200.00 will not affect the operator's ability to continue in business.

The parties urge that reconsideration of the six statutory criteria is justified in light of Quarto's excellent efforts to deal effectively with a problem area in its mine and its lack of negligence. Reassessment of the criteria justifies the penalty amount of \$200.00 and the modification from a § 104(d)(2) order to a non-significant and substantial § 104(a) citation.

CITATION NO. 2331244

This citation was issued for an alleged violation of § 104(d)(2) of the Federal Mine Safety and Health Act of 1977 which states that:

If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

During the November 15, 1984 inspection that resulted in the issuance of order No. 2331243 (previously addressed hereinbefore) one of the consequences of that order was to include the longwall mining crew

as being within the affected area of order No. 2331243 (see Exhibit "A").

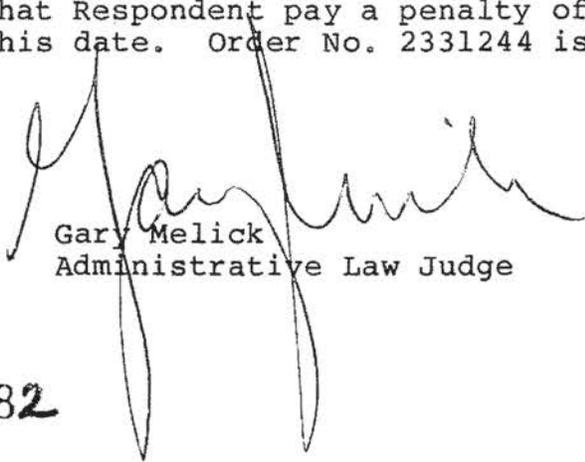
The air readings at the longwall were acceptable; well within permissible limits for oxygen content and methane content. However because the longwall section was considered by the inspector to be part of the affected area under order number 2331243 mining operations were halted. When it was determined that order number 2331243 would be modified to allow the 04 Evaluation Point to be an exhaust point rather than an intake point it was further determined by the inspector that the longwall crew could go back to work. Although the inspector had not physically returned to the longwall to remove his closure tag, one of the operator's employees interpreted the verbal affirmation that the longwall crew could resume mining as sufficient notice that the closure order had been removed and resumed mining. The citation was issued for this reason.

Most importantly as explained above the Secretary has determined that the closure order should not have been issued, but only a nonsignificant and substantial § 104(a) citation. Thus citation number 2331244 was based on an improperly issued order and was defective for this reason.

In evaluating the propriety of this settlement it should also be noted for the Court that one of the consequences of order number 2331243 was the loss of a day's longwall production while the order, which should have been a citation, was in effect.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered disposition is appropriate under the criteria set forth in Section 110(i) of the Act.

Wherefore, the motion for approval of settlement is GRANTED. Order No. 2331243 is hereby MODIFIED to a non "significant and substantial" citation under section 104(a) of the Act and it is ORDERED that Respondent pay a penalty of \$200.00 within 30 days of this date. Order No. 2331244 is hereby VACATED.


Gary Melick
Administrative Law Judge

Distribution:

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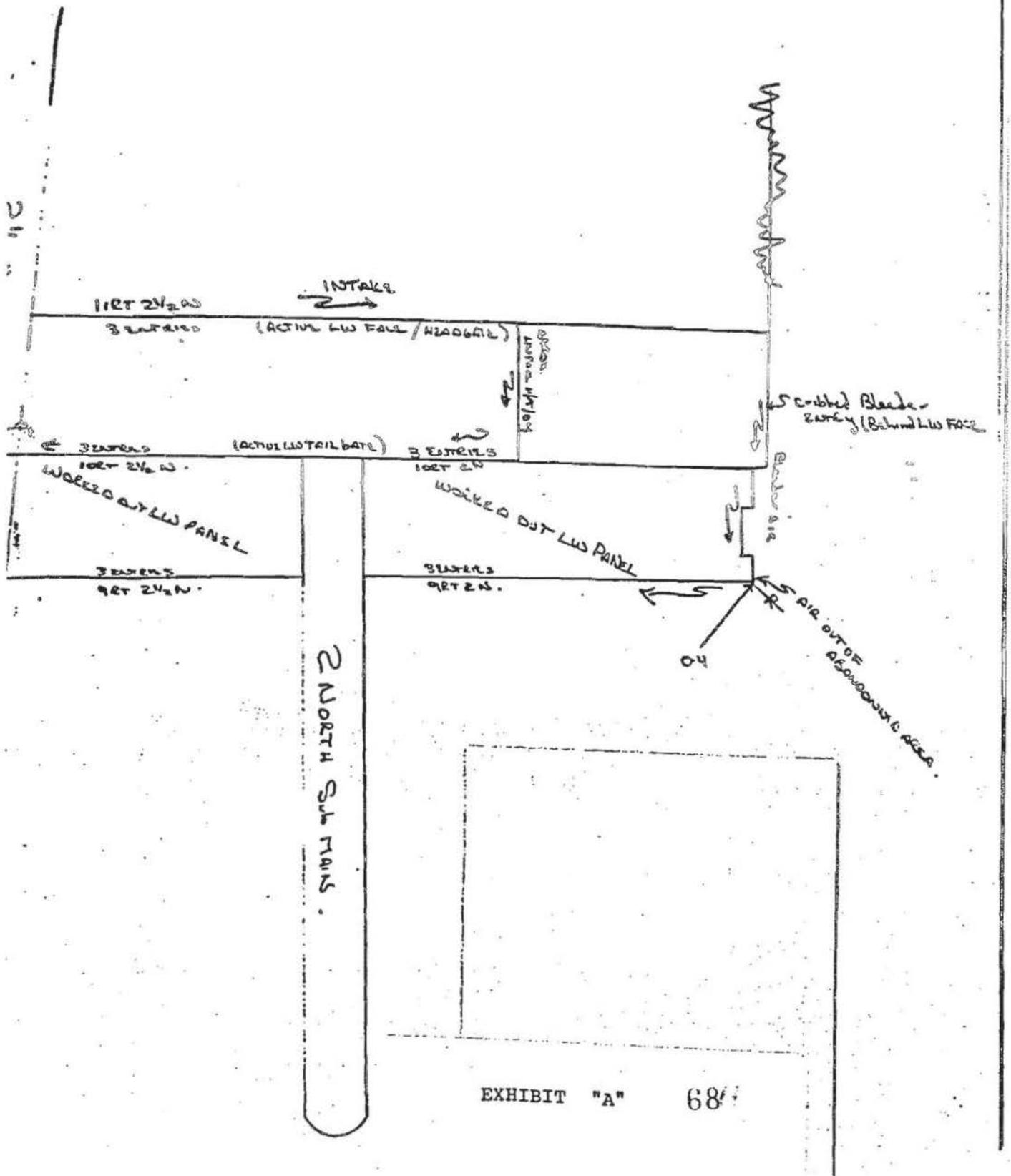


EXHIBIT "A" 68

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 14, 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 84-73-M
Petitioner	:	A. C. No. 04-00119-05508
	:	
v.	:	Docket No. WEST 84-138-M
	:	A. C. No. 04-00119-05510
GRANITE ROCK COMPANY,	:	
Respondent	:	Logan Quarry

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U. S. Department of Labor, San Francisco, California for Petitioner; Gloriann Katen, Esq., for Granite Rock Company, Watsonville, California, Respondent.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed under section 110(a) of the Federal Mine Safety and Health Act ("the Act") by the Secretary of Labor against Granite Rock Company, for alleged violations of the mandatory safety standards.

Stipulation

At the hearing, the parties agreed to the consolidation for hearing and decision of the two docket numbers (Tr. 2).

They also agreed to the following stipulations (Tr. 2-3):

1. Granite Rock Company is the owner and operator of the subject mine.
2. The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The presiding administrative law judge has jurisdiction over the proceedings.
4. The inspector who issued the subject citations was a duly authorized representative of the Secretary.

5. True and correct copies of the subject citations were properly served upon the operator.
6. Imposition of any penalty will not affect the operator's ability to continue in business.
7. The alleged violations were abated in good faith.
8. The operator has no previous history of violations.
9. The operator is moderate in size.
10. It was raining on November 11, 1983 (Tr. 14).

WEST 84-73

Citation No. 2088078

The Solicitor moved to dismiss this citation on the grounds that further investigation had indicated that there was insufficient evidence to sustain the citation (Tr. 3). The motion was granted from the bench (Tr. 4).

The citation is Vacated and no penalty is assessed.

Citation No. 2088077

The subject citation dated November 16, 1983, describes the condition or practice as follows:

On November 11, 1983, at approximately 5:45 p.m. the Euclid dump truck model number 202 LD went over the bank at the dump site and came to rest submerged in approximately twenty feet of water. The truck driver was about to dump a truckload of wet muck when the ground failed under the truck. The truck driver jumped off of the truck before it went over the bank and was not injured.

The citation was issued under 30 C.F.R. § 56.9-55, which provides as follows:

Where there is evidence that the ground at a dumping place may fail to support the weight of a vehicle, loads shall be dumped back from the edge of the bank.

The operation is described as an open pit. Granite is drilled and blasted then pushed over a bank to the floor of the pit with D-9 caterpillars. The granite is then loaded by unloaders and hauled to the mill. At the mill the product is crushed, sized and stockpiled. The waste materials are dumped into a settling pond which is a 35 foot drop from the edge of the bank (Tr. 5-6). The dump site itself consists of dirt and rock

and other waste material compacted due to continual truck traffic backing up to dump (Tr. 24). The inspector described the area as unconsolidated earth (Tr. 6).

As already set forth, the parties have stipulated that it was raining on Friday, November 11, 1983 (Tr. 6). The inspector testified that about 5:45 p.m. when the driver, Mr. Bispo, was backing the truck to dump his load over the bank he looked back to see a crack open (Tr. 10). Another driver had driven up and was parked with his lights facing the rear wheels of Bispo's truck, so Bispo was able to see the crack forming (Tr. 11). Bispo put his truck into first gear in order to drive out. He looked back, saw the bank giving way, and jumped out. The truck went over the bank and submerged in approximately 20 feet of water (Tr. 10).

However, although the inspector testified about Bispo's account of the accident, which happened at about 5:45 p.m. on Friday, he himself did not arrive at the site until the Monday or Tuesday following the accident (Tr. 13). The inspector agreed that the rain which continued for two days between the accident and his inspection could have caused a change in the angle of repose as he saw it on the Monday or Tuesday following the accident (Tr. 15).

The inspector expressed the view that the area immediately adjacent to where the trucks were dumping was unconsolidated (Tr. 23) and that rain would have made the ground looser and less stable (Tr. 24). The inspector conceded that he had not done compaction or soil tests (Tr. 25). According to the inspector, under normal conditions a truck could come within four to five feet of the bank when dumping (Tr. 27). But when the ground is wet and muddy it is less stable and the edge of the bank is looser (Tr. 26-27). Under such circumstances a wider margin of safety is required and a truck should remain with its rear wheels at least 15 feet from the bank (Tr. 26). The ground gave way eight feet back (Tr. 37).

Mr. Green, the superintendent and Mr. Davies, the swing shift foreman, inspected the dumping site numerous times on the day of the accident (Tr. 30, 37). Neither felt that there was anything to cause them to believe that the ground would fail to support the weight of the dump trucks (Tr. 30, 37). Neither saw any sign of ground cracks (Tr. 31, 37).

Although Davies expressed concern about the rain to Green, he testified it was not about the safety of dumping, but rather was with respect to slipperiness of the surface (Tr. 34, 36). This testimony is uncontradicted and was not challenged on cross-examination. Green stated he would not have ordered dumping to take place if he had believed it was unsafe (Tr. 36). This testimony also was unchallenged.

The mandatory standards requires "evidence that the ground at a dumping place will fail." Mr. Green inspected the site

several times on the day of the accident, the last time being around 3:15 or 3:30 p.m., just two hours before the incident (Tr. 30). Mr. Davies was at work beginning at 3:30 p.m. the day of the accident and inspected the site two or three times prior to the accident (Tr. 37). Neither saw anything causing them to doubt the ground's stability (Tr. 30, 37). I find the testimony of these two men who themselves saw the ground conditions close to the time of the accident more credible than that of the inspector who did not see it until two or three days later. The inspector himself admitted that rain in the intervening days could change the angle of repose (Tr. 15). The only contemporaneous evidence offered by MSHA was the inspector's second-hand account of what the driver told him. The operator's evidence is more persuasive.

In light of the foregoing, I conclude MSHA has failed to sustain its burden of proving a violation of the cited mandatory standard.

Citation No. 2088079

The subject citation dated November 16, 1983, describes the condition or practice as follows:

Adequate illumination was not provided at the dump site where the Euclid truck went over the bank and into the pond on November 11, 1983.

The citation was issued under 30 C.F.R. § 56.17-1, which provides as follows:

Illumination sufficient to provide safe working conditions shall be provided. . . , loading and dumping sites, and work areas.

The operator's safety director testified that the lighting at the site consisted of a light tower on the conveyor belt. The tower contained 4 westinghouse 400 watts high intensity sodium luminaires, two of which pointed away from the dump site and two which point in the general direction of the dump site (Tr. 57). The lights were approximately 50 feet up into the tower, which was 200 feet from the dump site (Tr. 61). The safety director further testified to other lighting on the pump raft in the reservoir. Although not specifically directed to the dump, he said it would have caused some general illumination at the dump site (Tr. 58).

The inspector expressed the opinion that the illumination available at the dump site was inadequate and would not be sufficient to illuminate the work area unless there were floodlights directed specifically to the bank (Tr. 45). However, he did not take a light meter reading, but merely relied upon what he said was the industry practice of using "dumping lights", which stand and beam light directly into the area (Tr. 46). Moreover, the

inspector did not investigate on the day of the accident and he could not say what time he was at the dump site (Tr. 47). He admitted that in saying the lighting was insufficient, he was just taking the driver's word for it (Tr. 47).

Both the safety director and a former Euclid driver, testified that they found the illumination to be sufficient (Tr. 58, 61, 62, 66). The safety director stated that he was at the site at 5:45 on November 11, 1984, one year after the incident, under the same artificial lighting as was present during the accident, and was able to read his notes from the area lighting provided at the exact point the Euclid went over the bank (Tr. 58).

The former Euclid driver testified that he actually saw the truck go over the edge and that at that time there was adequate illumination to conduct the dumping operation at the site of the accident (Tr. 66). He had always considered the light sufficient to enable him to work safely (Tr. 67). He specifically stated that he saw the edge of the bank, saw a crack open up and could have seen it without his headlights shining before him (Tr. 68).

Here again the evidence of the operator is far more persuasive than that of MSHA. The operator's safety director had a precise knowledge of the lighting involved as opposed to the inspector who did not. And the safety director tested the lighting at the same time one year later. Most persuasive is the testimony of the former Euclid driver who was at the site exactly at the time cited by the inspector and who unequivocally stated the illumination was sufficient.

Accordingly, I find that illumination at the dump site was sufficient and conclude therefore that there was no violation. This citation is VACATED.

WEST 84-138-M

Citation Nos. 2363563 and 2363564

At the hearing the parties agreed that both citations should be tried together.

Citation Number 2363563, dated May 9, 1984, describes the condition or practice as follows:

The backup alarm on the No. 2636 dump truck dumping rock at the main bin for the primary crusher was inoperable.

Citation Number 2363564, dated the same, describes the condition or practice as being identical except with respect to the number (2639) of the truck.

Both citations were issued under 30 C.F.R. § 56.9-2, later modified to 30 C.F.R. § 56.9-87 which provides as follows:

Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to backup.

The inspector testified that the Euclid trucks were customarily equipped with a horn such as one would find on an ordinary automobile (Tr. 92). He did not check for horns and was therefore unable to testify as to whether these trucks had them or not. Accordingly, it must be found in the absence of evidence to the contrary, that the trucks were so equipped.

In addition, the mandatory standard requires that where the view to the rear is obstructed, such equipment must have an automatic reverse signal or an observer to signal. The inspector was of the opinion that the view from the truck was obstructed (Tr. 70). The inspector, however, never interviewed the driver as to whether he in fact had an obstructed view (Tr. 82). Further, he testified that although he had been in a Euclid to check noise levels he did not sit in the driver's seat to check whether the view was obstructed (Tr. 80). There is therefore, no support for his opinion that the dump part of the truck itself constituted an obstruction.

The operator presented the testimony of a former employee, who previously drove a Euclid truck for the operator (Tr. 89). He testified that the view was not obstructed in any way (Tr. 89). He relied on 2 mirrors, 12 inches long by 6 inches wide, which were located on both the passenger and driver sides. With the aid of the mirrors he was able to see perfectly to the rear of the truck during all phases of the operation (Tr. 90-91).

I accept the opinion of the former Euclid driver and find that the view was not obstructed and that therefore, an audible reverse signal or an observer was not required. The Euclid is ordinarily equipped with an audible warning device such as a horn and there is nothing to show that these trucks did not have them. The operator's safety director and the former driver testified without contradiction that the trucks had air horns. On the evidence presented this was all that was required here.

Accordingly, I conclude there were no violations. These citations are VACATED.

ORDER

In light of the foregoing it is Ordered that:

WEST 84-73

Citation No. 2088078 be VACATED
Citation No. 2088077 be VACATED
Citation No. 2088079 be VACATED

WEST 84-138-M

Citation No. 2363563 be VACATED
Citation No. 2363564 be VACATED

The above-captioned cases are hereby DISMISSED.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a long horizontal stroke at the beginning.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Marshall P. Salzman, Esq., Office of the Solicitor, U. S. Department of Labor, 11071 Federal Building, 450 Golden Gate Avenue, Box 36017, San Francisco, CA 94102 (Certified Mail)

Gloriann Katen, Esq., Granite Rock Company, 411 Walker Street, Watsonville, CA 95077 (Certified Mail)

/g1

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 15 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 84-171-M
Petitioner	:	A. C. No. 15-00061-05502
	:	
v.	:	Docket No. KENT 84-178-M
	:	A. C. No. 15-00061-05503
ADAMS STONE CORPORATION,	:	
Respondent	:	Docket No. KENT 84-194-M
	:	A. C. No. 15-00061-05505
	:	
	:	Docket No. KENT 84-234-M
	:	A. C. No. 15-00061-05506
	:	
	:	MJM Mine and Mill
	:	
	:	Docket No. KENT 84-208-M
	:	A. C. No. 15-00056-05501
	:	
	:	Jenkins Mine and Mill
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 84-235-M
MINE SAFETY AND HEALTH	:	A. C. No. 15-00061-05504
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. KENT 84-239-M
	:	A. C. No. 15-00061-05507
	:	
v.	:	
	:	MJM Mine and Mill
MAGOFFIN, JOHNSON & MORGAN	:	
STONE COMPANY,	:	
Respondent	:	

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
No one appeared at the hearing on behalf of
Respondent.

Before: Judge Steffey

Pursuant to an order providing for hearing issued
January 24, 1985, a hearing in the above-entitled proceeding

was held on February 27, 1985, in Prestonsburg, Kentucky, under section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977. The order explained that I would receive evidence from both parties and would render a bench decision at the conclusion of presentation of evidence unless the parties expressed a wish to file posthearing written briefs.

When the hearing was convened, counsel for the Secretary of Labor entered her appearance, but no one appeared at the hearing to represent respondent. Normally, when a respondent fails to appear at a hearing, I return to my office and issue a show-cause order pursuant to section 2700.63 of the Commission's rules, 29 C.F.R. § 2700.63, requiring respondent to show cause why it should not be held in default for failing to appear at the hearing. If respondent fails to answer the show-cause order or fails to give a satisfactory reason for failing to appear at the hearing, I simply find respondent in default and order respondent to pay the penalties proposed by MSHA as provided for in section 2700.63 of the rules. For the reasons hereinafter given, I did not follow that procedure in this instance. Instead, I allowed counsel for the Secretary to present evidence with respect to several alleged violations which she believed to be serious. After she had completed the presentation of evidence, I rendered a bench decision (Tr. 135-174) which will hereinafter be issued as a part of this decision, but a procedural event occurred after I had rendered the bench decision which requires that I amend the first part of the bench decision to show that I have taken that procedural occurrence into consideration.

Belated Filing of Financial Data

The procedural event referred to above consisted of the filing by respondents' counsel, Mr. David Adams, of some financial data which he had been ordered to submit prior to the hearing. Mr. Adams filed the material on March 7, 1985, 8 days after the hearing had been completed. The material was submitted to support Mr. Adams' claim that payment of penalties would cause respondent Magoffin, Johnson & Morgan Stone Company to discontinue in business. As indicated above, a bench decision was rendered at the conclusion of the hearing held on February 27, 1985, which Mr. Adams had declined to attend. Since respondent had presented no financial data whatsoever at the time the bench decision was rendered, I necessarily concluded in the bench decision that respondent had failed to prove that it was unable to pay penalties. Therefore, the portion of the bench decision which considered the criterion of whether the payment of penalties would cause respondent to discontinue in business must now be revised to show that I have examined the financial information belatedly submitted by Mr. Adams.

An additional reason for rewriting the first part of my bench decision lies in the fact that the Secretary's counsel made the following request at the conclusion of her presentation of evidence (Tr. 133):

MS. RAY: The Secretary would urge that you consider, not in assessing the amount of penalties, but for your consideration and perhaps referral to the Commission, Mr. Adams' lack of attendance at all the past hearings, his lack of response to your orders in this case as well as in other cases, and we just ask you to take that into consideration and do what you will with it.

When I rendered the bench decision, I noted in it the many times that Mr. Adams had failed to appear at hearings and his failure to respond to my orders requesting that he submit various types of information, but I did not recommend that the Commission take any disciplinary action against him pursuant to section 2700.80 of the rules, because I believed that my giving emphasis in a public decision to his lack of response to the judges' orders and his failure to follow the Commission's procedural rules would be sufficient to impress upon him that he cannot continually ask the Commission to give consideration to his arguments while continuing to ignore the Commission's procedural rules and the judges' orders.

I still think that the publicity given to his past conduct is all that is necessary at the present time, but I shall hereinafter discuss Mr. Adams' conduct in more detail than I would have if he had appeared at the hearing and had introduced his financial exhibits in a manner which would have made it possible for the Secretary's counsel and me to ask clarifying questions about their meaning and interpretation.

Mr. Adams' Practice of Ignoring Procedural Requirements

It is astonishing to me how Mr. Adams continues to ignore the Commission's rules and the judges' orders. He proceeds in each case as if he is a law unto himself and he seems to think that he can with impunity continue to supply as few of the materials he is requested to submit as suits his inclination and purpose and that he is absolutely entitled to submit any sort of material he sees fit to provide with the belief that everyone is required to give his contemptuous approach full consideration despite the fact that he never appears at hearings or presents a witness who can explain the basis for his arguments or the validity of his claims.

I have had at least three previous proceedings involving Mr. Adams who, in addition to acting as respondents' counsel, is also shown in the Legal Identity Reports filed with MSHA as respondents' vice president (Exh. 1). Mr. Adams indicated in his pleadings filed in each of the previous three proceedings that he wanted a hearing. Yet, when the hearings in those three proceedings were convened, no one appeared to represent respondent. When show-cause orders were thereafter sent to Mr. Adams, he either failed to answer the show-cause orders or failed to give a satisfactory reason for failing to appear at the hearing. Therefore, in each case, a default decision was issued holding respondent in default and assessing the penalties proposed by MSHA. Secretary of Labor v. Adams Stone Corp., Docket No. KENT 80-254-M, issued January 16, 1981 (unreported); Secretary of Labor v. Adams Stone Corp., Docket Nos. KENT 81-71-M, et al., issued December 30, 1981 (unreported); and Secretary of Labor v. Adams Coal Enterprises, Inc., Docket No. KENT 82-10, 4 FMSHRC 1159 (1982).

In a pleading filed on December 7, 1984, in this proceeding, Mr. Adams purports to excuse his failure to appear at the hearings by stating that Magoffin, Johnson & Morgan Stone Company (hereinafter called MJM) "is on the brink of bankruptcy" and that "it has failed to send counsel to several hearings due to the lack of funds to protest, present proof, and pay legal fees." The lack of merit to that contention is shown by the fact that the above-mentioned default proceeding in Docket No. KENT 82-10 pertained only to Adams Coal Enterprises, Inc., as to which no claim of bankruptcy has been raised. Also three of the seven cases involved in the default proceeding in Docket Nos. KENT 81-71-M, et al., pertained to the Jenkins Mine or to Adams No. 3 Preparation Plant, which are owned and operated by Adams Stone Corporation, as to which no claim of bankruptcy has been raised.

Moreover, in the default proceeding in Docket No. KENT 80-254-M, only MJM was involved, but Mr. Adams replied to the show-cause order issued in that case, asking him to explain why he had failed to appear at the hearing, by stating that he had had to appear before a Federal district court on the same day the hearing was held in Docket No. KENT 84-254-M and he requested that I schedule another hearing in that case so that he could be given another chance to appear. Obviously, if the reason he had failed to appear in that case was MJM's lack of funds to pay counsel, that same lack of funds would have prevented him from coming to the second hearing just as it allegedly prevented him from appearing at the first hearing. Since that was my first experience with Mr. Adams' practice of failing to appear at hearings, I would naively have granted

his request for rescheduling the hearing, had it not been for the fact that the Secretary's counsel in that case had tried repeatedly to talk to Mr. Adams on the day prior to the hearing but Mr. Adams had declined to return the calls made to his office by the Secretary's counsel. Additionally, at no time prior to the hearing, did Mr. Adams ever try to let me or the Secretary's counsel know that he had to appear in another proceeding in a Federal court.

The Evidence Shows that MJM Is Not Operated as a Completely Independent Company As Claimed by Mr. Adams

Because of Mr. Adams' statement that MJM is being operated under an agreement between the union and MJM, the Secretary's counsel requested that I order Mr. Adams to supply "any and all union arbitration agreements which may have an effect on the MJM Mine and Mill." Mr. Adams was ordered to supply the above information in my order issued January 24, 1985, but he failed to do so, 1/ despite his statement in his pleading filed on December 7, 1984, that "[r]espondent is willing to submit any and all records including financial statements, union contracts, or any other information which the Regional Solicitor would need or the Department of Labor herein."

In his answer filed on February 8, 1985, to my order of January 24, 1985, Mr. Adams stated as follows:

This corporation [MJM] has been in effect for many years and has been in good standing with the State of Kentucky. It has its own corporate records and books along with its own employees and equipment. All records are kept separate, including separate sales, payroll, accounts payable, general ledger, and job cost from the Adams Stone Corporation [which operates the Jenkins Mine and Mill]. There is no intermingling of the employees or equipment and the two operations are over 100 miles apart geographically and serve different customers in different geographical areas.

1/ Mr. Adams was also ordered to submit, in reply to the Secretary's motion for a more definite statement, the reason each citation was being contested as required by 29 C.F.R. § 2700.28. He was additionally directed to provide me with the number of witnesses he expected to present at the hearing, along with an estimate of the amount of hearing time his direct case would take, and a list of stipulations of any non-contested facts. He failed to submit any of the aforementioned materials and failed to reply to the proposed stipulations sent to him by the Secretary's counsel.

Attached hereto is a copy of the bill of sale when said company [MJM] was purchased.

By an error, either on the Respondent (sic) or the Petitioner's part in past years, the MJM Stone Company has been referred to as the Adams Stone Company, when in fact there was no connection between the two as far as corporate identity.

When one of the inspectors was testifying in this proceeding, he stated that MJM's employees had advised him that the slippage switches used to abate the violation alleged in Citation No. 2249133 (Exh. 18) were brought from the Jenkins Quarry and installed on conveyor belts being used at MJM (Tr. 104). He also stated that Adams Stone Corporation exchanged equipment between its various operations, including the construction and asphalt operation. He additionally stated that it was his understanding that the same general superintendent is in charge of all of the operations (Tr. 105).

As to Mr. Adams' statement, quoted above, that Adams Stone Corporation has erroneously been shown to be in charge of the MJM operations, it is clear from an examination of the material attached to that statement that Adams Stone Corporation is the alter ego of MJM. One of the documents submitted by Mr. Adams is a copy of a judgment issued on September 25, 1974, by the United States District Court of the Eastern District of Kentucky in Civil Action No. 1611. That judgment explains that Adams Stone Corporation purchased the capital stock of MJM during the calendar year of 1970 and agreed to pay certain indebtedness of MJM, but the financial arrangements between the parties were never consummated.

The judgment thereafter approves a settlement under which Stuart Adams, individually and personally, and Adams Stone Corporation were made liable for the payment of \$600,000 in discharge of a loan made to MJM by the United States of America through the Small Business Administration. The settlement concluded all claims between Stuart Adams, Adams Stone Corporation, Adams Construction Company, MJM, and any other corporation in which Stuart Adams has a controlling interest and the Estate of Gaines P. Wilson, Sr., Alexander Equipment and Trucking Company, Greenup Stone Company, Greenup Aggregate Company, Inc., Ken-Ten, Inc., Gaines P. Wilson & Son, Inc., Wilson Contracting Co., Estate of Donald L. Schieman, Mercer Stone Company, A & W Construction Company, and all other companies in which the Estate of Gaines P. Wilson, Sr., is a substantial stockholder.

The judgment additionally noted that the parties having possession of the stock book and minute book of MJM would forthwith deliver those books to Adams Stone Corporation, that the Estate of Gaines P. Wilson, Sr., would convey to MJM real estate used in quarry operations and property adjacent to the quarry, that the Citizens Fidelity Bank & Trust Company would dismiss all claims against Stuart Adams, Adams Construction Company, Adams Stone Corporation, and MJM, and that the parties would secure a release of a working capital loan needed by MJM.

There was also attached to Mr. Adams' statement in reply to my order of January 24, 1985, a satisfaction of judgment issued on January 2, 1975, by the Federal Court in Civil Action No. 1611 stating that MJM had paid the sum of \$600,000 "as required by the terms of the Judgment entered in this proceeding on September 25, 1974."

Under 30 C.F.R. § 41.10 each operator of a coal or other mine is required to file with MSHA "the name and address of such mine, the name and address of the person who controls or operates the mine, and any revisions in such names and addresses." Section 41.10 also states that the required information is to be submitted on a Legal Identity Report Form 2000.7. The Legal Identity Report submitted for the MJM Mine and Mill is dated January 30, 1979, and shows that S. H. Adams is president and that D. H. Adams is vice president of Adams Stone Corporation. No change in the name of the operator of the MJM Mine and Mill was made until a "Change Notice" was filed on July 12, 1984, showing that the operator of the MJM Mine and Mill is Magoffin, Johnson & Morgan Stone Company and that Stuart H. Adams is president, that David H. Adams is vice president, and that Barbara Adams is Secretary-Treasurer of Magoffin, Johnson & Morgan Stone Company.

The Legal Identity Report filed on January 30, 1979, with respect to the Jenkins Quarry shows that Adams Stone Corporation is the operator and that S. H. Adams is president of Adams Stone Corporation. The Legal Identity Report filed on April 29, 1980, with respect to the Adams No. 3 Preparation Plant shows the operator to be Adams Stone Corporation and indicates that S. H. Adams is president, and that both D. H. Adams and Robert S. Adams are vice presidents.

MSHA issues all citations and orders in the names of the operators shown on Legal Identity Reports. All of the citations in this proceeding were issued in the name of

Adams Stone Corporation because all citations, except Citation No. 2386423 dated July 16, 1984, in Docket No. KENT 84-239-M, were written before July 12, 1984, when the revised Legal Identity Report was filed showing that the operator of the MJM Mine and Mill had been changed from Adams Stone Corporation to Magoffin, Johnson & Morgan Stone Company. The Secretary's counsel filed the proposals for assessment of civil penalty in Docket Nos. KENT 84-235-M and KENT 84-239-M in the name of Magoffin, Johnson & Morgan Stone Company, but apparently the association of Adams Stone Corporation with the MJM Mine and Mill was so embedded in the minds of those who processed the pleadings, that the name of Magoffin, Johnson & Morgan Stone Company was crossed out and the name of Adams Stone Corporation was inserted as the respondent in both Docket Nos. KENT 84-235-M and KENT 84-239-M. My order of January 24, 1985, explained that the cases in Docket Nos. KENT 84-235-M and KENT 84-239-M would be processed in the name of Magoffin, Johnson & Morgan Stone Company, instead of Adams Stone Corporation since the Secretary's counsel had initially filed those two cases in the name of Magoffin, Johnson & Morgan Stone Company.

Mr. Adams had not, up to the time of his filing of his pleadings in this proceeding, attempted to obtain a change in previous cases to indicate that Adams Stone Corporation is not the operator of the MJM Mine and Mill. The default decisions which I have previously mentioned in Docket Nos. KENT 80-254-M and KENT 81-71-M, et al., showed Adams Stone Corporation as the operator of the MJM Mine and Mill. Mr. Adams' failure to file a revised Legal Identity Report from 1979 to 1984 and his failure to ask that the name of the respondent in previous cases be changed from Adams Stone Corporation to Magoffin, Johnson & Morgan Stone Company as the operator of the MJM Mine and Mill show that he did not distinguish between the two affiliates as the operator of the MJM Mine and Mill until he decided to raise a claim in this proceeding that Magoffin, Johnson & Morgan Stone Company is financially unable to pay civil penalties.

Moreover, the Federal U.S. Corporation Income Tax Return for 1983, belatedly submitted by Mr. Adams on March 7, 1985, shows that it was filed in the name of Stuart Adams Corporation & Subsidiaries. An attachment in that tax return lists the "Subsidiaries in Consolidated Group" as follows:

- Burdine Coal
- Adams Sand Corporation
- Adams Concrete Products Corporation
- Adams Construction Company
- Adams Diversified
- Adams Ford Company
- Adams Stone Enterprises
- Adams Equipment Corporation
- Adams Stone Corporation
- Magoffin, Johnson & Morgan Stone

Although the Legal Identity Report filed on July 12, 1984, is checked to state that Magoffin, Johnson & Morgan Stone Company is not a subsidiary of Stuart Adams Corporation, the tax return for 1983 clearly indicates otherwise.

MJM Failed to Prove in this Proceeding that It Cannot Pay Civil Penalties

The hearing in this proceeding was convened on February 27, 1985, primarily to provide Mr. Adams with an opportunity to prove his allegation that Magoffin, Johnson & Morgan Stone Company (MJM) cannot pay penalties. Mr. Adams failed to appear at that hearing and the only excuse he gives for failure to appear is that MJM is so close to bankruptcy that it cannot afford to pay any one to represent it at a hearing. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd, 736 F.2d 1147 (7th Cir. 1984), that a judge may presume that an operator is able to pay penalties unless he presents financial evidence proving that he is, in fact, unable to pay penalties. Therefore, the burden is on the operator to prove that it is unable to pay penalties. Mr. Adams is not even entitled to have that question determined in this proceeding because he failed to respond to my order requiring him to present many types of evidence which he declined to do. The burden should not be on the Secretary's counsel or me to spend hours examining the complicated tax returns he did finally submit 8 days after the hearing had been completed and a bench decision had been rendered, finding that he had failed to prove that MJM cannot pay penalties.

Despite the fact that Mr. Adams is not procedurally entitled to have his incomplete financial evidence considered on its merits, I have spent a great deal of time examining it. The materials he submitted raise far more questions than they answer. The Secretary's counsel was entitled to have a witness explain the tax returns and balance sheets submitted by Mr. Adams because an ordinary person without a background in tax and accounting is unable to determine the exact financial condition of Stuart Adams Corporation & Subsidiaries.

It should also be noted, before I discuss the details of the financial information submitted by Mr. Adams, that the criterion here involved, as stated in section 110(i) of the Act, is "the effect [that payment of civil penalties will have] on the operator's ability to continue in business." That criterion is not proven by a showing that an operator participated in providing its affiliated companies with tax deductions which resulted in a negative taxable income on line 30 of a U.S. Corporation Income Tax Return Form 1120.

Companies which are making profits which would require them to pay taxes have been known to purchase corporations in financial difficulty for the sole purpose of using such companies' losses as deductions on their Forms 1120 so as to avoid the payment of income taxes. One of the questions which I would have asked Mr. Adams, or his witness, if he had appeared at the hearing held on February 27, 1985, would have been just what motive the Stuart Adams Corporation had in paying the United States Government \$600,000 and assuming the debts of the Estate of Gaines P. Wilson, Sr., in return for acquiring MJM's equipment and real estate interests.

Mr. Adams submitted the Forms 1120 filed by Stuart Adams Corporation and Subsidiaries for the years 1979 through 1983. He also submitted the individual balance sheets of MJM for the years 1979 through 1983. All that can be determined for certain from that stack of materials is that they were chosen selectively and are very incomplete. For example, the portion of the return for 1983 consists of only seven pages, but those seven pages refer to 62 back-up and explanatory statements which were not submitted along with the return. While I do not purport to say that I would have understood every aspect of them even if they had been submitted, it is certain that I cannot conclude from my examination of the selective portions of the returns submitted by Mr. Adams that Stuart Adams Corporation is going to stop operating MJM simply because it is required to pay the civil penalties hereinafter assessed in this proceeding.

A few pertinent figures from the returns will serve to illustrate the difficulty of analyzing the information submitted by Mr. Adams. The respective returns, on line 11, show that Stuart Adams Corporation and Subsidiaries had a total income in 1979 of \$6,534,981, in 1980 of \$4,432,352, in 1981 of \$6,867,541, in 1982, of \$6,286,028, and 1983 of \$346,330. Line 30 of the returns shows that Stuart Adams Corporation and Subsidiaries (hereinafter referred to as SACS) had a taxable income of \$700,852 in 1979, a negative taxable income of \$1,542,880 in 1980, a taxable income of \$132,612 in 1981, a taxable income of \$45,348 in 1982, and a negative taxable income of \$602,207 in 1983. Thus, in 3 of the 5 years, SACS had a taxable income.

The second largest negative taxable income of \$602,207 occurred in 1983 and the return for that year was prepared by a different accounting firm from the one which prepared the returns for the previous 4 years. That firm changed the method for calculating gross profit on line 3 of the form by including salaries and wages in the cost of goods sold,

whereas the previous accounting firm had included salaries and wages on line 13 of the form under deductions. The new accounting firm also included deductions for depreciation in determining the cost of goods sold, whereas the previous accounting firm had included depreciation as a deduction on line 21 of the form. The new accounting firm also made other changes in the method of determining the ultimate important figure of taxable income on line 30. Those changes cannot be evaluated for effect because they are explained in statements which were not provided by Mr. Adams.

The balance sheets submitted by Mr. Adams for MJM raise questions about the interrelationship of SACS and MJM. For example, in 1979, the cost of MJM's equipment is shown as \$969,892 and accumulated depreciation is shown as \$697,502, but the balance sheet for 1980 shows that the cost of MJM's equipment has been drastically reduced to \$577,836 and that accumulated depreciation has been reduced to \$281,626. That decline in the cost of MJM's equipment by nearly \$400,000 in a single year may be the result of a realistic reevaluation of the equipment or the transfer of equipment from MJM to some other subsidiary.

Another unanswered question about the balance sheets submitted by Mr. Adams for MJM is that each sheet for the 5 years from 1979 through 1983 shows among MJM's assets an amount ranging from \$476,010 in 1979 to \$336,000 in 1983 as being "due from affiliates." That figure is unexplained on any of the balance sheets, but its presence does add support to my previous finding that MJM is not the independent company which Mr. Adams claims that it is.

There are, of course, many aspects of MJM's balance sheets which show that it is not a profitable company. The information supplied by Mr. Adams does show that MJM had a net loss of \$59,443 in 1979, a net loss of \$105,733 in 1980, a net gain of \$20,184 in 1981, a net loss of \$108,681 in 1982, and a net loss of \$105,541 in 1983. In other words, out of the 5 years reflected in the information submitted by Mr. Adams, MJM suffered a net loss on its operations in 4 of those years. The balance sheets also indicate that MJM did not produce many products in 1982 because it purchased no explosives, purchased little electrical power, experienced few repair bills, and paid only \$11,895 in wages and salaries in that year. It should be noted, however, that MJM began to increase its operations again in 1983. Although it still had a large net loss for 1983, there are indications of improvement in production and sales. It should also be noted that Mr. Adams submitted the financial information on

March 7, 1985. While SACS had not submitted its 1984 Form 1120 by that date, there is no doubt but that Mr. Adams could have supplied some indication by March of 1985 concerning the nature of MJM's operations by the end of 1984. I have always required a respondent in a civil penalty case to provide financial information for the period immediately preceding the hearing if the respondent made a claim that its financial condition was so poor that it could not pay civil penalties. The only facts which Mr. Adams did provide for MJM for the year 1984 is that the tons sold by MJM increased from 6,697.52 in 1983 to 72,669.50 in 1984 and that the total hours worked by MJM's employees in 1984 increased from 3,648 in 1983 to 17,444 in 1984. The hours worked and the tons produced show a substantial increase for 1984 and support a conclusion that MJM is not as close to bankruptcy as Mr. Adams has represented.

The main theme which I have expressed above is that one cannot make definite conclusions from the information submitted by Mr. Adams because of the inherent conflicts in the way the information was prepared and submitted. A final illustration of the inconsistent nature of the information may be seen in the fact that the balance sheet for MJM's operations for 1983 shows that MJM had a total loss of \$105,541. Yet another tabulation submitted as a part of SACS' consolidated tax return for 1983 shows that MJM had a negative taxable income of \$324,964. It is not possible to determine from the information submitted by Mr. Adams how a net loss of \$105,541 can be increased by three times that amount for purposes of filing a tax return, but that seems to be what happened.

If Mr. Adams had appeared at the hearing on February 27, 1985, and had explained in person, or through a witness, the exact nature of MJM's operations, it is possible that he could have proven his contention that MJM is in such dire financial condition that it will discontinue in business if it has to pay the civil penalties hereinafter assessed. The information submitted by Mr. Adams on March 7, 1985, however, is too complicated, inconsistent, and incomplete to permit me to make a finding that the civil penalties in this proceeding should be reduced under the criterion that payment of civil penalties will cause MJM to discontinue in business.

The remainder of this decision consists of the bench decision which I rendered at the hearing held on February 27, 1985 (Tr. 143-174):

This proceeding involves seven proposals for assessment of civil penalty filed by the Secretary of Labor seeking to have penalties assessed for a total of 33 alleged violations of the mandatory health and safety standards by Adams Stone Corporation and Magoffin, Johnson & Morgan Stone Company. A tabulation showing the docket number, dates of filing, and the number of violations alleged in each case is set forth below.

<u>Docket No.</u>	<u>Date of Filing</u>	<u>Number Alleged Violations</u>
KENT 84-171-M	June 21, 1984	8
KENT 84-178-M	July 9, 1984	5
KENT 84-194-M	July 30, 1984	6
KENT 84-208-M	August 13, 1984	8
KENT 84-234-M	September 26, 1984	2
KENT 84-235-M	October 19, 1984	1
KENT 84-239-M	October 19, 1984	3
		<u>33</u>

The issues in a civil penalty proceeding are whether violations of the mandatory health and safety standards occurred and, if so, what monetary penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act.

The Secretary of Labor presented evidence with respect to some of the violations, but did not present evidence as to other violations. I shall consider below all of the violations alleged under each docket number and indicate that I am either approving the penalty proposed by MSHA or I am assessing a penalty on the basis of a de novo hearing with respect to the violations as to which evidence was presented. The Commission held in the Sellersburg case, previously cited, and in U.S. Steel Mining Co., Inc., 6 FMSHRC 1148 (1984), that the Commission and its judges are not bound by the penalty formula used by MSHA to propose penalties under Part 100 of Title 30 of the Code of Federal Regulations. The penalties which I hereinafter assess are based on the evidence presented at this hearing.

DOCKET NO. KENT 84-171-M

Citation No. 2248435, or Exhibit 7, alleged a violation of 30 C.F.R. § 57.15-4, because three employees were working to free a hangup of rock at the primary jaw crusher located underground and were not wearing safety glasses. Pieces of rock of various sizes were being thrown in the direction of the employees. That section requires that all persons shall wear safety glasses, goggles, or face shields when in or

around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

The inspector testified that the materials which would not go into the jaws of the crusher were being pried by one employee while another employee threw pieces of rock into the crusher, which was running, for the purpose of trying to get the crusher jaws to grasp the rocks and pull them into the crusher. Therefore, one employee was exposed to being hit with the rocks that were being thrown into the crusher. The other employee was exposed to the possibility that a piece of rock might fly out of the crusher and hit him.

This particular citation was written in conjunction with an imminent danger order and the inspector considered that there was a high degree of negligence as well as gravity associated with the violation.

I find that the violation occurred. Having found a violation, a civil penalty is required to be assessed. Tazco, Inc., 3 FMSHRC 1895 (1981). In the discussion at the outset of this decision I indicated, as to the criterion of whether the payment of penalties would cause respondent to discontinue in business, that respondent had failed to submit sufficient unambiguous information to prove its allegation that payment of penalties would adversely affect its ability to continue in business. Consequently, it will not be necessary to reduce a penalty determined under the other criteria, under the criterion of whether the payment of penalties would cause respondent to discontinue in business.

Counsel for the Secretary presented some information in Exhibit 2 indicating that the number of hours worked at the MJM Mine and Mill in 1983 was 13,500, and that the number of hours worked at the Jenkins Mine and Mill was 19,000. Those figures would support a finding that respondent is a small operator. Therefore, to the extent that penalties are based on the size of respondent's business, a relatively low penalty should be assessed. 2/

The inspector testified that all of the violations were abated within the time that he provided in his citations and that he would conclude that respondent did demonstrate a good-faith effort to achieve rapid compliance. It has always

2/ The information submitted by Mr. Adams on March 7, 1985, is somewhat different from the facts given in Exhibit 2, but the finding that respondent is a small operator would remain unchanged regardless of whether one uses the information in Exhibit 2 or the facts submitted by Mr. Adams.

been my practice to increase a penalty under the criterion of good-faith abatement if the evidence shows that respondent failed to make a good-faith effort to correct the violation, and to deduct some amount from a civil penalty determined under the other criteria if respondent made some outstanding effort to correct a violation. In this instance, and in this entire proceeding, all of the violations were abated in a normal fashion by the operator correcting the violation within the time provided, so that none of the penalties assessed in this proceeding need to be increased or decreased under the criterion of good-faith abatement.

Counsel for the Secretary presented as Exhibits 3 and 4 a tabulation of prior violations as to which respondent has paid civil penalties. Neither exhibit shows that respondent has previously been assessed a penalty for a violation of section 57.15-4. Therefore, no portion of the penalty in this instance should be assessed under the criterion of history of previous violations.

The remaining two criteria are negligence and gravity. The inspector was unable to say that the foreman knew that the employees were working on the crusher without wearing safety glasses of any type. Consequently, I cannot find that there was negligence on the part of the operator in this instance. The Commission held in Southern Ohio Coal Co., 4 FMSHRC 1459 (1982), that an operator is not liable for the negligence of rank and file miners in assessing civil penalties. Therefore, no portion of the penalty should be assessed under the criterion of negligence.

The Commission has held in other cases that a respondent is liable for the occurrence of a violation without regard to fault. U.S. Steel Corp., 1 FMSHRC 1306 (1979). The discussion of the violation here at issue indicates that the employees had subjected themselves to a serious violation in this instance and that from the standpoint of gravity a penalty of \$50 should be assessed.

Citation No. 2248436, or Exhibit 8, alleged a violation of section 57.12-16 because work was being performed on the vibratory feeder at the jaw crusher underground without the power switch being locked out and deenergized. The inspector believed that a very serious violation existed because the inadvertent start up of the feeder could cause the employee to fall into the crusher. Section 57.12-16 requires that electrically powered equipment be deenergized

before mechanical work is done on such equipment. Power switches are required to be locked out or other measures taken which will prevent the equipment from being energized without the knowledge of the individuals working on it. The locks placed on the switches are to be removed only by the person who installed them or by an authorized person. The inspector believed that the violation was very serious in this instance as indicated above, but he was not sure that the foreman was aware of the employee's failure to lock out the equipment. Therefore, I cannot assess any portion of the penalty under the criterion of negligence.

Exhibits 3 and 4 do not indicate that respondent has been cited for a previous violation of section 57.12-16. It is unnecessary for me to repeat the findings made above with respect to the size of the respondent's business or the ability to pay penalties or good-faith abatement.

Consequently, the penalty to be assessed is based entirely on the gravity of the violation, which was extremely serious in this instance, because the employee was in a position where rocks could have fallen on him from the feeder if it had started up. He could also have fallen or have been pushed by rocks into the crusher itself. In view of the extreme seriousness of the violation I believe that a penalty of \$250 should be assessed for this violation.

Citation No. 2248437, or Exhibit 9, alleged a violation of section 57.4-24(c) because a fire extinguisher provided in the underground maintenance truck had been used and several days had passed without the fire extinguisher being immediately recharged or replaced with a fully charged extinguisher. Section 57.4-24(c) requires that fire extinguishers be replaced with a fully charged extinguisher or device or recharged immediately after any discharge. The inspector testified that the foreman did not know that the fire extinguisher had been discharged. Consequently, no portion of the penalty may be based on the criterion of negligence. There is no history of a previous violation of section 57.4-24(c), so that no portion of the penalty should be assessed under the criterion of history of previous violations.

The only remaining criterion not previously discussed above is gravity. The inspector said that the truck was an old model, in the late sixties or early seventies, and that if it had caught fire without having the fire immediately extinguished, there was a potential for the gasoline tank to explode. Of course, the rubber tires on the truck could

catch on fire, along with the wooden beams which it was hauling, with a result that toxic gases could be transported to the face area by the ventilation system. Therefore, he considered the violation to be serious. In such circumstances, I believe that a penalty of \$50 should be assessed.

Citation No. 2248438, or Exhibit 10, alleged a violation of section 57.4-2 because a sign warning against smoking and open flames was not provided at the oil storage area located underground. Section 57.4-2 requires that signs warning against smoking and open flames be posted in areas or places where fire or explosion hazards exist. The inspector testified that there were several 55-gallon and 5-gallon containers filled with oil in this area and that there was some spillage from the tanks when the miners went to them to obtain oil for their vehicles. It is permissible for the employees to smoke in some areas of this particular underground mine since it is mining limestone rather than coal, and the inspector thought that an employee might forget that he was in an area where smoking was prohibited and go into the no-smoking area to obtain oil and drop a cigarette in the oil and cause a fire. Oil is not a highly inflammable substance, as gasoline would have been, and therefore the likelihood of fire or explosion was not great. Exhibits 3 and 4 show that no previous violation under this section has occurred.

There had previously been a sign prohibiting smoking in this area but it had disappeared and the foreman was surprised that the sign was not there at the time this alleged violation was cited. Therefore, I cannot find that respondent was negligent in the occurrence of this particular violation. The seriousness of the violation is not great because of the types of materials that were being stored. Consequently, I find that a penalty of only \$25 should be assessed in this instance.

The next citation involved in this proceeding is No. 2248439, alleging a violation of section 57.14-1. That citation alleged that the belt drive for the No. 3 belt conveyor was not guarded to prevent persons from becoming caught in pinch points. The pinch points were exposed and accessible. The Secretary did not present any evidence with respect to this alleged violation. I have examined the proposed assessment which was based on the inspector's findings checked on the citation to the effect that there was moderate negligence and that there was a reasonable likelihood that a permanent disabling injury could be sustained as a result of the failure to guard the belt drive.

The Secretary proposed a penalty of \$58 pursuant to the assessment formula contained in Part 100 of Title 30 of the Code of Federal Regulations. I find that that is a reasonable penalty and it will be affirmed.

Citation No. 2248481 alleged a violation of section 57.9-1, and stated that self-propelled equipment was not being inspected by the equipment operator before being placed in operation. The defects, if any, were not recorded or reported by the operator of the equipment.

The Secretary did not present any evidence with respect to this alleged violation, and since the inspector checked the citation as not involving a "significant and substantial" 3/ violation, a single penalty was assessed of \$20 pursuant to section 100.4 of the Secretary's assessment formula. Since no evidence was presented to show that the violation was any more serious than the inspector considered it to be, I find that the \$20 penalty is reasonable and should be affirmed.

Citation No. 2248482, or Exhibit 12, alleged a violation of section 57.12-25 because the 120-volt electric motor on the diesel tank located beside the mine office was not grounded. The ground conductor had been disconnected at the motor disconnect and the breaker panel. The pump is used daily and the area around the pump is at times wet.

Section 57.12-25 provides that "[a]ll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection."

The inspector testified that when persons were reaching for the nozzle of the diesel tank they could be exposed to a serious shock or electrocution hazard, and that a spark could also have the potential for igniting the diesel fuel. The inspector did not know whether the foreman was aware of the violation, but he had been in that area and should have notice

3/ In Consolidation Coal Co., 6 FMSHRC 189 (1984) the Commission held that an inspector may properly designate a violation cited pursuant to Section 104(a) of the Act as being "significant and substantial" as that term is used in Section 104(d)(1) of the Act, that is, that the violation is of such nature that it could significantly and substantially contribute to the cause and effect of a mine safety and health hazard.

that the electrical pump was not grounded. Consequently, I find that there was a moderate amount of negligence associated with the violation of section 57.12-25 and that the violation was very serious.

The exhibits in this proceeding do not show that respondent has been previously cited for a violation of section 57.12-25. Therefore, a penalty of \$25 will be assessed under the criterion of negligence, and a penalty of \$100 will be assessed under the criterion of gravity for a total penalty of \$125.

Citation No. 2248483, or Exhibit 13, alleged a violation of section 57.9-3 because the service brakes on the front-end loader were not adequate. Section 57.9-3 provides that "[p]owered mobile equipment shall be provided with adequate brakes." A distance of 20 feet was required for stopping the loader when it was traveling at a speed of 3 to 4 miles per hour, whereas the brakes should have stopped the end loader within a distance of 3 or 4 feet. The loader is operated in the plant and stockpile areas where foot traffic is present.

The inspector noticed that the brakes were probably inadequate because the operator of the end loader was putting the transmission in reverse to help stop it. The inspector stated that the driver of the front-end loader had not reported the defective brakes to the mine foreman and therefore respondent cannot be held liable for the employee's negligence in this instance.

The violation was serious because people coming to the mine to obtain crushed stone often walk in the area where the end loader is used, and were exposed to possible serious injury or death if the operator of the end loader had been required to stop in order to avoid hitting someone.

Exhibit 3 shows that respondent was previously cited for a violation of section 57.9-3 only about 4 months before the present violation was cited. Therefore, a penalty of \$25 will be assessed under the criterion of history of previous violations. No portion of the penalty may be assessed under the criterion of negligence, but since the violation was serious, a penalty of \$75 will be assessed under the criterion of gravity, for a total of \$100.

Citation No. 2248486 alleged a violation of section 57.13-21 because a 2-inch high-pressure air hose to the drill and automatic shutoff valve was not provided with suitable locking devices. Section 57.13-21 provides:

Except where automatic shutoff valves are used, safety chains or other suitable locking devices shall be used at connections to machines of high pressure hose lines of 3/4-inch inside diameter or larger, and between high-pressure hose lines of 3/4-inch inside diameter or larger, where a connection failure would create a hazard.

The Secretary did not present any evidence with respect to this violation. The inspector's citation indicates that he considered the violation to be "significant and substantial." He rated negligence as moderate, and gravity as reasonably likely to involve an injury of a permanently disabling nature for one person. A penalty of \$58 was proposed pursuant to section 100.3 of the assessment procedure. I find that that is a reasonable penalty and it will be affirmed.

Citation No. 2248434, or Exhibit 6, alleged a violation of section 57.15-5 because an employee was observed standing on two rocks that were lodged in the jaw crusher. The jaw crusher was operating and the employee was not wearing a safety belt and using a line while freeing a hangup of rocks in the crusher. Section 57.15-5 provides that "[s]afety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

The inspector cited this violation as part of an imminent danger order. The inspector believed that the employee was in extreme danger because the jaws of the crusher had an opening of from 30 to 42 inches and the employee was standing on two rocks at the jaws of the crusher while trying to get the rocks separated so that they would go into the crusher. Another employee was standing on the feeder of the crusher trying to free some other rocks. A third employee was standing near the crusher throwing rocks into the jaws of the crusher so as to promote the jaws to catch hold of the rocks which were hanging at the mouth of the crusher. The inspector stated that he felt that the employee was in danger of falling into the crusher at any moment and that

he wrote the imminent danger order to require him to be withdrawn, along with the employee in the feeder, until they could be provided with the proper lifelines and protected from falling.

Inasmuch as the foreman had been with the inspector up to the point that they found the employees engaged in this hazardous practice it cannot be said that the operator was aware of the employees' practice, assuming it was a practice, of freeing rocks in the crusher while failing to use the lifeline.

The inspector stated that section 57.16-2(a)(1) requires that the operator use a mechanical breaker or a hydraulic ram for the purpose of freeing hangups in the crusher, and that the operator did not have such equipment.

I find that this violation was a very serious one and that a penalty of \$1,000 should be assessed under the criterion of gravity.

The exhibits do not show that respondent has been previously cited for a violation of section 57.15-5 and therefore no portion of the penalty will be assessed under history of previous violations.

Citation No. 2248440, or Exhibit 11, alleged a violation of section 57.9-2 because the parking brake was not operable on the truck used to transport powder and the brake cannot be set when employees are on the lift in the truck when it is raised to put explosives into a drill hole. The truck is used in several areas of the mine where the floor of the mine is not level. The inspector stated that the driver of the truck could not rely upon placing the truck in a low gear for holding it when it was engaged in filling holes or drilling roof bolts because at times the truck's hydraulic system was required for the work that was being performed. As a result only the foot brake would be a means of holding the truck at such times, and if the driver should happen to be distracted, or become fatigued, he might allow the truck to move while one or more persons were working on the lift.

Section 57.9-2 requires that "[e]quipment defects affecting safety shall be corrected before the equipment is used." The equipment in this instance was being used when the brakes were obviously defective. The violation was serious and a penalty of \$100 should be assessed under the criterion of gravity. The operator of the truck had not reported the defective brakes to the foreman and no portion

of the penalty should be assessed under the criterion of negligence. There is no history of a previous violation of that section and therefore a total penalty of \$100 will be assessed.

Citation No. 2248484 alleged a violation of section 57.11-1 because a safe means of access was not provided and maintained to the impact crusher area. Sections of the crusher platform floor were missing and persons were required to walk narrow concrete supports to reach the crusher for welding and maintenance operations.

Counsel for the Secretary did not present evidence as to Citation No. 2248484. The citation shows that the inspector believed that it was a "significant and substantial" violation, and that it was a violation that could reasonably be expected to result in a permanently disabling injury. MSHA proposed a penalty of \$58 which appears to be appropriate and will be affirmed.

Citation No. 2248485 alleged a violation of section 57.14-1 because a guard for the V-belt drive on the impact crusher did not extend below the pinch point. The pinch point was exposed and accessible. One person works in the area when the crusher is operating. The inspector considered this violation to be "significant and substantial," and checked the citation to indicate his belief that it was reasonably likely that an injury of a permanently disabling nature could occur for one person. The Secretary's counsel did not present any evidence with respect to this alleged violation. A penalty of \$58 was proposed by MSHA. That appears to be appropriate and that penalty will be affirmed.

DOCKET NO. KENT 84-194-M

Citation No. 2249127 alleged a violation of section 57.12-18 because the principal power switches located at the primary jaw crusher control deck were not labeled to show which unit each controlled. Identification by location could not readily be made. Work was being performed on two of the three units which did not have labeled switches.

The inspector considered the violation to be moderately serious and believed that it was reasonably likely that an injury might occur of a permanently disabling nature. MSHA proposed a penalty of \$58. Since the Secretary's counsel did not present any evidence with respect to this violation, the penalty will be affirmed.

Citation No. 2249129, or Exhibit 14, alleged a violation of section 57.3-22 because loose ground was not taken down in the No. 5 entry before work was done. The loose ground consisted of rocks ranging in size from 3 inches by 5 inches to 8 inches by 16 inches and was located near the back a distance of 18 feet from the mine floor. Two employees were working in this area.

Section 57.3-22 provides that:

Miners shall examine and test the back, face and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

The inspector said that the material was obviously cracked and loose, that he had discussed the operator's tendency to leave loose ground with the foreman on a previous inspection, that this was an active working area, and that since the roof was about 18 feet high in this area, the two men working in the vicinity of the loose material were exposed to a hazard which could cause serious injury or death if the loose material had been dislodged. Therefore, I find that he properly concluded that the operator was very negligent and that the violation was very serious.

I further find that the violation occurred, that a penalty of \$200 should be assessed under the criterion of negligence, and that a penalty of \$300 should be assessed under the criterion of gravity, for a total penalty of \$500. There is no history of a previous violation of that section.

Citation No. 2249130, or Exhibit 15, alleged another violation of section 57.3-22 and stated that loose ground was not taken down in the No. 6 heading before work was done. The loose ground located high on the rib and face ranged in size from 6 inches by 12 inches to much larger sized slabs. Two mechanics were working in the area. The inspector believed that the second violation of section 57.3-22 was as serious as the first one and that respondent was equally negligent.

Since the materials were even larger in size than the materials described in the first citation, I find that a penalty of \$200 should be should be assessed under the criterion of negligence, and \$400 under gravity, for a total penalty of \$600.

Citation No. 2249131, or Exhibit 16, alleged a violation of section 57.12-34. That section provides that "[p]ortable extension lights, and other lights that by their location present a shock or burn hazard shall be guarded." The guard for the portable light had been removed in this instance and was not in place to prevent a burn or shock injury.

The inspector said that the type of bulb used in the light was very different from the ordinary light bulb used in a home and that it was extremely hot. Since the employees were working within 4 feet of the light, they could easily have backed into it and burned themselves. He also pointed out that he knew of an employee who had been electrocuted when he came in contact with a fluorescent light fixture at a mine that does not belong to respondent in this case. The inspector's testimony supports a finding that the violation was serious.

The evidence does not show that respondent's foreman was aware of this particular hazard or violation so that no portion of the penalty should be assessed under negligence. In view of the gravity of the violation in the circumstances described by the inspector, a penalty of \$50 will be assessed under the criterion of gravity. The evidence does not show that respondent has previously violated section 57.12-34.

Citation No. 2249134 alleged a violation of section 57.5-13 because sufficient water or other efficient dust-control measures were not being used during drilling operations. A large quantity of suspended dust was observed where three employees were working.

The Secretary did not present any evidence with respect to this violation and the inspector did not rate the violation as "significant and substantial" so that a penalty of \$20 was proposed by MSHA. Since there is no evidence to show that a different amount should be assessed, I find that the amount of \$20 is reasonable and should be affirmed.

DOCKET NO. KENT 84-234-M

Citation No. 2249132, or Exhibit 17, alleged a violation of section 57.16-2(a)(1). That section provides that:

Bins, hoppers, silos, tanks and surge piles, where loose unconsolidated materials are stored, handled or transferred shall be equipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials.

The inspector testified that a mechanical device had not been provided at the hopper for the vibratory feeder located at the jaw crusher so that persons could avoid working where they would be exposed to entrapment or the danger of falling into the jaw crusher. The inspector stated that he had previously cited the operator for failing to have such a device, and that no attempt had been made to obtain that type of device. He believed that the failure to have the equipment could result in serious or permanently disabling injuries.

The exhibits do not show that the respondent has previously been cited for a violation of this section. The inspector stated that he had orally discussed the need for the mechanical device and had refrained from citing the operator for that violation at the time the imminent danger order discussed above was written. Therefore, respondent was extremely negligent in failing to provide the mechanical device to make it possible for the rocks to be dislodged without having a person get into the feeder or crusher for that purpose.

I find that the evidence supports a finding that respondent was very negligent in this instance and that the violation was serious. Therefore a penalty of \$300 will be assessed under the criterion of negligence, and \$200 under the criterion of gravity for a total penalty of \$500.

Citation No. 2247332 alleged a violation of section 57.11-58 because an accurate record of persons in the mine was not being kept. The check-in and check-out system indicated two persons were underground when there were actually four underground, and those four persons were not carrying a positive means of being identified.

The Secretary did not present any evidence with respect to this alleged violation. The inspector rated the violation as not being "significant and substantial" and a penalty of only \$20 was proposed by MSHA. In the absence of evidence to support a greater penalty than \$20, I shall affirm the penalty proposed by MSHA.

DOCKET NO. KENT 84-235-M

Citation No. 2249128 alleged a violation of section 57.9-22 because a berm or guard was not provided alongside the elevated roadway beginning at the No. 2 belt conveyor and extending to the jaw crusher feeder, a distance of about 60 feet. The level below the roadway averaged approximately 12 feet. A 35-ton truck traveled the roadway.

The inspector considered the violation to be "significant and substantial," that it was associated with moderate negligence, and that it was reasonably likely that someone would be injured in a permanently disabling fashion. The Secretary's counsel did not present any evidence with respect to this violation, and MSHA proposed a penalty of \$58 pursuant to section 100.3 of MSHA's assessment formula. In the absence of any evidence to support a different penalty, I find that the proposed penalty of \$58 should be affirmed.

DOCKET NO. KENT 84-239-M

Citation No. 2249249 alleged a violation of section 57.5-50(b) because the full shift exposure of the operator of the Michigan front-end loader to mixed noise levels exceeded the allowable rating by 1.55 times, or was 155 percent more than the permissible level. That exposure is the equivalent of subjecting an 8-hour employee to 93 decibels. Personal hearing protection was being used. The cab windows and windshield had been removed.

The inspector extended the time for compliance with respect to this alleged violation on about six occasions to allow time for installation of engineering controls until, in July of 1984, the loader operator was found to be protected and was not subject to an excessive noise level.

The Secretary did not present any evidence with respect to this violation and MSHA assigned a penalty of only \$20 to the violation because it was not checked as being "significant and substantial." Since there is no evidence in this proceeding to show that a different penalty should be assessed, I shall affirm the penalty of \$20.

Citation No. 2249133, or Exhibit 18, alleged a violation of section 57.4-75. That section provides that "[b]elt conveyors shall be equipped with slippage and sequence switches." The citation states that the Nos. 1 and 2 belt conveyors were not equipped with slippage and sequence switches and that both belts are located underground.

The purpose of having a slippage switch, according to the inspector, is to make sure that the belt will be de-energized if the belt starts slipping on a roller or a pulley. If the belt is not deenergized, friction from the slipping may result in the belt catching on fire. He further explained that the sequence switch was designed to stop other belts from dumping material on the belt that is stopped so that there will not be a pileup of material. He believed that the violation was serious because failure to have the slippage switch could result in a fire and the toxic fumes from the fire would be carried to the working section. He stated that he had previously discussed with the operator's foreman the need for providing slippage switches, but they had not been installed.

The evidence supports a finding that the violation occurred, that the operator was highly negligent in this instance, and that the violation was serious. Therefore, I find that a penalty of \$300 should be assessed under the criterion of negligence, and \$150 under the criterion of gravity, for a total penalty of \$450. The exhibits do not show that there has been any previous violation of section 57.4-75.

Citation No. 2386423 alleged a violation of section 50.30(a) because respondent had not submitted the quarterly employment and production report in a timely manner. As a result, a copy of the quarterly report was not available at the mine office.

The Secretary did not present any evidence with respect to this violation and the inspector did not check it as being "significant and substantial." MSHA proposed a penalty of only \$20. Since there is no evidence to support assessment of a different penalty I shall affirm the proposed penalty of \$20.

DOCKET NO. KENT 84-208-M

Citation No. 2247321, or Exhibit 24, alleged a violation of section 56.14-6. Section 56.14-6 provides that "[e]xcept when testing the machinery, guards shall be securely in place while the machinery is being operated."

The inspector stated that the guards for the primary impact crusher V-belt drives were not in place. The guards were lying on the ground. He stated that the superintendent

or foreman did not know that the guards had been removed, but he believed the violation was serious because one of the belts was 2 feet above the ground and the other one was higher than that. The pinch point between the pulley and the belt was large enough for an arm to go into the exposed area. The machinery was being operated and there were several exposed tripping hazards in the vicinity, such as pieces of metal and soft drink bottles. The inspector believed that people would be walking close to the pinch points at least once daily, and believed that the violation was serious and could result in permanently disabling accidents, such as the severance of an arm if a person should fall into the pinch point.

Since there is no indication that respondent's foreman was aware of the violation, no portion of the penalty should be assessed under negligence, but the gravity of the violation warrants a penalty of \$100. There is no evidence to show that a previous violation of this section has been cited.

Citation No. 2247322 alleged a violation of section 56.16-2(a)(1). That section has already been cited and I have quoted the language of the standard. It should be noted that this particular violation occurred at respondent's Jenkins mine rather than the MJM Mine.

The inspector had discussed the failure to provide the mechanical rock breaker, which is required by section 56.16-2 when he was at the MJM Mine, and he believed that respondent was very negligent in failing to provide the mechanical device at the Jenkins Mine. He stated that the employee was engaged in a very hazardous practice at the Jenkins Mine because he was going into the hopper and putting an explosive on a rock that needed to be broken into pieces small enough to go into the crusher. He would then place mud on top of the explosive and discharge it. That type of operation was very hazardous because flying rocks could injure a person. Just the fact that he was using explosives increased the seriousness of the violation.

Since respondent was very negligent in failing to provide a proper device for breaking up the rock, and since explosives were being used in a hazardous manner as a substitute for the type of equipment that should have been provided, I find that a penalty of \$300 should be assessed under the criterion of negligence, and a penalty of \$400 should be assessed under the criterion of gravity, for a total penalty of \$700. The evidence fails to reflect a previous history for a violation of section 56.16-2(a)(1) except for the other violation which was cited in this proceeding.

Citation No. 2249136, or Exhibit 19, alleged a violation of section 56.12-25. That section provides that "[a]ll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection." The inspector testified that three disconnect switches located in the control room were not grounded or provided with equivalent protection. The middle lug was missing on the disconnect for heaters allowing the energized conductors to move about when the knife switch was in open position.

The inspector believed that the violation was very serious because when a person opens the compartment his body may become a conductor and result in a serious injury or electrocution. The inspector said that he did not think that the foreman was aware of the condition. Consequently, no portion of the penalty should be assessed under negligence, but in view of the seriousness of the violation, a penalty of \$100 will be assessed under the criterion of gravity. The exhibits do not show that a previous violation of that section has been alleged.

Citation No. 2249137, or Exhibit 20, alleged a violation of section 56.12-32. That section provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

The citation states that 16 covers were left off or not closed on electrical panels located in the main electrical room, and that these energized parts were exposed and accessible. The boxes were located at various heights, some as low as 2 feet, and others as high as 5 feet from the floor. The inspector said that a person could slip and fall against one of the conductors and that it was necessary for someone to go into the control room at least once a day. He said there was sufficient dirt in the panels to show that there was a practice of leaving a large number of them open. There were soft drink bottles and old electrical equipment in the area so that a person could fall against one of the conductors. Since they were 480-volt conductors, there was a danger of serious injury or electrocution.

The evidence supports a finding that the violation occurred and that respondent was very negligent in allowing this large number of covers to be left off of the panels. A penalty of \$100 will be assessed under the criterion of negligence. Because of the seriousness of the violation, a penalty of \$200 will be assessed under the criterion of gravity, for a total penalty of \$300. There is no history of a previous violation.

Citation No. 2249138, or Exhibit 21, alleged a violation of section 56.11-1. That section requires that a "[s]afe means of access shall be provided and maintained to all working places." The citation states that handrails for the No. 13-2 belt conveyor were broken in several places, and completely missing in other areas. The conveyor belt is used to gain access to the head and trough rollers by maintenance personnel.

The inspector testified that there was fine dust on the belt which made it somewhat slippery. The belt was 15 to 20 feet above the ground and was on an incline. Generally when a person walks on the belt he is doing so for the purpose of performing maintenance work and therefore is carrying something in his hand. The existence of dust on the belt, the type of work being done, and the sloping nature of the belt are conditions which support a finding that respondent was negligent because the violation was clearly obvious to the foreman as well as to the person who had to walk on the belt. I find that the violation occurred, that a penalty of \$100 should be assessed under the criterion of negligence, and that a penalty of \$100 should be assessed under the criterion of gravity, for a total penalty of \$200. There is no previous history of a violation of section 56.11-1.

Citation No. 2249139, or Exhibit 22, alleged a second violation of section 56.11-1 because a safe means of access was not provided to persons performing maintenance on the head and trough rollers of the No. 5-4 belt conveyor. No handrails at all were provided on this conveyor, which was approximately 15 to 20 feet from ground level.

I find that the violation occurred. Since the violation is almost identical to the previous violation discussed above, a penalty of \$200 will be assessed for this violation also.

Citation No. 2249140, or Exhibit 23, alleges a violation of section 56.9-87. That section provides that:

Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

The citation stated that the reverse signal alarm was not operable on the Michigan front-end loader. The loader operator had an obstructed view to the rear because the engine of the loader was located there and obstructed his view

directly behind him. His view was also obstructed by the large wheels of the vehicle.

Respondent's customers go into the area where the front-end loader operates for the purpose of getting crushed stone, and they often get out of their trucks and walk around in the vicinity of the end loader. There was a lot of noise from the crusher in this area, and the audible backup alarm, if it had been operating, would have been sufficient to alert a person that the machine was backing up. The inspector considered the violation to be serious because of the fact that people did walk in the vicinity of the end loader when it was in operation. In fact, the inspector saw two people in that area at the time the citation was written.

I find that the violation occurred. Since the end loader was operating in full view of the foreman, I find that respondent was very negligent for failure to have the backup alarm in operation, and that the violation was very serious in the circumstances. Therefore, a penalty of \$200 will be assessed under the criterion of negligence, and a penalty of \$150 under the criterion of gravity, for a total penalty of \$350. There is no history of previous violations.

Citation No. 2249135 alleged a violation of section 50.30(a) because respondent had not submitted a quarterly employment and production Form 7000-2 for the past two quarters. The Secretary's counsel did not present any evidence with respect to this alleged violation. The inspector did not consider the violation to be "significant and substantial" and did not evaluate the criteria of gravity and negligence associated with the violation. MSHA proposed a penalty of only \$20. In the absence of any evidence to support different findings, I shall affirm the penalty proposed by MSHA.

Adams Stone Corporation will hereinafter be ordered to pay all penalties in Docket Nos. KENT 84-171-M, KENT 84-178-M, KENT 84-194-M, and KENT 84-234-M because all of the proposals for assessment of civil penalty in those dockets for the MJM Mine and Mill were filed with the understanding that Adams Stone Corporation was the operator of the MJM Mine and Mill. Adams Stone Corporation will also be ordered to pay the penalties assessed for the Jenkins Mine and Mill in Docket No. KENT 84-208-M because the proposal for assessment of civil penalty named Adams Stone Corporation as the operator of the Jenkins Mine and Mill at the time the proposal was filed and Adams Stone Corporation is still the operator of the Jenkins Mine and Mill. Magoffin, Johnson & Morgan Stone

Company will be ordered to pay the civil penalties assessed for the MJM Mine and Mill in Docket Nos. KENT 84-235-M and KENT 84-239-M because the proposals for assessment of civil penalty in those two dockets named Magoffin, Johnson & Morgan Stone Company as the operator of the MJM Mine and Mill at that time.

Mr. Adams filed his answers in all dockets with captions showing Adams Stone Corporation as the respondent, including the answers filed in Docket Nos. KENT 84-235-M and KENT 84-239-M, even though the Secretary's counsel had shown Magoffin, Johnson & Morgan Stone Company as the respondent in those two cases. All prior case involving the MJM Mine and Mill have been processed with the understanding that Adams Stone Corporation was the operator of the MJM Mine and Mill. Therefore, it is appropriate for the processing of the cases here involved that they be completed in the name of the affiliated company in whose name the cases were originally filed by MSHA.

WHEREFORE, It is ordered:

(A) Adams Stone Corporation shall, within 30 days from the date of this decision, pay civil penalties in the amount of \$5,728.00 for the penalties assessed in Docket Nos. KENT 84-171-M, KENT 84-178-M, KENT 84-194-M, KENT 84-234-M, and KENT 84-208-M which are allocated to the respective violations as follows:

<u>Docket No. KENT 84-171-M</u>			
Citation No.	2248435	3/26/84	\$ 57.15-4 . . . \$ 50.00
Citation No.	2248436	3/26/84	\$ 57.12-16 . . . 250.00
Citation No.	2248437	3/26/84	\$ 57.4-24(c) . . . 50.00
Citation No.	2248438	3/26/84	\$ 57.4-2 . . . 25.00
Citation No.	2248439	3/26/84	\$ 57.14-1 . . . 58.00
Citation No.	2248481	3/27/84	\$ 57.9-1 . . . 20.00
Citation No.	2248482	3/27/84	\$ 57.12-25 . . . 125.00
Citation No.	2248483	3/27/84	\$ 57.9-3 . . . <u>100.00</u>
Total Penalties Assessed in Docket No.			
KENT 84-171-M			\$ 678.00

Docket No. KENT 84-178-M

Citation No.	2248486	3/28/84	§ 57.13-21	. . .	\$ 58.00
Citation No.	2248434	3/26/84	§ 57.15-5	. . .	1,000.00
Citation No.	2248440	3/27/84	§ 57.9-2	. . .	100.00
Citation No.	2248484	3/27/84	§ 57.11-1	. . .	58.00
Citation No.	2248485	3/27/84	§ 57.14-1	. . .	<u>58.00</u>

Total Penalties Assessed in Docket No.
KENT 84-178-M \$1,274.00

Docket No. KENT 84-194-M

Citation No.	2249126	4/26/84	§ 57.14-1	. . .	\$ 58.00
Citation No.	2249127	4/26/84	§ 57.12-18	. . .	58.00
Citation No.	2249129	4/26/84	§ 57.3-22	. . .	500.00
Citation No.	2249130	4/26/84	§ 57.3-22	. . .	600.00
Citation No.	2249131	4/26/84	§ 57.12-34	. . .	50.00
Citation No.	2249134	4/26/84	§ 57.5-13	. . .	<u>20.00</u>

Total Penalties Assessed in Docket No.
KENT 84-194-M \$1,286.00

Docket No. KENT 84-234-M

Citation No.	2249132	4/26/84	§ 57.16-2(a)(1)	. . .	\$ 500.00
Citation No.	2247332	5/21/84	§ 57.11-58	. . .	<u>20.00</u>

Total Penalties Assessed in Docket No.
KENT 84-234-M \$ 520.00

Docket No. KENT 84-208-M

Citation No.	2249135	5/7/84	§ 50.30(a)	. . .	\$ 20.00
Citation No.	2247321	5/8/84	§ 56.14-6	. . .	100.00
Citation No.	2247322	5/8/84	§ 56.16-2(a)(1)	. . .	700.00
Citation No.	2249136	5/8/84	§ 56.12-25	. . .	100.00
Citation No.	2249137	5/8/84	§ 56.12-32	. . .	300.00
Citation No.	2249138	5/8/84	§ 56.11-1	. . .	200.00
Citation No.	2249139	5/8/84	§ 56.11-1	. . .	200.00
Citation No.	2249140	5/8/84	§ 56.9-87	. . .	<u>350.00</u>

Total Penalties Assessed in Docket No.
KENT 84-208-M \$1,970.00

(B) Magoffin, Johnson & Morgan Stone Company shall, within 30 days from the date of this decision, pay civil penalties

totaling \$548.00 for the penalties assessed in Docket Nos. KENT 84-235-M and KENT 84-239-M which are allocated to the respective violations as follows:

Docket No. KENT 84-235-M

Citation No. 2249128 4/26/84 § 57.9-22. . . .	\$	<u>58.00</u>
Total Penalties Assessed in Docket No. KENT 84-235-M	\$	58.00

Docket No. KENT 84-239-M

Citation No. 2249249 11/22/83 § 57.5-50(b) . . .	\$	20.00
Citation No. 2249133 4/26/84 § 57.4-75. . . .		450.00
Citation No. 2386423 7/16/84 § 50.30(a) . . .		<u>20.00</u>
Total Penalties Assessed in Docket No. KENT 84-239-M	\$	490.00
Total Penalties Assessed in This Proceeding .		\$6,276.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

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/ejp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 15 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 85-18
Petitioner : A.C. No. 33-01069-03578
v. : Sunnyhill No. 9 North
: Mine
PEABODY COAL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), proposing civil penalty assessments for three alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations.

Respondent filed a timely answer and notice of contest and the case was scheduled for hearing in Columbus, Ohio. However, by motion filed April 29, 1985, the parties seek approval of a proposed settlement pursuant to Commission Rule 30, 29 C.F.R. § 2700.30. The violations, initial assessments, and the proposed settlement amounts are as follows:

§ 104(d)(1)

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR §</u>	<u>Assessment</u>	<u>Settlement</u>
2331457	8/2/84	75.1403-5(g)	\$ 750	\$ 400

§ 104(d)(1)

<u>Order No.</u>	<u>Date</u>	<u>30 CFR §</u>	<u>Assessment</u>	<u>Settlement</u>
2331458	8/2/84	75.200	\$1,000	\$ 550
2331459	8/2/84	75.400	1,000	550

Discussion

In support of the proposed settlement disposition of this matter, counsel for the parties state that they have discussed the alleged violation and the six statutory criteria stated in section 110(i) of the Act, and that the circumstances presented warrant the reduction in the original civil penalty assessments for the violations in question. Further, counsel for the petitioner has submitted a detailed discussion and disclosure as to the facts and circumstances surrounding the issuance of the citation and orders, as well as a full explanation and justification for the proposed reductions.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the joint motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion is GRANTED and the settlement is APPROVED.

ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above in satisfaction of the violations in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is dismissed.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAY 15 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 84-70-M
Petitioner	:	A.C. No. 29-00174-05517
	:	
v.	:	Amax Mine & Mill
	:	
AMAX CHEMICAL CORPORATION,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Morris

This is a civil penalty proceeding initiated by the petitioner against the respondent in accordance with Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The civil penalties are for the violation of mandatory standards promulgated pursuant to the Act.

The citations, the standards allegedly violated, the initial assessments, and the proposed dispositions, are as follows:

<u>Citation No.</u>	<u>Standard C.F.R. Title 30</u>	<u>Initial Assessment</u>	<u>Disposition</u>
2235591	57.20-3(a)	\$ 20	Vacate
2235739	57.20-3(a)	168	\$ 20
2235596	57.19-120	192	20
2235597	57.19-24	178	20

Discussion

The narrative statements contained in the proposed settlement agreement relate to the statutory criteria for the assessment of civil penalties as contained in 30 U.S.C. § 820(i).

I find the proposed settlement is reasonable and it should be approved.

Accordingly, I enter the following:

ORDER

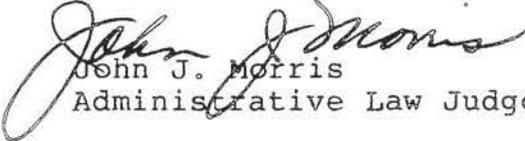
1. The proposed settlement agreement is approved.
2. Citation 2235591 and all proposed penalties therefore are vacated.

3. Citation 2235596 is reduced to a non-significant and substantial violation.

4. The following citations and penalties, as amended, are affirmed:

<u>Citation No.</u>	<u>Penalties</u>
2235739	\$20
2235596	20
2235597	20

5. Respondent is ordered to pay the sum of \$60.00 within 40 days of the date of this decision.


John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 15 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 84-224
Petitioner	:	A.C. No. 36-05018-03556
v.	:	
	:	Cumberland Mine
U.S. STEEL MINING COMPANY,	:	
INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

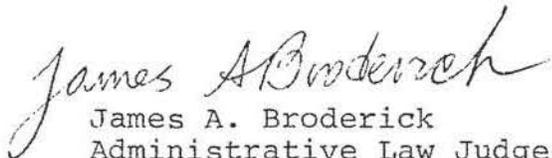
Before: Judge Broderick

On May 6, 1985, the Secretary of Labor filed a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at \$231 and the parties propose to settle for \$209.

The case involves two citations: the first charges a violation of 30 C.F.R. § 75.605 because of inadequate strain protection at a load center. It was originally assessed at \$112. The agreement proposes a reduction to \$90 because further investigation revealed the gravity to be less than originally believed, and it was agreed that the significant and substantial designation was erroneous and should be removed. The other citation charges a violation of 30 C.F.R. § 75.302-1(b)(1) because of inadequately installed line brattice. It was originally assessed at \$119 and the parties propose to settle for the same amount. The violation was moderately serious and resulted from Respondent's negligence.

I conclude that the settlement is in the public interest and should be approved.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of \$209 within 30 days of the date of this decision.


James A. Broderick
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAY 15 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 85-28
Petitioner	:	A.C. No. 02-01195-03513
	:	
v.	:	Docket No. WEST 85-40
	:	A.C. No. 02-01195-03514
	:	
PEABODY COAL COMPANY,	:	Docket No. WEST 85-57
Respondent	:	A.C. No. 02-01195-03516
	:	
	:	Kayenta Surface Mine

DECISION APPROVING SETTLEMENT

Before: Judge Carlson

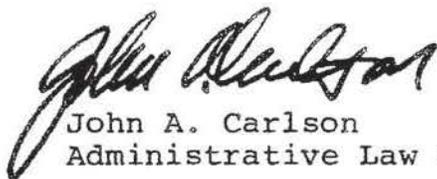
The respondent's motion for consolidation of these three cases is hereby granted.

The parties have submitted an amended settlement agreement through which they seek to settle all issues. Specifically, the parties agree that respondent shall pay the full \$20 penalty originally proposed by the petitioner for each of the nine citations, and they move jointly for dismissal of these proceedings.

Based upon the representations of the parties and the contents of the files, I conclude that the settlement agreement should be approved.

Accordingly, the settlement agreement is approved in all respects, and the motions of the parties are granted. Respondent shall therefore pay a total of \$180.00 in civil penalties within 30 days of this decision. These proceedings are dismissed.

SO ORDERED.


John A. Carlson
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

MAY 15 1985

333 W. COLFAX AVENUE, SUITE 400
DENVER COLORADO 80204

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 83-121-M
Petitioner : A.C. No. 42-00149-05506
: :
v. : Utah Copper Division
: :
KENNECOTT MINERALS COMPANY, :
UTAH COPPER DIVISION, :
Respondent :

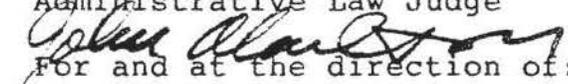
DECISION APPROVING SETTLEMENT

Before: Judge Lasher

Upon Petitioner's motion for approval of a proposed settlement of the two violations involved, and the same appearing proper and in the full amount of the initial assessment, the settlement is approved.

Respondent, if it has not previously done so, is ordered to pay to the Secretary of Labor within 30 days from the date hereof the sum of \$370.00 (\$20.00 for Citation No. 2083588 and \$350.00 for Citation No. 2083589).

John A. Carlson
Administrative Law Judge


For and at the direction of:
Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 20 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 84-37
Petitioner : A. C. No. 44-05141-03503
 :
v. : No. 1 Tipple
 :
J.A.D. COAL COMPANY, INC., :
Respondent :

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for Petitioner;
Hugh P. Cline, Esq., Cline, McAfee & Adkins,
Norton, Virginia, for Respondent.

Before: Judge Steffey

Pursuant to orders issued on October 5, 1984, and January 22, 1985, hearings in the above-entitled proceeding were held on November 8, 1984, and February 26, 1985, respectively, in Norton, Virginia, under section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977. I rendered a bench decision during the second hearing, but before the bench decision is reproduced as my final action in this proceeding, it is necessary that I deal with a procedural matter which was raised at the second hearing.

Denial of Request for Continuance

The second hearing in this proceeding was scheduled to commence at 9:00 a.m. on February 26, 1985, but at 9:00 a.m. on that day, I did not convene the hearing because no one had appeared in the hearing room to represent respondent. After we had waited for about 10 minutes for respondent's counsel to arrive, one of MSHA's secretaries in the building where the hearing was being held handed me a telephone message which had been received from the Norton, Virginia, law office of respondent's counsel. The note read as follows: "He [Mr. Carl E. McAfee] was to be here for meeting but he is out of town. His associate Mr. Kline cannot be here either so they are requesting a continuance. Pls. call Sandy Osborne if you have any questions."

Several factors enter into my conclusion that the request for continuance should be denied. When the first hearing was convened on November 8, 1984, Mr. Carl McAfee, who had signed all the pleadings and letters from respondent in the official file with respect to this proceeding, failed to appear at the hearing, but an associate, Mr. Hugh P. Cline, in Mr. McAfee's law firm, did appear at the hearing on respondent's behalf. His first request was that I delay the convening of the hearing until Mr. Woodard, respondent's vice president, could be present because he had had trouble with his car or truck and could not be present at 9:00 a.m. I agreed to delay the hearing until Mr. Woodard arrived with the result that the hearing did not commence until 10:10 a.m.

After the hearing was convened, Mr. Cline moved for a continuance on the ground that the petition for assessment of civil penalty sought to obtain assessment of penalties for only nine alleged violations, whereas MSHA's inspectors had cited a total of about 20 violations at the same time the nine here involved were written. Mr. Cline claimed that it would be tantamount to a denial of due process for respondent to be required to hire a lawyer to defend it in two cases when one would have been sufficient if MSHA had waited until all the citations had been processed through MSHA's assessment procedures before filing a petition for assessment of civil penalty for only nine of the citations.

In response to Mr. Cline's request for a continuance on the ground that this case did not include all violations which had been cited on or about May 9, 1984, I read from a letter to me from Mr. McAfee dated October 1, 1984, in which he had stated:

I am prepared to stipulate and agree that a violation occurred at the Tipple of J.A.D. Coal Company of St. Charles, Virginia, and there was a violation of 104a of the regulations and assessment of appropriate fine and penalty; however, I am not prepared to admit or stipulate that there were approximately fifteen or twenty 104a violations.

I then pointed out to Mr. Cline that in my order setting the case for hearing I had stated as follows:

The petition for assessment of civil penalty filed in this proceeding seeks to have penalties assessed for nine alleged violations of the mandatory health and safety standards. For that reason, I am somewhat perplexed by the statement in the last paragraph of respondent's reply to the prehearing order because reference is there made to 15 or 20 alleged violations.

Mr. Cline agreed with my observation that the least Mr. McAfee should have done in response to my hearing order would have been to file a motion requesting consolidation of the other alleged violations with the present case or a request that the hearing be continued until such time as the status of the other alleged violations could be determined.

As an alternative to continuing the hearing which was then in progress, I stated that the two inspectors who wrote the nine citations involved in this proceeding were present in the hearing room and I could see no reason why their direct testimony could not be introduced at this hearing and that I would return to Norton and hold a second hearing to consider the remaining alleged violations after respondent had received from MSHA a proposal for assessment of penalties with respect to the remaining citations.

Mr. Cline said he could not waive his objection to proceeding with the other alleged violations still pending, but that I had suggested "an excellent alternative" (Tr. 11). Therefore, the Secretary's counsel presented two inspectors who testified in support of the nine violations alleged in this proceeding and Mr. Cline cross-examined them (Tr. 19-83). Mr. Cline at first stated that he would prefer to wait until MSHA had filed a petition for assessment as to the remaining alleged violations before presenting any evidence (Tr. 84). When I pointed out that Mr. Cline might find that his client did not protest the remaining alleged violations which would have the result of preventing them from ever coming before the Commission, he said that he would present Mr. Woodard "briefly" as a witness (Tr. 84).

The time was then about 12:45 p.m. and I suggested that we have a luncheon recess before receiving respondent's evidence. An off-the-record discussion was then held during which Mr. Cline again expressed a preference for not putting on any evidence because he apparently had other commitments after lunch although my order providing for hearing had specifically stated on page one that "each attorney should arrange his schedule so that he has a full day to devote to the completion of the hearing." It was then agreed that respondent would waive the presentation of any evidence if it should be found that respondent had not contested the penalties proposed by MSHA with respect to the remaining citations which had been written during the same inspection which resulted in issuance of the nine citations involved in this proceeding. The following colloquy then occurred (Tr. 85):

JUDGE STEFFEY: During an off the record discussion Mr. Cline indicated that his client would not put on additional testimony as to any of the

nine violations that we have discussed today, and if the subsequent ones which were written at the same time as these go to a hearing before me he will put on a witness or witnesses pertaining to these nine violations. However if the other violations are settled by J.A.D. Coal Company's paying the proposed penalty so that no additional hearing is required as to the additional citations, Mr. Cline has indicated that I may issue a decision based on the testimony which has now been given by the government.

MR. CLINE: Judge, I believe you told me that's what you would do.

JUDGE STEFFEY: But I want your agreement that that's all right.

MR. CLINE: Yes.

JUDGE STEFFEY: Then this proceeding is concluded unless we have to have an additional one when the other matters come before Mr. Woodard and he decides whether he wants a hearing on them.

Despite the arrangement agreed upon by Mr. Cline for presentation of evidence only if respondent requested that a hearing be held with respect to violations in addition to the nine involved in this proceeding, Mr. McAfee subsequently sent to me a letter in which he revised his reply to the prehearing order issued in this proceeding to state that he wished to present two witnesses instead of three as originally anticipated and that the time required for presenting their testimony would be 2 hours instead of the 45 minutes previously indicated. The letter was postmarked on November 15, 1984, which was 7 days after the first hearing had been held on November 8, 1984.

Thereafter counsel for the Secretary filed on December 7, 1984, a letter in which he stated as follows:

In the above-captioned matter nine 104(a) citations were contested at hearing in Norton, Virginia, on November 8, 1984. Discussions indicated that some twelve other citations were written by the inspectors at a time contemporaneous with the nine subject to hearing. Counsel for Respondent indicated that he wished to present a defense common to all twenty-one citations and your Honor agreed to reconvene the hearing once the other citations were before your office.

Please be advised that upon my inquiry it was found that Mine Safety and Health Administration never received a Notice of Contest from the respondent in regard to the other twelve citations. It presently appears, then, that the Office of Administrative Law Judges does not and will not have jurisdiction over the other twelve citations. Accordingly, the hearing should be reconvened only to hear the defense to the nine pending citations.

Although I was of the opinion that Mr. Cline had waived the presentation of evidence with respect to the nine violations involved in this case unless it turned out that respondent had requested a hearing on the other 12 alleged violations, I concluded, for two reasons, that the hearing should be reconvened so that respondent could present evidence as to the nine violations involved in this proceeding. First, the letter quoted above from counsel for the Secretary indicated that he had no objections to my reconvening the hearing for the purpose of allowing respondent to present evidence as to the nine violations involved in this proceeding. Second, it appeared that respondent's counsel had reevaluated his case and had mailed the letter on November 15, 1984, to advise me that he was expecting me to reconvene the hearing so that he could introduce evidence pertaining to the nine alleged violations involved in this proceeding.

For the foregoing reasons, I issued on January 22, 1985, an order providing for the hearing to be reconvened on February 26, 1985, in Norton, Virginia. The order explained that respondent had failed to contest MSHA's proposal for a penalty with respect to the other 12 violations and that the hearing was being reconvened on February 26 "for the sole purpose of permitting respondent to present evidence with respect to the nine violations as to which counsel for the Secretary introduced evidence on November 8, 1984". A return receipt in the official file shows that Mr. McAfee's office received a copy of the order on January 26, 1985. Therefore, respondent's counsel had 30 days' notice that the hearing would be reconvened on February 26, 1985, for the sole purpose of allowing respondent to present evidence. Moreover, the hearing was scheduled to be held in the same town in which Mr. McAfee and Mr. Cline have their law office. It is difficult to imagine how a respondent could be given more adequate notice of a hearing or be afforded a more convenient hearing site than was provided by my order issued January 22, 1985.

Exhibit 10 in this proceeding indicates that Mr. McAfee is respondent's president. Mr. Cline stated at the first hearing that he had had a conference with Mr. McAfee prior to appearing before me on November 8, 1984, to represent respondent (Tr. 8). It is difficult for me to understand why

Mr. McAfee would have led Mr. Cline to believe that the remaining 12 violations cited by the inspectors in early May of 1984 would ever be the subject of a proceeding before the Commission. According to MSHA's Civil Penalty Processing Unit, those 12 alleged violations were the subject of Assessment Control Nos. 3502, 3504, 3505, and 3506. All of those proposed assessments were sent to respondent in June or July of 1984. Respondent did not protest any of those proposed assessments and all of them became final orders under section 105(a) of the Act in July or August of 1984. Therefore, when Mr. Cline appeared at the hearing before me on November 8, 1984, and moved for a continuance because there were allegedly 12 other violations which might subsequently come before me or some other judge for hearing and argued that it was a denial of due process for me to hold repetitious hearings for violations which were issued at the same time, he should have been advised by Mr. McAfee, respondent's president, or Mr. Woodard, respondent's vice president, that the remaining 12 violations could never come before me or any other judge because of respondent's failure to file a notice of contest regarding the penalties proposed by MSHA with respect to the other 12 violations.

By asking his law partner to represent respondent at the first hearing, Mr. McAfee was able to raise frivolous issues about the Secretary's failure to include all violations in a single proceeding which could not have been raised by Mr. McAfee if he had personally represented his company because he would have been unable to profess ignorance, as his partner in good faith did, with respect to the remaining 12 violations which are not a part of this proceeding. In any event, Mr. McAfee undoubtedly knew prior to the morning of February 26, 1985, that he would be unable to appear at the hearing to represent his company. The least he should have done, therefore, would have been to request a continuance before the Secretary's counsel and a judge had traveled to Norton, Virginia, to convene a hearing for respondent's sole benefit.

As I have indicated above on page four of this decision, Mr. Cline had already waived the presentation of evidence with respect to the nine violations in the event it developed that respondent had not filed a notice of contest with respect to the remaining 12 alleged violations. Mr. Cline's realization that he had waived presentation of evidence as to the nine violations here involved may have caused him to believe that it would be inappropriate for him to represent respondent at the reconvened hearing. Mr. Cline had also stipulated at the first hearing that all of the factual statements made in the inspectors' citations were correct (Tr. 12). That stipulation also probably contributed to Mr. Cline's lack of willingness to appear at the reconvened hearing because there is little that a respondent can present in its own defense in a civil penalty proceeding after it has stipulated that the facts stated by the inspectors in their citations are correct.

The facts which I have given above show that Mr. McAfee was afforded two opportunities for presenting evidence in this proceeding and failed to take advantage of either one of them. I do not believe that Mr. McAfee has shown good cause for being given a third opportunity to present evidence and there is no reason to believe that he would appear at a third hearing even if one were to be scheduled. Therefore, the order accompanying this decision will deny respondent's request for continuance made in a note delivered to me on February 26, 1985, by one of MSHA's secretaries.

The Commission issued its decision in Little Sandy Coal Sales, Inc., 7 FMSHRC 313 (1985), after I had finished drafting this decision, but I do not think that denial of respondent's request for a continuance in this case is in conflict with the Commission's holding in the Little Sandy case. In that case, the Commission reversed a judge's ruling to the effect that Little Sandy's representative was not entitled to cross-examine MSHA's witness because of the representative's failure to appear at the hearing. Little Sandy's representative, however, had called the judge's secretary the day before the hearing was held to state that he was too ill to attend the hearing. Therefore, in the Little Sandy case, the judge at least knew before convening the hearing that respondent's representative did not plan to attend the hearing.

In this case, respondent's counsel had already cross-examined both of MSHA's witnesses at the first hearing. The second hearing was held solely to permit respondent to introduce a direct case with respect to the same citations which were the subject of the testimony introduced by the Secretary's counsel at the first hearing. Moreover, in this case, respondent's counsel did not call me or my secretary prior to the hearing to advise me that he could not be present at the hearing and waited until after the time had passed for the hearing to commence before sending me a note by one of MSHA's secretaries asking for a continuance. While the note indicated that Mr. McAfee "is out of town" the note, as to Mr. Cline, who had represented respondent at the first hearing, simply stated that he "cannot be here either".

Additionally, in the Little Sandy case, the owner was proceeding without assistance of counsel, whereas in this case, Mr. McAfee, respondent's president, is an attorney who has a professional obligation to ask for continuances in a timely manner so as to avoid the inconvenience and expense which resulted from the untimely request for continuance made in this proceeding.

Respondent's Claims of Discriminatory Treatment by MSHA

At the commencement of the first hearing, counsel for respondent made a motion for dismissal of the Secretary's petition for assessment of civil penalty for the reason given below (Tr. 4):

Furthermore we move that all charges be dismissed by reason of the violation of equal protection under the constitution; that this is a discriminatory inspection, we can show by evidence, that Your Honor probably well knows, if not I have no objection to telling you that these inspectors were not permitted to inspect this tipple for some two years by reason that there was a court action that ruled in our Western District of Virginia that the Mine Safety and Health Act did not apply to tipples, and a court order in federal court was entered to that effect, and being law abiding citizens they abided by that, and then the court reversed its decision and said tipples were under the jurisdiction of MSHA, and of course we abided by that. And as soon as that was lifted we had a discriminatory inspection, and we move that it be dismissed for that reason. ***

It was not clear from the above argument just what was discriminatory about the inspection of respondent's tipple until respondent's counsel cross-examined the two inspectors who testified in support of the citations which they had written (Tr. 31-33; 80-81). That cross-examination shows that respondent was under the belief that MSHA would conduct a preliminary "walk-through" of the tipple and informally advise respondent as to the requirements of the regulations before conducting an inspection which would result in the writing of actual citations alleging violations of the mandatory health and safety standards (Tr. 33). Both of the inspectors stated that when a new facility has been constructed and the prospective operator of that facility requests MSHA to make a "walk-through" before any coal is processed, that MSHA will make that kind of examination, but both inspectors stated that respondent's tipple had been processing coal before the inspection here involved was made and that MSHA does not perform "walk-through" inspections in such circumstances (Tr. 31; 80).

The above references in the transcript show that respondent is claiming that the inspection in this instance was discriminatory because respondent's tipple was not made the subject of a friendly walk-through inspection, whereas other operators

have received such advisory inspections (Tr. 33). Respondent's counsel at no time mentioned or asked about any other specific operator who has received a friendly advisory inspection. Consequently, there are no facts in the record to support a finding that MSHA treated respondent any differently than it has any other tipple operator who has been actively processing coal prior to being inspected by MSHA.

Moreover, it should be noted that section 103(a) of the Act specifically states that "[i]n carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections". The legislative history clearly shows that Congress did not intend for the Secretary of Labor, or any representative of the Secretary of Labor, to give advance notice of an inspection. The Joint Explanatory Statement of the Committee of Conference explained the provisions of section 103(a) as follows: 1/

The Senate bill prohibited advance notice of any inspection conducted by the Secretary of Labor irrespective of the purpose. The Senate bill did permit the HEW Secretary to give advance notice of inspections or investigations conducted for the purpose of obtaining or disseminating information or for the development of standards. [Emphasis supplied.]

....

The conference substitute conforms to the Senate bill, with an amendment to clarify the fact that while the Secretary of Health, Education, and Welfare has authority to enter the mines, he has no enforcement responsibilities.

Section 110(e) of the Act provides as follows: "Unless otherwise authorized by this Act, any person who gives advance notice of any inspection to be conducted under this Act shall, upon conviction, be punished by a fine of not more than \$1,000 or by imprisonment for not more than six months, or both."

1/ CONFERENCE REP. NO. 95-41, 95th Cong., 1st Sess. 44 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 1322 (1978).

In view of the prohibition of advance notice set forth in section 103(a), it appears inappropriate for respondent to argue that it ought to have been given advance notice before an inspection was made at its tipple, especially since respondent's president had signed a stipulation agreeing that MSHA could commence making inspections at its tipple (Exh. 10). The former Board of Mine Operations Appeals long ago held that operators are conclusively presumed to know what the mandatory health and safety standards are. Freeman Coal Mining Co., 3 IBMA 434, 422 (1974); North American Coal Corp., 3 IBMA 515 (1974). The Board's holding is especially pertinent in the case of a respondent whose president is a lawyer. There is nothing in the record to show that respondent's tipple was subjected to a discriminatory investigation in the first instance and there is doubt that respondent has any right to claim that it would be entitled to a "friendly" advisory inspection in the second instance, even if its tipple had been new, which does not appear to be the case (Tr. 80-81).

In the circumstances described above, I find that there is no merit to respondent's claim that the citations here involved were issued during a discriminatory inspection. The order accompanying this decision will deny respondent's request that the petition for assessment of civil penalty be dismissed because of MSHA's alleged discriminatory conduct in making the inspection.

Decision on the Merits

The order providing for the first hearing in this proceeding specified that I would render a decision at the hearing with respect to each of the respective alleged violations as soon as the parties had completed their presentations of evidence. I was unable to render a bench decision at the first hearing because I ruled that I would postpone deciding the issues on the merits until it could be determined whether a further hearing would be required with respect to the other 12 violations which have already been discussed at length in the first part of this decision (Tr. 10).

At the second hearing, after I had determined that respondent's motion for a continuance should be denied, I rendered a bench decision with respect to the nine violations which are the subject of the petition for assessment of civil penalty filed in this proceeding. As my order providing for hearing stated, the issues to be considered in a civil penalty

proceeding are whether any violations of the mandatory health and safety standards occurred and, if so, what penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. The substance of my bench decision follows (Tr. 94-109):

Counsel for respondent stipulated that the factual statements in all of the citations were correct, but that he would not stipulate as to some of the six criteria, such as negligence and gravity (Tr. 12). Subsequently, counsel for the parties stipulated to four of the six criteria, specifically that respondent abated all of the violations within the time provided by the inspectors, that respondent is a small operator which processes an average of about 750 tons of coal per day, that respondent has not been cited for any violations during the 24-month period preceding the writing of the citations involved in this proceeding (Tr. 28), and that payment of penalties will not cause respondent to discontinue in business (Tr. 30). Consequently, the evidence presented by counsel for the Secretary was limited to testimony pertaining to the remaining two criteria of negligence and gravity.

The two inspectors who wrote the citations involved went to respondent's tipple on the same day. One of the inspectors had received specialized training in electrical installations and equipment, whereas the other inspector did not have such specialized training. The inspector without specialized electrical training wrote all of the citations pertaining to safety in general, while the electrical inspector wrote the citations pertaining to failure to maintain electrical equipment in a safe operating condition. Both inspectors, however, had examined the entire plant. Therefore, the electrical inspector testified about the negligence and gravity associated with the electrical violations which he personally cited as well as to the negligence and gravity of the violations which were cited by the other inspector. My findings as to negligence and gravity are based on the testimony presented by both inspectors. My transcript reference to both inspectors' testimony will make it a simple matter for anyone reading my decision to check the testimony and to determine whether my findings are supported by the record.

A violation of 30 C.F.R. § 77.1713(c) was alleged in Citation No. 2155278, or Exhibit 1. Section 77.1713(c) requires the results of daily inspections for hazardous conditions to be entered in a book kept for that purpose. Respondent did not have a book available for that purpose and was not recording the results of the inspections, assuming that they were being made. The types of hazards which might be noticed during an inspection for hazardous conditions would include such things as impediments to safe walking, such as

coal accumulations on walkways, the lack of guards along elevated walkways or failure to guard moving machine parts where employees are required to work. Failure of the person performing the inspection to record the hazards in a book would mean that no place would exist where another person could determine whether hazardous conditions existed in the plant. Failure to make such entries could also result in a failure to eliminate the hazards because if the person who makes the examinations for hazardous conditions is not also responsible for their correction, he might forget to inform a supervisor that the hazards exist, so that the supervisor could have the hazards eliminated (Tr. 24-26; 59).

As I have noted above, stipulations have already been made with respect to the four criteria of the size of respondent's business, history of previous violations, respondent's good-faith effort to achieve rapid compliance, and the fact that payment of penalties will not cause respondent to discontinue in business. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd, 736 F.2d 1147 (7th Cir. 1984) and in U.S. Steel Mining Co., 6 FMSHRC 1148 (1984), that its judges are not bound by the Secretary's assessment procedures described in Part 100 of Title 30 of the Code of Federal Regulations in assessing penalties. Therefore, the penalties which I shall hereinafter assess in this proceeding will be based on the six criteria listed in section 110(i) of the Act, in light of the evidence presented by the parties in this proceeding.

The first criterion which should be examined is the size of respondent's business. Respondent has only two employees working at its preparation plant and processes only 750 tons of coal on an average daily basis. In such circumstances, penalties in a very low range of magnitude should be assessed to the extent that they are based on the size of respondent's business.

Another important consideration is the criterion of history of previous violations. Respondent had not been cited for any violations during the 24-month period preceding the writing of the citations which are involved in this proceeding. Counsel for respondent has indicated that a court proceeding initiated by respondent resulted in no inspections being made of respondent's plant for about 2 years. Consequently, it may be that violations existed at respondent's plant during the 24 months preceding the writing of the instant citations, but regardless of why no violations were cited, it is a fact that there is no history of previous violations to be considered. For that reason, no portion of the penalties will be attributed to the criterion of respondent's history of previous violations.

Respondent's cross-examination elicited from both inspectors many statements to the effect that respondent was cooperative in trying to correct all of the violations immediately after they were cited. The inspectors have agreed that respondent began working on abatement of the violations as soon as they were cited, but not all of them were corrected by the second day of the inspection and it was necessary for the inspectors to extend the time for abatement with respect to some of the violations (Tr. 50; 54).

It has always been my practice to increase a penalty by some amount if an operator fails to show a good-faith effort to abate the violation and to reduce the penalty if an operator demonstrates an unusual effort to achieve compliance, such as shutting down other operations so as to bring additional employees into a cited area to correct conditions which have not been the result of a withdrawal order which would have closed down a mine or portion of a mine in any event. In this case, the two employees who normally worked at the plant apparently began to correct the violations instead of processing coal, and that is what normally happens. Therefore, I believe that respondent made a good-faith normal effort to achieve compliance. When that occurs, I neither increase nor reduce any of the penalties under the criterion of good-faith abatement.

The fourth criterion as to which the parties stipulated is that the payment of penalties will not cause respondent to discontinue in business. Therefore, it is not necessary to reduce any of the penalties upon a finding that respondent is in dire financial condition.

The discussion above shows that the penalties in this case will primarily be based on the three criteria of the size of respondent's business, negligence, and gravity. As to the violation of section 77.1713(c) discussed above, there is no doubt but that the failure to have a book for recording the results of inspections for hazardous conditions was associated with a high degree of negligence. As previously indicated above, the former Board of Mine Operations Appeals held in Freeman Coal Mining Co., 3 IBMA 434 (1974), that an operator is conclusively presumed to know what the mandatory health and safety standards are. Consequently, a penalty of \$30 should be assessed under the criterion of negligence. I would assess a much larger penalty except for the fact that I am bearing in mind throughout this decision that a small operator is involved.

The inspectors found coal accumulations on one elevated walkway. They considered those accumulations to be a stumbling

hazard. If the person making the daily examinations for hazardous conditions had written in a book every day that he had observed that hazardous condition on the walkway, it would have impressed him with the importance of correcting that hazard if he also had the responsibility of correcting any hazards that he observed during his inspections. If a supervisor or other person was responsible for correcting the dangerous condition, that person would have been more likely to take action to clean up the coal by seeing the hazard noted in a book which he read each day. Consequently, the violation was moderately serious and a penalty of \$20 should be assessed under the criterion of gravity, making a total penalty of \$50 appropriate for the violation of section 77.1713(c).

A violation very similar to the one discussed above was alleged in Exhibit 2 which is Citation No. 2278321 alleging a violation of section 77.502. The pertinent portion of section 77.502 here involved requires the results of examinations of electrical equipment to be recorded in a book kept for that purpose. The citation alleges that respondent was failing to record the results of electrical inspections because no book was available for making such entries. The types of deficiencies which should be recorded would include accumulations of coal dust on electrical components and broken electrical conduits which might result in a fire. Failure to record the existence of such deficiencies might result in their continuance without being remedied (Tr. 60-61).

I have already discussed the six criteria in connection with the previous violation of section 77.1713(c) which also pertained to the failure to record hazards in a book kept for that purpose. The evidence supports similar findings as to negligence and gravity with respect to the instant violation of section 77.502, namely, that the violation was associated with a high degree of negligence and was moderately serious. Therefore, a penalty of \$50 should be assessed for the violation of section 77.502.

Two violations of section 77.1710(e) were alleged in Exhibits 3 and 4 which are Citation Nos. 2155279 and 2155280. Section 77.1710(e) requires employees in surface work areas to wear suitable protective footwear. Each of the citations alleged that an employee was not wearing protective footwear in the form of hardtoed shoes. Each employee was exposed to the possibility of having heavy tools or pieces of coal up to 6 inches in size drop on his foot (Tr. 37-38; 62-64). Failure to wear hardtoed shoes could result in injuries ranging from a bruise to a broken toe.

The evidence supports a finding that the violations were associated with a high degree of negligence because respondent should have made certain that its employees were wearing proper protective shoes. Consequently, a penalty of \$30 will be assessed for each violation under the criterion of negligence. The violations were relatively nonserious because the employees were not likely to suffer greater injuries than bruised or broken toes. While such injuries are painful, they are not life threatening. Consequently a penalty of \$10 will be assessed under the criterion of gravity, making a total penalty of \$40 for each violation appropriate.

A violation of section 77.410 was alleged in Exhibit 5 which is Citation No. 2282283. That section requires trucks and other mobile equipment to be equipped with an adequate automatic warning device which will give an audible alarm when the equipment is put in reverse. The citation stated that a truck being used to haul coal from a stockpile to the tipple was not equipped with the required back-up alarm. Coal was dumped into the truck with an endloader which was operated by the same person who drove the truck. Therefore, the truck was not normally used in a manner which would place a second person behind the truck when it was being backed up. As one of the inspectors pointed out, however, there are two employees working at the plant and one of them is working at the tipple when the other employee backs a truck to the tipple for the purpose of unloading coal. Consequently, it would be possible for the driver of the truck to run over and injure another person because of the lack of an adequate back-up alarm (Tr. 41-43; 65-66).

Here again the violation was associated with a high degree of negligence because respondent either knew or should have known that back-up alarms are required on all such mobile equipment. The violation, however, was relatively nonserious in the circumstances because it would have been very unusual for anyone to be on the ground behind the truck when it was backing up. Of course, it is that rare occasion when someone might be behind the truck when it is being used in reverse gear that makes the back-up alarm a vital consideration if that rare instance does occur. Therefore, I think that a penalty of \$30 is appropriate under the criterion of negligence and that a penalty of \$10 should be assessed under the criterion of gravity, making a total penalty of \$40 for this violation of section 77.410.

Citation No. 2282284, which is Exhibit 6, alleged that the same truck discussed in the previous citation was violating section 77.1109(c)(1) which requires mobile equipment such as trucks to be equipped with at least one portable fire extinguisher. The truck used to haul coal from the stockpiles to the tipple was not provided with a fire extinguisher. Fires may start in a truck because of a short circuit in the wiring or as a result of a person dropping a cigarette on flammable materials. The inspector stated that the driver of the truck could have obtained a fire extinguisher in a building located about 100 feet from the one stockpile, but that the truck might be farther away from that fire extinguisher if it were being used at another stockpile farther from the place it was being used when the citation was written (Tr. 44-46).

The Commission held in Puerto Rican Cement Co., Inc., 4 FMSHRC 997 (1982), that having a fire extinguisher on a wall 100 feet away from a piece of mobile equipment is not a satisfactory alternative for being required to have the fire extinguisher available on the mobile equipment because additional time is required to obtain an extinguisher from a nearby place. An electrical fire expands rapidly once it starts and ability to put out the fire depends upon having the fire extinguisher close at hand and ready for use. Therefore, I find that there was a high degree of negligence associated with failure to have a fire extinguisher on the truck. The evidence does not show that a fire was likely to occur and it is improbable that a fire would have exposed the driver of the truck to serious injury because, in most instances, he would be able to jump out of the truck if he should find himself unable to extinguish any fire that might occur (Tr. 44-45).

The discussion above supports a finding that there was a high degree of negligence associated with the violation and that it was relatively nonserious in the circumstances which prevailed when the citation was written. Therefore, a penalty of \$30 will be assessed under the criterion of negligence and \$10 under the criterion of gravity for a total penalty of \$40 for the violation of section 77.1109(c)(1).

Citation No. 2282285, which is Exhibit 7, alleged a violation of section 77.205(b). That section requires that travelways and platforms where persons are required to travel or work are to be kept clear of all extraneous materials and other stumbling or slipping hazards. The citation states that the travelway leading to the head roller of the No. 5 belt was completely covered with loose coal. The walkway was constructed of steel and had toeboards about 4 inches in

height and a single hand railing about 42 inches above the walkway. The coal accumulations were deep enough to be even with the toeboard and the inspector had to walk on the accumulations in order to check the motor size and related components on the electrical system. The walkway was constructed at an angle so that its lower end was about 8 feet above ground level and its upper end was about 12 feet from ground level. If a person should stumble in the coal and fall through or over the hand railing, he could suffer minor injuries or death, depending on how he landed on the concrete surface below the walkway. The inspector believed that the coal had been in existence for a considerable period of time because coal is wet when it first comes from the mine, but the coal accumulations were dry. An examiner would have to use the walkway at least once a day (Tr. 46-48; 66-70).

There was a high degree of negligence associated with this violation because the coal accumulations appeared to have been in existence for several days, but had not been cleaned up. The violation was serious because it exposed an employee to the possibility of a fall which might have resulted in serious injury or death. Consequently a penalty of \$40 will be assessed under the criterion of negligence and a penalty of \$50 will be assessed under the criterion of gravity, for a total penalty of \$90 for this violation of section 77.205(b).

Citation No. 2278322, which is Exhibit 8, alleged a violation of section 77.202 which prohibits allowing coal dust to accumulate in dangerous amounts on structures or enclosures. The citation stated that dangerous accumulations of float coal dust ranging in depths of from 1/8 to 1/2 inch were present inside the enclosures of the motor control center, the combination AC-DC magnet controllers and other related electrical units located inside the motor control room. The motor control center and other units were energized with 480-volt, three-phase power, and contained relays and other arcing components.

The inspector who wrote the citation estimated that the float coal dust had been accumulating for 6 months or longer than that. The dust had accumulated not only in the compartment, but was also lying on the circuit breaker, the wiring, and all of the components. A person has to enter the motor control center to push a button to start and to stop the equipment. Even when the equipment is operating under normal conditions, there is an arcing

effect when machinery is energized and deenergized. If equipment is deenergized under a full load, which occurs when a belt is overloading, the extent of the arcing is increased. Such arcing can cause an ignition to occur which in turn may be propagated throughout all the electrical compartments. Such an ignition could result in anything from a minor burn to serious burns or death (Tr. 70-74).

The evidence discussed above supports a finding that respondent was extremely negligent in allowing float coal dust to accumulate to the extent described by the inspector. The violation was very serious because an ignition hazard existed which could have caused a fire at any time. Such a fire could have resulted in serious burns or death of the person who operated the controls. In such circumstances, a penalty of \$75 should be assessed under the criterion of negligence and a penalty of \$75 should be assessed under the criterion of gravity for a total penalty of \$150 for the violation of section 77.202.

Citation No. 2278323, which is Exhibit 9, alleges a violation of section 77.506-1 which requires operators to use devices for protection of short circuit or overload conforming to the National Electric Code. The citation stated that a 480-volt control circuit for the No. 8 belt controller was not provided with a device conforming with the minimum standards of the National Electric Code because the fuse had blown and had been wrapped in aluminum foil. The inspector stated that putting foil around the fuse destroyed the design of the fuse and allowed an unknown amount of amperage to pass through the circuit with relatively no control as to what the safe limits are. When an overload occurs, in such circumstances, the insulation on the conductors begins to melt and that causes damage to other conductors in the general vicinity so that a possible fire may occur. If a fire should occur, its results could be anything from a minor burn to death because the float coal dust referred to in connection with the previous violation was present (Tr. 75-77).

There was an extremely high degree of negligence associated with the violation of section 77.506-1 because respondent had deliberately wrapped foil around the fuse with the result that its short circuit and overload protection had been destroyed. The violation was not quite as serious as the previous violation because the belt in question was not being used at the time the citation was written and the belt is used only on an intermittent basis.

Therefore, the likelihood of a fire or explosion was reduced as compared with the previous violation. In such circumstances, a penalty of \$75 should be assessed under the criterion of negligence and a penalty of \$25 should be assessed under the criterion of gravity for a total penalty of \$100 for the violation of section 77.506-1.

WHEREFORE, it is ordered:

(A) The request for continuance contained in a note handed to me at the hearing reconvened on February 26, 1985, by one of MSHA's secretaries is denied.

(B) Respondent's motion for dismissal of the petition for assessment of civil penalty on the ground that the inspection resulting in the alleged violations here involved was discriminatory is denied.

(C) J.A.D. Coal Company, Inc., within 30 days from the date of this decision, shall pay civil penalties totaling \$600.00 which are allocated to the respective violations as follows:

Citation No. 2155278	5/9/84	§ 77.1713(c)	. . .	\$ 50.00
Citation No. 2155279	5/9/84	§ 77.1710(e)	. . .	40.00
Citation No. 2155280	5/9/84	§ 77.1710(e)	. . .	40.00
Citation No. 2278321	5/9/84	§ 77.502	. . . .	50.00
Citation No. 2278322	5/9/84	§ 77.202	. . . .	150.00
Citation No. 2278323	5/9/84	§ 77.506-1	. . . .	100.00
Citation No. 2282283	5/9/84	§ 77.410	. . . .	40.00
Citation No. 2282284	5/9/84	§ 77.1109(c)(1)	. . . .	40.00
Citation No. 2282285	5/9/84	§ 77.205(b)	. . . .	<u>90.00</u>

Total Civil Penalties Assessed in
This Proceeding \$ 600.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 23 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 82-91
Petitioner : A.C. No. 36-03247-03021
v. :
Cooper No. 2 Prep. Plant
BRADFORD COAL COMPANY, INC., :
Respondent :

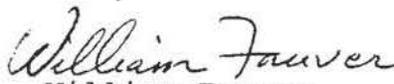
ORDER OF DISMISSAL

Before: Judge Fauver

An Order to Show Cause was entered on April 22, 1985, because of Petitioner's long and unexplained delay and failure to file a post-hearing brief.

Petitioner's Response to Order to Show Cause, filed on May 13, 1985, reflects a decision not to file a brief in this case. Such position amounts to a failure of prosecution of his case by failing to present his contentions, arguments, reliance upon and references to the evidence, and proposals for specific findings, conclusions, and penalty with the reasons therefor.

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED for want of prosecution after the evidentiary hearing.


William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAY 23 1985

LOCAL UNION 7950, DISTRICT	:	COMPENSATION PROCEEDING
28, UNITED MINE WORKERS	:	
OF AMERICA,	:	Docket No. VA 84-47-C
Complainant	:	
v.	:	No. 1 Mine
	:	
FOX TEN MINING CORPORATION,	:	
Respondent	:	

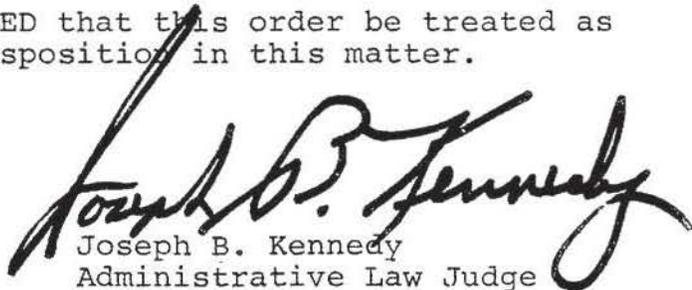
ORDER OF DEFAULT

Before: Judge Kennedy

The operator having failed to SHOW CAUSE WHY it should not be deemed in DEFAULT of its settlement agreement of February 26, 1985, it is ORDERED that said operator be, and hereby is, determined to be in DEFAULT and to pay FORTHWITH the full amount of the settlement AGREED UPON, to wit \$9,084.00.

It is FURTHER ORDERED that for the reasons set forth in counsel's letter to complainant of May 3, 1985, the ORDER TO SHOW CAUSE as to them be, and hereby is, DISCHARGED.

Finally, it is DIRECTED that this order be treated as the trial judge's final disposition in this matter.



Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 23 1985

ALBERT R. CROSS,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 84-145-R
v.	:	Citation No. 2260658; 1/18/84
	:	
SECRETARY OF LABOR,	:	Loveridge No. 22 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Broderick

On March 15, 1984, Contestant, Chairman of the Mine Safety Committee at the subject mine filed a contest challenging the citation issued on January 18, 1984, and modified after a conference on February 17, 1984. The citation charged a violation of 30 C.F.R. § 75.1403 because of a defective track switch. The citation was originally demoninated as significant and substantial. Following the conference, which, according to Contestant, was not attended by the Inspector who issued the citation or any UMWA representative, the significant and substantial designation was removed.

On December 17, 1984, the Secretary of Labor filed a motion to dismiss the proceeding and a memorandum in support of the motion. Contestant has not replied to the motion.

In the case of United Mine Workers of America v. Secretary of Labor, 5 FMSHRC 807 (1983), the Commission held that miners or their representatives do not have the statutory authority to initiate review of citations by a notice of contest. That case involved a combined imminent danger withdrawal order issued under section 107(a), and a citation issued under section 104(a) of the Act. The UMWA contended that the violation resulted from the mine operator's unwarrantable failure to comply with the standard in question, and sought to have the citation amended to include an unwarrantable failure finding. The Commission held that the statute did not grant the miners the right to initiate a contest proceeding, challenging a citation issued under section 104 of the Act. I believe the Commission decision is controlling here.

Therefore, IT IS ORDERED that the motion is GRANTED,
and this proceeding is DISMISSED.

James A Broderick

James A. Broderick
Administrative Law Judge

Distribution:

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slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAY 23 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 85-13
Petitioner	:	A.C. No. 44-04856-03501 R15
	:	
v.	:	Buchanan No. 1 Mine
	:	
INDUSTRIAL RESOURCES, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on May 2, 1985, in the above-entitled proceeding a motion for approval of settlement. Under the parties' settlement agreement, respondent would pay the total penalty of \$105 proposed by MSHA for the single violation of 30 C.F.R. § 77.200 which is involved in this proceeding.

Section 110(i) of the Federal Mine Safety and Health Act of 1977 lists six criteria which are required to be considered in assessing civil penalties. The motion for approval of settlement states that respondent operates a small business, but neither the motion nor the proposed assessment sheet in the official file provides any facts regarding the hours worked by respondent's employees or the tons of coal produced by respondent. The proposed assessment sheet does show that zero penalty points were assigned under MSHA's penalty formula described in 30 C.F.R. § 100.3(b). Therefore, I find that respondent does operate a small business and that, insofar as the penalty is determined under the criterion of the size of respondent's business, the penalty should be in a low range of magnitude.

There is nothing in the official file or in the motion for approval of settlement regarding respondent's financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd, 736 F.2d 1147 (7th Cir. 1984),

that if an operator fails to furnish any evidence concerning its financial condition, that a judge may presume that the operator is able to pay penalties. Therefore, I find that payment of civil penalties will not adversely affect respondent's ability to continue in business. Consequently, it will not be necessary to reduce the penalty, determined pursuant to the other criteria, under the criterion of whether the payment of penalties will cause respondent to discontinue in business.

The proposed assessment sheet indicates that MSHA assigned zero penalty points under section 100.3(c) of the penalty formula because respondent has not previously been cited for a violation of the mandatory health and safety standards. In such circumstances, no portion of the penalty in this proceeding should be assessed under the criterion of respondent's history of previous violations.

A brief discussion of the facts pertaining to the alleged violation is necessary in order to evaluate the remaining criteria of negligence, gravity, and respondent's good-faith effort to achieve rapid compliance after the violation was cited. The motion for approval of settlement states that the violation occurred on November 2, 1984, when a fatality occurred at the mine because a subcontractor was using scaffolding equipment which had not been maintained in a safe operating condition. The equipment was being used by a subcontractor, Western Avella Contractors, Inc., which was performing work for respondent. The inspector's citation alleges that respondent had failed to take "precautionary measures to ensure that subcontractors working at the construction site were utilizing equipment that was in a good state of repair to prevent accidents."

The inspector's subsequent action sheet indicates that the citation was abated within the time given by the inspector and that abatement was accomplished by another company which had been assigned to replace the previous subcontractor. MSHA followed the inspector's ratings as to negligence and gravity and assigned a maximum number of penalty points under the criterion of gravity and 15 penalty points under the criterion of negligence. MSHA also reduced the proposed penalty by 30 percent under section 100.3(f) of the assessment formula because respondent had abated the violation within the time given by the inspector.

Respondent has taken the position that nothing stated in this proceeding is to be deemed to be an admission of a violation except for the purposes of enforcement of the Act. That is an acceptable position under the Commission's decision in Amax Lead Company of Missouri, 4 FMSHRC 975 (1982).

I find that the parties have given satisfactory reasons for approving their settlement agreement under which respondent has agreed to pay in full the penalty of \$105 proposed by MSHA after applying its penalty formula to the facts hereinbefore described.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement is granted and the parties' settlement agreement is approved.

(B) Pursuant to the parties' settlement agreement, Industrial Resources, Inc., shall, within 30 days from the date of this decision, pay a civil penalty of \$105.00 for the violation of 30 C.F.R. § 77.200 alleged in Citation No. 2455472 dated December 6, 1984.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAY 23 1985

GREENWICH COLLIERIES,	:	CONTEST PROCEEDING
DIVISION OF PENNSYLVANIA	:	
MINES CORPORATION,	:	Docket No. PENN 85-115-R
Contestant	:	Citation No. 2255647; 1/17/85
	:	
v.	:	Greenwich No. 1 Mine
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

ORDER GRANTING MOTION TO WITHDRAW

Before: Judge Steffey

Counsel for contestant filed on May 1, 1985, a motion to withdraw the notice of contest filed in the above-entitled proceeding. The reason given in support of granting the motion is that contestant has paid the civil penalty proposed by MSHA with respect to the violation alleged in Citation No. 2255647. In such circumstances, contestant states that it now has no interest in pursuing the matters raised in the notice of contest. I find that the motion should be granted for the reason given by contestant and for the reason given by the Commission in its decision in Old Ben Coal Co., 7 FMSHRC 205 (1985).

In a prehearing order issued March 14, 1985, the issues raised in the notice of contest filed in Docket No. PENN 85-115-R were consolidated with the issues raised by the notice of contest filed in Docket No. PENN 85-114-R. The instant case should be severed from the consolidated proceeding in Docket No. PENN 85-114-R so that it will be clear that it is no longer the subject of the prehearing order issued in both dockets.

WHEREFORE, it is ordered:

(A) The issues raised by the notice of contest filed in Docket No. PENN 85-115-R are severed from the issues raised by the notice of contest filed in Docket No. PENN 85-114-R for purposes of separate disposition as hereinafter ordered.

(B) The motion to withdraw filed May 1, 1985, is granted, the notice of contest filed in Docket No. PENN 85-115-R is deemed to have been withdrawn, and all further proceedings herein are dismissed.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 23 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 84-163
Petitioner	:	A.C. No. 36-00897-03527
	:	
v.	:	LaBelle Preparation Plant
	:	and Refuse Area
LABELLE PROCESSING COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on May 16, 1985, in the above-entitled proceeding a motion for approval of settlement. Under the parties' settlement agreement, respondent would pay reduced penalties totaling \$1,580 for the four violations alleged in this proceeding instead of the penalties totaling \$3,000 originally proposed by MSHA.

Section 110(i) of the Federal Mine Safety and Health Act of 1977 lists six criteria which are required to be considered in assessing civil penalties. The proposed assessment sheet in the official file does not indicate the number of tons of coal which are processed in respondent's preparation plant, perhaps because the preparation plant was in the process of being remodeled at the time the orders here involved were issued. The proposed assessment sheet does show that respondent's controlling company is in the category of a large operator because the controlling company produces over 12,606,000 tons of coal on an annual basis. Consequently, to the extent that the penalties in this case are based on the criterion of the size of respondent's business, penalties in an upper range of magnitude would be appropriate.

There is nothing in the official file or the motion for approval of settlement regarding respondent's financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd, 736 F.2d 1147 (7th Cir. 1984), that if an operator fails to furnish any evidence concerning its financial condition, a judge may presume that the operator is able to pay penalties. Therefore, I find that payment of civil penalties

will not adversely affect respondent's ability to continue in business. In such circumstances, it will be unnecessary to reduce any of the penalties, determined pursuant to the other criteria, under the criterion of whether the payment of penalties would cause respondent to discontinue in business.

The motion for approval of settlement states, as to respondent's history of previous violations, that respondent has been assessed for 164 violations during 166 inspection days, whereas the proposed assessment sheet in the official file shows 85 violations during 77 inspection days. If one applies the facts in the file or the facts in the motion for approval of settlement to make the calculation described in the assessment formula given in 30 C.F.R. § 100.3(c), the result would require assignment of eight penalty points. The parties' proposed settlement penalties are sufficiently large to allow for an appropriate amount to have been assigned under the criterion of respondent's history of previous violations.

The motion for approval of settlement states that respondent demonstrated a good-faith effort to achieve compliance after the orders were issued. Since all the violations alleged in this proceeding were cited in orders, the inspector did not specify an abatement period for any of the violations. The inspector issued subsequent action sheets showing that three of the alleged violations had been corrected within 4 days after they were cited and that the remaining violation had been corrected within 10 days after it was cited. As hereinafter explained, respondent was confronted with some unusual adverse conditions at its plant at the time the orders were written. In such circumstances, I find that respondent did demonstrate a good-faith effort to achieve compliance and that the proposed settlement penalties were appropriately determined without attributing any portion of any penalty to a finding that respondent failed to demonstrate a good-faith effort to achieve rapid compliance.

A brief discussion of the specific violations is required to evaluate the remaining two criteria of negligence and gravity. Order No. 2251438 was first issued January 19, 1984, citing a violation of 30 C.F.R. § 77.1104 because loose coal had accumulated at several places on the first floor of the plant. Thereafter, three additional orders were issued January 23, 1984, also citing violations of section 77.1104, because there were loose coal accumulations near the tailrollers of conveyor belt Nos. 285, 484, and 283. MSHA waived the penalty formula described in section 100.3 of the regulations and proposed penalties of \$750 for each of the alleged violations on the basis of narrative findings which are included with the exhibits

submitted by MSHA in support of its petition for assessment of civil penalty. The motion for approval of settlement states that further investigation has revealed that a reduction in the proposed penalty to \$395 for each alleged violation would be appropriate. The basic conditions which support the parties' settlement agreement are described in the following paragraph from pages two and three of the motion for approval of settlement:

At the time of the issuance of these orders, the operator was in the process of renovating the out-dated equipment at the plant. The work of installing and testing equipment was being done in mid-winter weather conditions which substantially complicated the process. Unintentional coal spillages did occur, but they resulted from the persistent malfunctioning of the newly installed computer monitoring and control system. Pumps over-pumped and under-pumped, slurry lines clogged, belts overloaded and sumps overfilled. Plant personnel were preoccupied with the need to remedy the sources of the operational difficulties. Furthermore, this problem was exacerbated by freezing weather conditions and the malfunctioning of the plant's heating system, interfering with clean-ups. The coal spillages would freeze as a result of the weather conditions and lack of heat, making clean-up difficult, if not impossible. As a result of the aforementioned factors, the problem of what to do and when developed. The weather conditions caused a lot of the problems with the equipment and made it very difficult for personnel to work.

Based on the description of the difficulties which confronted the plant personnel at the time the orders were issued, the motion for approval of settlement asserts that MSHA's former finding of high negligence should be reduced to low negligence because, while respondent could not help but be aware of the existence of the loose coal accumulations, there were mitigating circumstances which merit a reduction of the criterion of negligence.

Attached to the motion for approval of settlement is a copy of the National Weather Service report for the Pittsburgh area showing that for the days during which the orders were issued, the temperatures remained below freezing. Also attached to the motion is a report showing the ice conditions on the Monongahelia River at the time the orders were issued. The river was frozen to a 5-inch thickness during the same time period and that affected the ability of barges to transport coal away from the plant even if the plant had been operating in a satisfactory manner.

The aforesaid conditions also merit a reduction in the assessment of gravity because frozen accumulations are not as likely to present a fire hazard as dry accumulations. Moreover, not one of the orders refers to float coal dust which is the most likely type of accumulation to become ignited if it should be placed in suspension. It should additionally be borne in mind that all of the accumulations were on the surface and were much less hazardous than coal accumulations underground where methane is more likely to become concentrated in explosive quantities than it is on the surface.

I find that the parties have justified approval of their settlement agreement under which the proposed penalties would be reduced from \$750 for each violation to \$395 for each violation.

WHEREFORE, it is ordered:

(A) The parties' motion for approval of settlement is granted and the settlement agreement is approved.

(B) Pursuant to the parties' settlement agreement, LaBelle Processing Company shall, within 30 days from the date of this decision, pay civil penalties totaling \$1,580.00 which are allocated to the respective alleged violations as follows:

Order No. 2251438	1/19/84	§ 77.1104	. . . .	\$	395.00
Order No. 2251442	1/23/84	§ 77.1104	. . . .		395.00
Order No. 2251443	1/23/84	§ 77.1104	. . . .		395.00
Order No. 2251444	1/23/84	§ 77.1104	. . . .		<u>395.00</u>
Total Settlement Penalties in					
This Proceeding					\$1,580.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480-Gateway Bldg., 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Michael T. Heenan, Esq., Smith, Heenan & Althen, 1110 Vermont Avenue, NW, Washington, DC 20005 (Certified Mail)

/ejp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAY 23 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 84-77-M
Petitioner	:	A.C. No. 42-00716-05508
	:	
v.	:	Magna Concentrator Mine
	:	
KENNECOTT MINERALS COMPANY,	:	
UTAH COPPER DIVISION,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Carlson

By joint motion the parties request approval of a settlement agreement in this civil penalty proceeding. Specifically, they ask that the citations and penalties originally issued and proposed be modified as follows:

<u>Citation No.</u>	<u>Original Proposed Penalty</u>	<u>Amended Proposed Penalty</u>
2083610	\$ 200.00	\$ 100.00
2083611	500.00	250.00
2083537	5,000.00	6,000.00
2083538	5,000.00	Withdrawn

Justification for the reduced and increased penalties are well documented. The parties seek to have citation 2083538 withdrawn on grounds that it is unfairly duplicative of citation 2083537.

Having considered the representations of the parties and the contents of the file, I conclude that the settlement agreement is appropriate and should be approved.

Accordingly, the agreement is approved in all particulars, and the attendant motions of the parties are granted. Respondent, within 30 days of the date of this order, shall pay civil penalties of \$100.00 for citation 2083610, \$250.00 for citation 2083611, and \$6,000.00 for citation 2083537, for a total of \$6,350.00. Citation 2083538 is vacated, and this proceeding is dismissed.

SO ORDERED.



John A. Carlson
Administrative Law Judge

Distribution:

Tobias B. Fritz, Esq., Office of the Solicitor, U.S. Department
of Labor, Room 2106, 911 Walnut Street, Kansas City, Missouri 64106
(Certified Mail)

Kent W. Winterholler, Esq., Parsons, Behle & Latimer, 185 South State
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/ot

767

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 30 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 84-70-M
Petitioner	:	A.C. No. 08-00915-05505
	:	
v.	:	Gulf Hammock Mine
	:	
FLORIDA LIME & DOLOMITE	:	
CO., INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

On February 4, 1985, the Parties filed a Joint Motion to Approve Settlement and to Dismiss, in the above-captioned case. At issue is one violation which was originally assessed a penalty of \$300. Settlement is proposed for the original amount.

Citation No. 2382764 was issued for violation of 30 C.F.R. § 56.9-3, when it was discovered that a truck used to haul fuel did not have an operative brake system. The parties agree that the violation was serious and that the violation could have contributed to a collision, with the danger of spilling flammable liquid.

The parties represent that the operator is small with the mine having approximately seven employees.

I accept the representations of the parties and find the proposed settlement in accord with the purposes and policies of the Act. The settlement is hereby APPROVED.

ORDER

The operator having paid the penalty this case is hereby DISMISSED.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Michael K. Hagan, Esq., U.S. Department of Labor, Office of
the Solicitor, 1371 Peachtree Street, N.E., Atlanta, GA
30367 (Certified Mail)

Jack Jarvis, Controller, Florida Lime & Dolomite Co., Inc.,
P.O. Box 2100, Ocala, FL 32678 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 30, 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No: SE 85-3-M
Petitioner	:	A.O. No: 09-00053-05508
	:	
v.	:	Clinchfield Mine & Mill
	:	
MEDUSA CEMENT COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a motion to approve settlement of the violation involved in this matter. The originally assessed amount was \$10,000 and the proposed settlement is for \$2000.

30 C.F.R. § 56.15-5 directs that "safety belts and lines be worn when men work where there is danger of falling". A violation of this standard occurred when two employees dropping railroad cars had not been wearing safety belts. One of the employees was thrown off the car and under the wheels when the car he was riding collided with a parked car. He was killed. Had he been wearing a safety belt, he would not have been thrown under the wheels.

The violation was therefore of the utmost gravity. The Solicitor represents however, that negligence is greatly diminished because the operator had a written safety manual directing employees to wear safety belts while gravity dropping rail cars and held regular safety meetings with all available employees which on occasion included discussion of the company's above-noted safety belt requirements. I accept these representations as mitigating negligence.

According to the Solicitor, the decedent was an unusually large person who was not normally assigned to work at this location and the operator had safety belts elsewhere at the mill which would have fit the deceased. In addition, the Solicitor advises that the accident occurred on the night shift in which the entire work force of the mill consisted of one supervisor and 8 employees under his direction. This supervisor had to move about a large

mill and several acres of premises in order to supervise these 8 employees. The supervisor was performing duties away from the rail cars at the time of the accident. These factors do not mitigate negligence. If the operator assigns a big person to work requiring a safety belt, it must have a belt on the spot which will fit him or it must find someone else to do the work. And supervision of hazardous work on the night shift must be just as effective as on any other shift.

The information furnished by the Solicitor indicates the operator has a very small history of prior violations.

I have carefully reviewed the recommended settlement because there was a fatality. The question is a close one. However, because negligence was somewhat less than originally thought and because the operator previously had a good record I have decided to approve the settlement which is a substantial amount. The operator must however, exercise far greater vigilance in the future.

The settlement is APPROVED and the operator having paid, this case is DISMISSED.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Larry A. Auerbach, Esq., Office of the Solicitor, U.S.
Department of Labor, 1371 Peachtree Street, N.E. Room 339,
Atlanta, GA 30367 (Certified Mail)

Tom W. Daniel, Esq., Hulbert, Daniel & Lawson, 912 Main
Street, P.O. Box 89, Perry, GA 31069-0089 (Certified Mail)

Mr. Richard P. Kistler, Plant Manager, Medusa Cement Company,
P.O. Box 120, Clinchfield, GA 31013 (Certified Mail)

Mr. B.L. Barrett, Administrative Assistant, Medusa Cement
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/db

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 30 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 85-10-M
Petitioner	:	A.C. No. 41-01003-05501
	:	
v.	:	Voca Pit & Plant
	:	
TEXAS MINING COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Parties have filed a Stipulation and Motion to Approve Settlement Agreement in the above-referenced matter. At issue is one violation originally assessed at \$36. Settlement is proposed for the original amount.

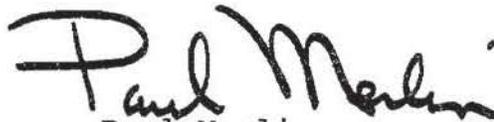
Citation No. 2232600 was issued for violation of 30 C.F.R. § 56.11-1, for failure to provide a safe means of access to a working place. The Solicitor represents that the inclined stairway which runs alongside the sand classifier is separated by a 15 inch step from the platform upon which the employee stands while servicing the classifier. Negligence and gravity were moderate. The Solicitor further represents that the operator abated the citation immediately by raising the stairway landing so that it was level with the platform.

The operator is small with no recorded violation in the preceding 24 month period.

I accept the Solicitor's representations and hereby APPROVE the settlement.

ORDER

The operator having paid the penalty this case is hereby DISMISSED.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Jack F. Ostrander, Esq., U.S. Department of Labor, Office
of the Solicitor, 555 Griffin Square Bldg., Dallas, TX
75202 (Certified Mail)

Sherrod Kilmer, Texas Mining Company, P.O. Box 429, Brady,
TX 76825 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 30 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 84-250
Petitioner	:	A.C. No. 46-01454-03571
	:	
v.	:	Pursglove No. 15
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a Motion for Decision and Order Approving Settlement in the above-captioned matter. At issue is one violation, originally assessed at \$1500. Settlement is proposed for \$1,250.

Order No. 2115013 was issued for violation of 30 C.F.R. § 75.400, when the inspector observed a dense accumulation of black float coal dust and loose coal along the belt conveyor (the 48 Mather conveyor) extending for approximately 2,200 feet.

The Solicitor asserts in justification of the proposed reduction that gravity was somewhat less than originally assessed. He represents that the mine is a wet mine and that although the belt entry was generally dry, the coal packed around the rollers was damp and the area around the rollers was wet. The Solicitor asserts operator was highly negligent.

In light of the foregoing, I accept the Solicitor's representations and hereby APPROVE the proposed settlement which is a substantial amount.

ORDER

The operator is hereby ORDERED to pay \$1,250 within 30 days of the date of this decision.



Paul Merlin
Chief Administrative Law Judge

Distribution:

David T. Bush, Esq., U.S. Department of Labor, Office of the
Solicitor, 3535 Market St., Philadelphia, PA 19104 (Certified
Mail)

Samuel P. Skeen, Esq., Consolidation Coal Company, Consol
Plaza, Pittsburgh, PA 15241 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 30, 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No: PENN 84-164
Petitioner	:	A.O. No. 36-03425-03561
	:	
v.	:	Maple Creek No. 2 Mine
	:	
U.S. STEEL MINING CO., INC	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The Solicitor has filed a motion to approve settlements for the two violations involved in this matter. The originally assessed amounts were \$349 and the proposed settlements are \$260. Citation No. 02252007 (30 C.F.R. § 75.1403), originally assessed at \$213 was issued when the inspector found there was no means to determine the alignment of a haulage track switch. The electric signal light was disconnected and was not operable. The operator was negligent because this condition should have been detected during the pre-shift examination. However, gravity was not as high as originally believed. The haulage track in question was designated as one-way, substantially reducing the possibility of accident. I accept the Solicitor's representations and approve the recommended settlement of \$160.

Citation No. 2252826 (30 C.F.R. § 75.517) originally assessed at \$136 was issued when the inspector found that a trailing cable serving 540 volts to a stamp crusher was not fully protected due to damage to the outer jacket of the cable exposing the power conductors. The crusher was energized.

The operator was negligent because this condition should have been detected during the routine electrical examination. However, gravity was not as high as was originally believed. Although the outer jacket of the cable was damaged, the exposed power conductors were insulated and there was no bare wiring present. I accept the Solicitor's representations and approved the recommended settlement of \$100.

The operator is Ordered to Pay \$260 within 30 days from the date of this decision.

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

Paul Merlin
Chief Administrative Law Judge

Distribution:

Joseph T. Crawford, Esq., Office of the Solicitor, U.S.
Department of Labor, Room 14480 Gateway Building, 3535 Market
Street, Philadelphia, PA 19104 (Certified Mail)

Louise Q. Symons, Esq., U.S. Steel Mining Company, Inc.,
600 Grant Street, Room 1580, Pittsburgh, PA 15230 (Certified
Mail)

/db

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 30 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 84-300
Petitioner	:	A.C. No. 46-06197-03501 A41
	:	
v.	:	Pine Creek No. 12 Prep.
	:	Plant
	:	
RUTTMAN CORPORATION,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a Motion for Decision and Order Approving Settlement in the above-referenced case. At issue are two violations, originally assessed at \$42 each. Settlement is proposed in the original penalty amounts.

Citation No. 2274227 was issued for violation of 30 C.F.R. § 77.208A, in that there were stumbling hazards present on the top of the silo. The Solicitor represents that negligence and gravity were moderate. Steel ropes, wooden cap blocks, power cables and metal created both falling and tripping hazards in the area. The Solicitor maintains that full payment of the \$42 penalty is appropriate.

Citation No. 2274228 was issued for violation of 30 C.F.R. § 77.200, when two openings in the top of the silo floor measuring 6x9 feet were found. The Solicitor asserts that this opening left unguarded posed a free fall hazard of approximately thirty feet. The Solicitor represents that negligence and gravity were moderate and that accordingly, full payment of the \$42 penalty is proper.

The Solicitor further represents that the operator is small with an excellent history of prior violations.

I accept the Solicitor's representations and find the proposed settlements in accord with the policies and purposes of the Act. The settlements are therefore APPROVED.

ORDER

The operator is hereby ORDERED to pay \$84 within 30 days from the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is written in a cursive, flowing style.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Thomas A. Brown, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Ruttman Corporation, John Wy, P.O. Box 120, 646 North Sandusky, Upper Sandusky, OH 43351 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 30 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 84-48-M
Petitioner	:	A.C. No. 16-00246-05524
v.	:	
	:	Bell Isle
CARGILL, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a Motion to Approve Settlement Agreement in the above-referenced matter. At issue is one violation originally assessed at \$119. Settlement is proposed for the original amount.

Citation No. 2236542 was issued for violation of 30 C.F.R. § 57.12-30, later modified to 30 C.F.R. § 57.12-45 because the 4160 volt powerlines at one point has an 11 foot clearance instead of the 15 feet required by the National Electric Code. The Solicitor represents that the operator had just rewired the powerlines and was not aware of the clearance. Negligence and gravity were moderate. The Solicitor further represents that the operator is a very safety conscious company, and upon being advised of the hazard immediately roped off the area to prevent entry.

I hereby accept the Solicitor's representations and Approve the settlement.

ORDER

The operator having paid the penalty, this case is DISMISSED.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Jack F. Ostrander, Esq., U.S. Department of Labor, Office of
the Solicitor, 555 Griffin Square Building, Dallas, TX 75202
(Certified Mail)

Mr. Charles Von Dreusche, Mine Manager, Cargill, Inc., P.O.
Box 339, Patterson, LA 70392 (Certified Mail)

rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAY 31 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 83-87-M
Petitioner : A.C. No. 42-01164-05501
 :
v. : Docket No. WEST 83-105-M
 : A.C. No. 42-01164-05502
ATLAS MINERALS, : (Consolidated)
Respondent :
ALLEN YOUNG, : Calliham Mine
Intervenor :

DECISION

Appearances: James H. Barkley, Esq., Robert J. Lesnick, Esq.,
and Margaret Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
John A. Snow, Esq., and James A. Holtkamp, Esq.,
VanCott, Bagley, Cornwall & McCarthy, Salt Lake
City, Utah,
for Respondent;
Allen E. Young, Dove Creek, Colorado,
Intervenor, pro se.

Before: Judge Morris

These cases, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"), arose as a result of an inspection of respondent's uranium mine. The Secretary of Labor seeks to impose civil penalties because respondent allegedly violated safety regulations promulgated under the Act.

After notice to the parties, a hearing on the merits commenced in Moab, Utah, on June 19, 1984.

The Secretary and the respondent filed post-trial briefs.

Issues

The issues are whether respondent violated the regulations; if so, what penalties are appropriate.

Format of the Decision

The decision initially considers issues involving the alleged exposure to radon daughters. The radon exposure citations are considered in numerical order. Thereafter, an alleged posting violation is reviewed.

Citation 2084505

This citation alleges a violation of 30 C.F.R. § 57.5-46, which provides:

57.5-46 Mandatory. Where radon daughter concentrations exceed 10 WL, respirator protection against radon gas shall be provided in addition to protection against radon daughters. Protection against radon gas shall be provided by supplied air devices or by face masks containing absorbent material capable of removing both the radon and its daughters.

Citation 2084506

This citation alleges a violation of 30 C.F.R. § 57.5-38, which provides:

57.5-38 Mandatory. No person shall be permitted to receive an exposure in excess of 4 WLM in any calendar year.

Citation 2084507

This citation alleges a violation of 30 C.F.R. § 57.5-37, which provides as follows:

Underground Only

57.5-37 Mandatory. (a) In all mines at least one sample shall be taken in exhaust mine air by a competent person to determine if concentrations of radon daughters are present. Sampling shall be done using suggested equipment and procedures described in section 14.3 of ANSI N13.8-1973 entitled "American National Standard Radiation Protection in Uranium Mines," approved July 18, 1973, pages 13-15, by the American National Standards Institute, Inc., which is incorporated by reference and made a part of the standard or equivalent procedures and equipment acceptable to the Administrator, Metal and Nonmetal Mine Safety and Health, Mine Safety and Health Administration. This publication may be examined at any Metal and Nonmetal Mine Safety and Health Subdistrict

Office of the Mine Safety and Health Administration, or may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, The mine operator may request that the required exhaust mine air sampling be done by the Mine Safety and Health Administration. If concentrations of radon daughters in excess of 0.1 WL are found in an exhaust air sample, thereafter:

(1) Where uranium is mined—radon daughter concentrations representative of worker's breathing zone shall be determined at least every two weeks at random times in all active working areas such as stopes, drift headings, travelways, haulageways, shops, stations, lunchrooms, magazines, and any other place or location where persons work, travel, or congregate. However, if concentrations of radon daughters are found in excess of 0.3 WL in an active working area, radon daughter concentrations thereafter shall be determined weekly in that working area until such time as the weekly determinations in that area have been 0.3 WL or less for 5 consecutive weeks.

(2) Where uranium is not mined—when radon daughter concentrations between 0.1 and 0.3 WL are found in an active working area, radon daughter concentration measurements representative of worker's breathing zone shall be determined at least every 3 months at random times until such time as the radon daughter concentrations in that area are below 0.1 WL, and annually thereafter. If concentrations of radon daughters are found in excess of 0.3 WL in an active working area radon daughter concentrations thereafter shall be determined at least weekly in that working area until such time as the weekly determinations in that area have been 0.3 WL or less for 5 consecutive weeks.

(b) If concentrations of radon daughters less than 0.1 WL are found in an exhaust mine air sample, thereafter:

(1) Where uranium is mined—at least one sample shall be taken in the exhaust mine air monthly.

(2) Where uranium is not mined—no further exhaust mine air sampling is required.

(c) The sample date, locations, and results obtained under (a) and (b) above shall be recorded and retained at the mine site or nearest mine office for at least two (2) years and shall be made available for inspection by the Secretary or his authorized representative.

Citation 2084508

This citation alleges a violation of 30 C.F.R. § 57.5-34, which provides:

57.5-34 Mandatory. (a) Auxiliary fans installed and used to ventilate the active workings of the mine shall be operated continuously while persons are underground in the active workings, except for scheduled production-cycle shutdowns or planned or scheduled fan maintenance or fan adjustments where air quality is maintained in compliance with the applicable standards of Section 57.5, and all persons underground in the affected areas are advised in advance of such scheduled or planned fan shutdowns, maintenance, or adjustments.

(b) In the event of auxiliary fan failure due to malfunction, accident, power failure, or other such unplanned or unscheduled event;

(1) The air quality in the affected active workings shall be tested at least within 2-hours of the discovery of the fan failure, and at least every 4-hours thereafter by a competent person for compliance with the requirements of the applicable standards of section 57.5 until normal ventilation is restored, or

(2) All persons, except those working on the fan, shall be withdrawn, the ventilation shall be restored to normal and the air quality in the affected active workings shall be tested by a competent person to assure that the air quality meets the requirements of the standards in Section 57.5, before any other persons are permitted to enter the affected active workings.

Citation 2084509

This citation alleges a violation of 30 C.F.R. § 57.5-45, which provides:

57.5-45 Mandatory. Inactive workings, in which radon daughter concentrations are above 1.0 WL, shall be posted against unauthorized entry and designated by signs indicating them as areas in which approved respirators shall be worn.

Citation 2084510

This citation alleges a violation of 30 C.F.R. § 57.5-44, which provides:

57.5-44 Mandatory. The wearing of respirators approved for protection against radon daughters shall be required in environments exceeding 1.0 WL and respirator use shall be in compliance with standard 57.5-5.

Citation 2084511

This citation alleges a violation of 30 C.F.R. § 57.5-39, which provides:

57.5-39 Mandatory. Except as provided by standard 57.5-5, persons shall not be exposed to air containing concentrations of radon daughters exceeding 1.0 WL in active workings.

Citation 2084513

This citation alleges a violation of 30 C.F.R. § 57.5-40.

Respondent's motion to withdraw its notice of contest as to this citation was granted (Tr. 449). Accordingly, the citation and the proposed penalty of \$20 should be affirmed.

Stipulation

At the hearing the parties stipulated as follows:

1. The COMFO II respirator is not the correct respirator to be worn in an exposure of 80 work levels (Tr. 260).
2. The radon sample sheets received in evidence are complete for those mines covered by such exhibits (Tr. 411).
3. The radon and the time/area cards received in evidence for miners Young, McCleary, Flynn, Wells, Stengel, Riley and Yates are complete (Tr. 411).

Summary of the Evidence

Evidence on behalf of the
Secretary of Labor

The Secretary's witnesses were Royal W. Crowson, Wade Cooper, Thomas Richards, Dennis Wells, Allen Young and Jess McCleary.

The evidence shows that radon, a gas, results from the natural sequential decay of uranium. The daughters of radon, particulates, are a decay product of the gas (Tr. 170). Daughters become particulates as the radon gas decays (Tr. 204).

The working level (hereafter at times referred to as WL) is a unit measuring a concentration of radon daughters. A working level hour of exposure is calculated by multiplying the concentration (as established by an air pump sample) by the number of

hours a miner is exposed to a concentration (Tr. 171). The exposure, which progresses arithmetically, can also be calculated as a WL week. In order to calculate a WL week you sum all of the WL hours for a given workweek.

A WL month, under current MSHA regulations, equals 173 WL hours (Tr. 171, 172). Four WL months constitute the allowable annual exposure to radon daughters (Tr. 172). A WL year is the sum of all WL hours in a calendar year (Tr. 171-172). Recommended cumulative lifetime exposure is limited to 120 WL months (4 WL months x 30 years)(Tr. 172). If a miner works 40 hours a week for 52 weeks for 30 years, he can be exposed to .33 WLs (4 WL months divided by 12 months equals .33)(Tr. 173).

Radon gas and its daughters are controlled by ventilation. Borehole fans are the primary method of diluting the daughters and reducing the radon gas decay time (Tr. 173, 174). Borehole fans move air through the mine, whereas auxiliary fans distribute the air within the mine (Tr. 174, 175).

If exposed to radon gas, protection can be provided by a miner using either a self-contained breathing apparatus or a Scott respirator with an attached absorbic chemical cannister (Tr. 175; Ex. P27). These are the only two types of respirators capable of furnishing protection against the gas and its daughters (Tr. 181). Only the canister type (Ex. P27) and the self-contained apparatus are approved for exposures above 10 WL.

Royal J. Crowson served as the Atlas radon technician during the period in issue here. His duties included sampling and recording the exposure levels of the radon daughters (Tr. 75-77). The daughters are sampled by drawing air, for five minutes, with an MSA portable air pump. The resulting readout shows, in work levels, the radiation concentration in the area sampled (Tr. 77, 78, 92).

After ascertaining the concentration Crowson would routinely record it. He retains one copy and posts the other copy in the office of the area he has sampled (Tr. 78-80; Ex. P19, P23).

Crowson's normal procedure is to give copies of the sampling to the supervisors in the engineering department and he also enters the detail on a summary sheet. The original goes into a permanent company file (Tr. 80; Ex. P9).

Crowson would generally, but not always, sample weekly. At times he would carry a reading forward from the previous week's recording. Crowson would then take the concentrations in specific areas and calculate the miners' exposures. Their exposures were based on the time (as reflected by their radon cards) they were in a given area (Tr. 81, 82).

The summary sheets have a column to record a "mine average." Some of the averages relate to an entire mine. Other averages relate to certain areas in a mine (Tr. 83). When Crowson assigns a figure to an entire mine, that number is entered on the summary sheet (Tr. 83; Ex. P9). The averages are also entered on the miners' individual radon cards (Tr. 83, 84).

Before Crowson enters the exposure on the card, the miner has already entered on the same card the number of hours he has spent in a given area. So the technician simply multiplies those hours by the exposure in that area. The final figure is the total exposure for each week (Tr. 83-85). For example, if a miner worked two hours for five days in the Calliham mine, the technician would simply multiply ten hours by the Calliham mine average (Tr. 84, 85).

The weekly exposures would then be entered monthly. This cumulative record would be the total exposure as expressed in work level months (WLM)(Tr. 85).

In determining what areas should be sampled Crowson would talk to the workers and foremen to determine where the work was being done (Tr. 90, 91). Crowson recalls testing when the concentration was at 1 WL (one work level)(Tr. 89). All miners must be withdrawn from an area where the exposure reaches 1 WL (Tr. 89-90).

Allen Young and Jess McCleary, both Atlas supervisors, avoided a general company layoff in January 1982. At that time these men were placed on standby status which involved mostly performing general maintenance work (Tr. 266-268). In late May or June they began salvage operations by starting at the Patti Ann, and encompassing the Sage, Calliham, Dunn and Rim mines. Salvage is basically the removal of anything that could be re-used. The order of equipment removal was usually the power substations followed by the power lines, then the fans, the pumps and finally the pipe sections (Tr. 268-270). The pipe would be removed from the furthest point and they would work up the incline (Tr. 269). Yates, an immediate supervisor, instructed the men to remove fans before other equipment (Tr. 270-271). Yates was aware when the fans were removed and he knew the order in which the material was being salvaged (Tr. 272). Yates would usually haul the salvage fans to the company office in his pickup (Tr. 272, 273). Neither Yates, nor anyone else at the mine, told the men to keep the fans in operation until the other work was completed (Tr. 273). On every occasion the electricians disconnected the fans before Young and McCleary entered the work areas (Tr. 274).

The company had taken Young's log book. Without the book he wouldn't know the exact date when the power was disconnected

(Tr. 274). In Young's opinion the removal of the fans in advance of the other equipment was an unreasonable practice (Tr. 273, 274).

(The evidence of alleged overexposure to radon daughters focuses on different weeks. The decision reviews these incidents in chronological order.)

For the week ending January 16, 1982, Young was in the East Haulage area one hour each day for a WL exposure of 14.35. This indicates a concentration of 2.87 WL (Tr. 433; Ex. P10-2).

For the week ending 1/ January 22, 1982, and particularly on January 19, 1982, of that week the radon daughter sample for the east haulage area of the Calliham mine showed an exposure of 2.87 WL (Tr. 110, 113; Ex. P19).

Young's radon card for the same area shows he worked one hour each day in a concentration 2/ of .15 WL. McCleary's card shows a concentration of .12 WL (Ex. P10-3; P11-2). Crowson agreed the men should have been removed from the 2.87 WL concentration. Crowson didn't know the miners' cards were so drastically understated but it related to a borehole fan shutdown. The timecards on their face show the mine was in compliance with the radon standards (Tr. 116). Crowson resampled the next day with fans on 3/ (Tr. 115-118).

For the week ending March 20, 1982, Jess McCleary worked at the Rim mine for two hours for a total exposure of 2.62 WL hours. This indicates an exposure of 1.31 WL (Tr. 438; P11-12-13).

McCleary also worked at the Sage mine for the week ending March 27, 1982, for four hours for an exposure of 4.28 WL hours, or in a radon exposure of 1.07 (Tr. 439; Ex. P11-13). In addition, McCleary worked in Section 10 for eight hours that week for a total exposure of 32.56 WL hours. This would indicate a

1/ At times the radon cards will indicate a week ending on a Friday; at other times it is on a Saturday.

2/ To calculate the radon daughter concentration from the working level you divide the working level by the number of hours spent in the area. For example, a .15 WL divided by five hours results in a .03 working level concentration (Tr. 117).

3/ The sample the following day showed a .03 WL concentration (Ex. P19-2).

radon daughter exposure of 4.07 WL (Tr. 439; Ex. P 11-13). From January through April 1982, Atlas had not told McCleary he was to wear a respirator when exposures were above 1 WL. Further, he was not provided with nor was he required to wear a canister type respirator any time in the first four months of 1982 (Tr. 439, 440).

Young testified that he worked in the Sage mine for three days during the week ending March 27, 1982 (Tr. 434, 425; Ex. P10-15). For that week the Sage showed a radon concentration of 4.28. Section 10, a drift in the Sage, showed a concentration of 32.56 (Tr. 426, 427). There were no signs requiring that respirators be worn before a miner entered the Sage. Further, there were no signs posted in the Sage mine warning against radon daughters during March or April. The only signs in the area related to safety glasses, moving vehicles, etc. (Tr. 428-429).

Crowson testified that during the week of May 22, 1982 three Atlas electricians spent time in an emergency escape drift in the Pandora mine (Tr. 94, 95). The radon concentration was "pretty high" at 80 WL. Crowson notified his supervisors and suggested in a handwritten memo that potentially high exposure areas should be sampled more frequently (Tr. 95, 97; Ex. P24). Crowson was concerned particularly in view of the upcoming shutdown which would involve a disruption of ventilation (Tr. 95, 96; Ex. P24).

Electrician Wells confirmed that he learned of his exposure when he returned to the Atlas office. Crowson questioned the number of hours on Wells' radon card. Wells reduced his recorded hours to two from three and one-half. Wells stated at the hearing that a more accurate figure for his time underground was at least three hours (Tr. 231-233). Crowson testified that none of the electricians had a canister type respirator that day. Wells had worn a COMFO respirator (Tr. 234-236).

On September 1, 1982 Crowson sampled North 700 West, a work heading in the Calliham mine. The radon daughter concentration was quite high, at 48.63 WL. Young and McCleary were removing pipe from the area at the time. They were wearing COMFO II respirators. Such respirators are not effective above 10 WL (Tr. 100-102). Crowson wrote a memo to management indicating the auxiliary fan was not ventilating the heading (Tr. 103, 104). Crowson did not know the extent of this exposure until he had left the mine and placed the sample in his counter (Tr. 105). Crowson advised a supervisor of this abnormally high concentration. He further stated that the men should be kept out of the area (Tr. 106-109). Crowson's written report went to supervisors Clements, Wilson and Dye (Tr. 109).

Young recalled the occasion when he was exposed to 48 WL. There was no ventilation (Tr. 279, 283-288). Young and McCleary first became aware of the exposure when they saw the radon daughter sample sheet in the Calliham mine office (Tr. 287, 288; Ex. P19-23). The two men had worked about four hours in this high exposure (Tr. 288, 289). Neither Yates, who knew the exposure, nor anyone else, told the two men not to re-enter the mine. Nor were they told to get appropriate respirator protection (Tr. 288-290). In fact, Young and McCleary re-entered the mine and remained underground for an hour (Tr. 290).

Young was aware that the yearly maximum WL hours permitted are 692. This knowledge apparently led to two meetings with management in mid-September, 1982. Young saw the Atlas record indicating that for the month of July 1982 his exposure to radon daughters was 345.21 WL hours (Tr. 344; Ex. P8). This figure seemed unusually high, so he discussed it with Clements, the general line foreman (Tr. 345, 346). Young said the hours were "climbing fast". But Clements, who was not overly concerned, said not to worry about it. Further, Yates didn't seem alarmed (Tr. 347).

The following day there was a meeting with Torres, Clements, Axtell, Yates and McCleary. Crowson was in and out of the meeting. At the meeting the group reviewed the radon cards for Young and McCleary from January 1st until the meeting. Torres did most of the talking. Management representatives questioned if the time cards correctly recorded the actual time the men were in a particular location in the mine (Tr. 348-350). Torres persisted in his request that Young change the cards. Young did so but there was no pressure or threats by management to make any changes (Tr. 301, 350). Some, but not all, cards were marked as "revised". Four cards were changed and were not marked as revised. Twenty of Young's 54 time cards were revised (Tr. 351-353; Ex. P10). In all instances the unrevised cards were more accurate than the revisions (Tr. 368).

Young, in a prior interview to MSHA's representative Ben Johnson, made some conflicting statements as to the accuracy of the original radon cards as compared with the revised cards (Tr. 369-380).

Health Hazards

Victor E. Archer, M.D., an expert witness, testified extensively on the medical effects of radiation exposure to underground uranium miners (Tr. 579-587). He was familiar with the citations in the pending cases (Tr. 588).

The hazards to the exposed miners include cancer of the lung, diffuse lung injury and skin cancer. The risk, in general, varies directly with the magnitude of the exposure (Tr. 590, 591).

Dr. Archer indicated that the risk of lung cancer to uranium miners increases almost directly to their exposure to radon daughters. Uranium miners who do not smoke have lung cancer seven times that of their counterparts in the general population (Tr. 593, 594, 596). The basic injury occurs at the time of exposure but the cancer may take years to appear (Tr. 598).

Dr. Archer was on a committee that recommended the 4 WL months as a standard in U.S. mines (Tr. 595, 596). In the doctor's opinion the 4 WL months should be reduced to 2 WL months (Tr. 600-601).

Dr. Archer, under contract with NIOSH, authored Exhibit P38. This extensive document contains a summary of all data relating to the health hazards caused by radon daughters (Tr. 602-603).

Dr. Archer's opinion focuses on the premise that a specific number of lung cancers will appear in a number of miners. But he agreed that no one could tell whether a particular miner in that group would, in fact, get lung cancer (Tr. 606, 607).

Respondent's Evidence

Respondent's witnesses included Richard E. Blubaugh, the Atlas manager for regulatory affairs. Mr. Blubaugh indicated that his duties, as of mid-January 1982, involved responsibility for regulatory compliance (Tr. 479-483).

His duties included supervision of monitoring exposures to radon by sampling work areas on a representative basis and assigning concentrations to miners on the basis of the time spent in those areas (Tr. 484). The samples would be taken only when there was prior notification from a supervisor (Tr. 484).

In May 1982, Blubaugh learned that Young and McCleary, experienced supervisors, were going from standby duties to salvage work. Blubaugh reviewed the company's procedures and concluded the work areas would be monitored before the miners entered the areas (Tr. 485-487). Blubaugh does not consider it prudent to permit men to work in an area where ventilation had been shut down (Tr. 486-487).

In May 1982, such procedures were not followed and a radon overexposure occurred to three electricians in the Pandora mine. The radon technician had not received prior notice that the men were to be in the area (Tr. 489). The radon technician showed Blubaugh his comments concerning that incident (Tr. 488, 489; Ex. P24). Blubaugh met with the company's chief engineer and they agreed to improve communications before there was any change in ventilation (Tr. 490).

Witness Blubaugh was aware that some radon cards had been revised after the exposure to Young and McCleary that occurred September 14 (Tr. 492). Blubaugh's only involvement was to direct that if changes were made, all new cards were to be marked as "revised." The original cards were not to be changed (Tr. 493).

Blubaugh had occasion to review the Atlas records. In August 1982, they reflected that the exposures to Young and McCleary were on the rise. Blubaugh discussed this with Crowson. He affirmed the need to watch the hours closely (Tr. 497, 498; Ex. P8).

Blubaugh does not dispute that miners were exposed to a concentration in excess of 10 WL in the Rim mine on July 1, 1982 and in the Calliham mine on September 1, 1982 (Tr. 504). Further, there was no dispute that miners were exposed to 48.6 WL and near 80 WL in the Pandora mine in May 1982. In addition, there is no dispute that Young and McCleary were exposed in excess of 4 WL months in the calendar year of 1982 (Tr. 505-507; Ex. P31, P32). It is also true that the WLs exceeded .3 and weekly measurements were not taken (Tr. 508, 511).

The concentration at the Calliham mine on September 1, 1982 exceeded 48 WL because the auxiliary fan was not operating (Tr. 511). Blubaugh cannot dispute Young's statement that the fan was inoperable (Tr. 514). Further, the witness does not dispute that the WL exposure exceeded 1 for Young and McCleary (Tr. 515).

The Atlas safety manual for the mill and the company policy manual for supervisors does not refer to radiation control (Tr. 521, 522; Ex. P35).

Crowson reported overexposures to Blubaugh. He reported levels if it was a serious concentration, such as a 80 WL or the 48.63 WL (Tr. 529, 535, 536).

If ventilation is turned off, the radon concentration would be affected (Tr. 538). The Yates work order requested that the fans be turned off on August 9th (Tr. 543). Blubaugh did not know about the work order but he knew salvage operations were proceeding (Tr. 543).

Dale Edwards, the radiation safety coordinator at the mill and a subordinate of Blubaugh, advised Young and McCleary of their overexposure and he told them to get out of the mine (Tr. 558, 559, 578).

In the months of July through September 1982, all portions of the mines that were in production were monitored at least once

a week. In the salvage area the miners were to notify the radon technician so he could monitor the area before they entered (Tr. 560).

Edwards reviewed the company procedures; in his opinion they were both good and adequate (Tr. 561, 562, 566). After July 1982, Edwards noticed the levels were higher than normal for Young and McCleary. He told Crowson to notify them (Tr. 565). Edwards, who was inexperienced in ventilation, did not know that the salvage activities included removal of the ventilation (Tr. 569, 572, 573).

When Edwards was put in charge of testing for salvage in July he was not advised of Crowson's memorandum in May relating to the 80 WL exposure (Tr. 574, 577).

Nick Torres learned that Young and McCleary had been overexposed in September 1982. Torres wanted to verify the over-exposure. In checking the radon cards he found three or four cards were arithmetically incorrect. In addition, at a later meeting Young and McCleary agreed that there was room for changes. Young objected to changing cards. He felt that if he agreed to the change it would mean he was not working his eight hours (Tr. 618-624; Ex. P11; P11-52; P10-1 through P10-55). Torres would write in the correct time they were underground if the men agreed. Some changes were made on the original cards. Later they started using new cards marking them as "revised" cards (Tr. 622). After the corrections and revisions the two miners were still overexposed (Tr. 620). From the information we received Atlas believed the timecards were now accurate (Tr. 633).

In the salvage operations the underground fans were taken out first. This is not a reasonable nor a prudent way to conduct such activities (Tr. 627-632).

Discussion

Citation 2084505

The regulation allegedly violated, § 57.5-46, requires that miners be protected against radon gas and its daughters. When the concentration of radon daughters exceeds 10 WL, a supplied air device or a filter type respirator must be used.

At the hearing three different types of respirators were introduced into evidence. The DUSTFOE respirator (Ex. P25) is used to filter dust and mist (Tr. 178, 179). The COMFO II respirator (Ex. P26) is approved to filter radon daughters, but not radon gas. It can be used in areas containing up to 10 WL (Tr. 179-181). A SCOTT respirator filters both radon gas and

radon daughters (Tr. 180-181; Ex. P27). A self-contained, air supplied breathing apparatus, approved for radon gas and its daughters, was also discussed at the hearing (Tr. 182).

The Secretary's citation alleges that the standard was violated in the Pandora mine in May 1982; in the Rim mine on July 1, 1982; and in the Calliham mine on September 1, 1982.

The evidence reflects that on May 17, 1982 Wells and two other electricians were exposed to 80 WL in the Pandora mine (Tr. 230). Wells wore a COMFO II respirator which is not the correct equipment for such an environment (Tr. 234, 260). Wells had never seen a supplied air respirator and none of the electricians had a canister type filter respirator (Tr. 236).

Respondent's post-trial brief asserts that before May 17, 1982 the radon level in the Pandora was below 1 WL (Tr. 148, 149; Ex. P23). Respondent asserts that the apparent cause for the high level of radon on May 17 was the result of exhaust air from the adjacent Union Carbide Snowball mine. This condition was further complicated because of a nonfunctioning fan in the Pandora mine. After the fan was turned on, a new reading showed a radon level of 5.0 WL (Ex. P22-1). Respondent's approach is that since there was no evidence the fan was not operating, it cannot be concluded that the miners were exposed to a radon level above 10.

I reject this argument. Clear proof that the three electricians were exposed to 80 WL lies in the radon measurements taken by Crowson, the Atlas technician. His findings were clearly supported by his handwritten message to management (Tr. 94-96; Ex. P24). The lack of an operating fan would not exonerate respondent but only compound its negligence.

The portion of the citation relating to the 80 WL exposure in the Pandora mine in May 1982, should be affirmed.

The Secretary's citation further alleges that Young and McCleary were exposed to concentrations of 11.1 and 16.5 in the Rim mine on July 1, 1982.

Witness Young identified his radon card for the week ending July 3, 1982 (Tr. 275; Ex. P10-34). The card, received in evidence, shows Young was in the Rim mine on Thursday (July 1) of that week. The radon daughter concentration, which would have been recorded by Crowson, was 13.81 (Ex. P10-34). Jess McCleary's radon card placed him in the same posture on the same day (Ex. P11-30).

Respondent's post-trial brief asserts there is no evidence as to the radon levels on July 1 in the Rim mine. The argument evolves in this fashion: the 16.5 WL reading (as per Ex. P22-14)

was not obtained in the Rim but in the "Columbus haulage" area, a separate but connected mine. Respondent then cites the radon cards to show that the citation should be dismissed because Young and McCleary were not in the "Columbus haulage" area on July 1.

Respondent's argument is without merit. As a threshold matter the radon daughter sample sheet (Ex. P22-14) is a sampling for July 7, not July 1. Young and McCleary were obviously in the Rim on July 1, 1982 and they were exposed to a WL of 13.81. Their timecards so reflect (Ex. P10-34; P11-52).

It is true that the exposure was 13.81 and not 16.5 as alleged in the citation. But the issue is whether the miners were exposed to an environment above 10 WL. They were, and a violation of the regulation has been established. This portion of the citation should be affirmed.

Respondent's brief raises issues involving the assessment of a civil penalty as a result of the events of September 1. But "as to the alleged violation of the subject standard at the Calliham on September 1, Atlas acknowledges that the Secretary has shown a violation." (Brief, page 5).

For the foregoing reasons Citation 2084505 should be affirmed.

Unwarrantable Failure

In these citations the Secretary claims that the violation was a result of the unwarrantable failure of the respondent to comply with the regulation.

The Secretary asserts that special findings of unwarrantability associated with the citation is not properly before the Commission in a civil penalty proceeding. I disagree. In a recent penalty case the Commission did, in fact, consider evidence of unwarrantability. Kitt Energy Corporation, 6 FMSHRC 1596 (July 1984).

The existing case law is that an unwarrantable failure to comply may be proved by a showing that a violative condition, or practice, was not corrected or remedied prior to the issuance of the citation because of indifference, willful intent, or a serious lack of reasonable care, United States Steel Corporation, 6 FMSHRC 1423, 1436 (June 1984).

As a defense Atlas asserts that because of the previous regular low level readings in these areas the company had no reason to know that high levels of radon exposure would exist.

The evidence here establishes that in the salvage operation the ventilation fans were the first things removed from the work areas. Atlas knew that radon daughters are controlled by such ventilation. Further, all agreed such removal was a poor work

practice. These factors establish an indifference and a serious lack of reasonable care by Atlas. In short, affirmative actions by Atlas caused this condition to occur. Blubaugh, the person in charge of compliance, did not consider it prudent to permit men to work in an area where ventilation had been shut down (Tr. 486-487). In addition, the Atlas "procedures" of notifying the radon technician before the men went into a given area were more illusory than real.

In respect to the overexposure to Young and McCleary on September 1, Atlas argues that the two were experienced miners who knowingly and willfully exposed themselves to an unventilated area with the resulting high levels of radon exposure.

Respondent's argument in effect seeks to shift the burden of compliance to the miners rather than itself. The Mine Safety Act is contrary to this view and the argument is rejected. In sum, the events culminating in these violations were the results of affirmative acts by respondent which brought about the violative exposures. For these reasons the citation should be affirmed due to the unwarrantable failure of respondent to comply.

Citation 2084506

The standard in contest here prohibits an exposure in excess of 4 WLM in any calendar year.

Correspondence to Young and McCleary from Atlas establishes the violation (Ex. P31, P32).

In its post-trial brief Atlas raises issues relating to a civil penalty but "admits the existence of a violation of the subject standard" (Brief, page 17).

Atlas disputes the allegations of unwarrantable failure in connection with this citation (Brief, page 28).

The citation here is an accumulation of radon exposures. The analysis, as previously stated in connection with unwarrantable failure, applies here. The allegation of unwarrantable failure is affirmed.

Citation 2084507

The Secretary's citation alleges that radon daughter samples were not taken in active work areas containing radon daughter concentrations above .30 WLMs.

In support of his case the Secretary's brief cites the admission by witness Blubaugh relating to this citation (Tr. 508).

I do not find such proof to be persuasive. Such evidence is, at best, a "belief" of the witness (Tr. 508, 509). Accordingly, it is necessary to review the evidence in detail. The Secretary's citation recites that the sampling shortfall occurred during the salvage operations and not during ore production.

The evidence relating to the various mines is fully set forth in the charts contained in Appendix A attached to this decision.

The threshold questions for determination, as urged by respondent, are whether the areas sampled were "active working areas" and whether the standard requires weekly sampling in inactive mines if concentrations are found in excess of .3 WL.

The Secretary's regulations, 30 C.F.R. § 57.2, define "active workings" to mean "areas at, in, or around a mine or plant where men work or travel." It is uncontroverted that Young and McCleary were engaged in salvage operations in the mines. It follows that when they were engaged in those activities they were in an active working area of the mine.

A review of the evidence as detailed in Appendix A establishes the following violations.

Sage Mine

Respondent found the Sage mine was above .30 WL on March 31, 1982, but the company did not resample until May 17 and again on June 14. In the intervening time Young was in the mine during the weeks ending April 3, 10, 17; May 29; June 5 and 12. McCleary was also present the same weeks except for the week ending May 29. In the period when there was no sampling, Young and McCleary respectively spent 42 and 41 hours in this environment.

It follows that respondent's argument that the miners were in the Sage on a sporadic basis lacks merit.

Rim Mine

Respondent sampled the Rim mine on March 11, 1982. The next sampling was not until March 26, 1982. Young and McCleary were both present in the intervening time. Respondent's records establish this violation since 30 C.F.R. § 57.5-37 requires at least "weekly" sampling in these circumstances.

Patti Ann and Small Fry Mines

Respondent sampled these mines on May 21 when the atmosphere was above .30 WL. Young and McCleary spent a total of 62 hours in these mines before the next sampling on June 17. Additional violations of this standard occurred after the sampling of June 21.

Callihar Mine

While the sampling was more frequent here, violations nevertheless occurred. Atlas sampled the mine on January 19 and learned it was above .30 WL. But they did not thereafter sample for five consecutive weeks as required by the regulations. Violations were repeated when the sampling on February 12th was again above .30 WL.

This citation as to the Sage, Rim, Patti Ann and Small Fry, and Calliham mines should be affirmed.

Citation 2084508

This citation alleges respondent violated 30 C.F.R. § 57.5-34 by causing its employees to be exposed to a radon daughter concentration of 48.63 WLs on September 1, 1982 in the N700-440W area of the Calliham mine.

The events concerning this exposure are enumerated in the summary of the evidence. I find witness Young to be generally credible and the uncontroverted evidence establishes a violation of the regulation.

Respondent's post-trial brief asserts it has no evidence to refute Young's claim that the fan was not operating. The Atlas brief further states "there was a violation" (Brief, page 37).

On the record the foregoing citation should be affirmed.

Unwarrantable Failure

Respondent contends that a finding of unwarrantable failure in connection with this citation is not justified. I agree. The high radon exposures of September 1 were due to an inoperative fan. There was no affirmative act by respondent that caused this violation. In addition, there is no evidence that respondent knew the fan was inoperative before the miners entered in the area.

The facts fail to establish that this violation was due to the unwarrantable failure of respondent to comply. The allegations of unwarrantable failure should, accordingly, be stricken.

Citation 2084509

This citation alleges that areas of the Sage mine where the concentration was above 1.0 WL were not posted against unauthorized entry and designated as a respirator area until after the salvageable material had been removed.

Unless Young and McCleary happened to see the radon readings they would have no way of knowing the concentration in a given

area of the Sage mine. As previously noted Young and McCleary worked in parts of the Sage generally in January through April 1982. Respondent during this time knew of the following high readings in the Sage:

Section 10 Drift	4.07 on March 24, 1982
Incline	1.07 same
Section 10 Drift	4.08 on March 31, 1982

(Ex. P20)

Yet the Sage was not posted to warn Young and McCleary. Young worked in the Sage on these specific dates:

<u>Date</u>	<u>Location</u>	<u>No. Hours</u>	<u>Ex. No.</u>
March 22	Sage	2	P10-16
	Section 10	2	
March 23	Sage	1	P10-16
	Section 10	3	
March 25	Sage	1	P10-16
	Section 10	3	
March 29	Sage	1	P10-17
	Section 10	3	
March 30	Sage	1	P10-17
	Section 10	4	
March 31	Sage	1	P10-17
	Section 10	4	
April 1	Sage	1	P10-17
	Section 10	4	
April 2	Sage	1	P10-17
	Section 10	1	
April 5	Sage	2	P10-18
April 12	Sage	1	P10-19 P10-20
May 27	Sage	1	P10-28

McCleary's work activities in the Sage basically parallel those of Young, his partner.

The violation occurred here since respondent knew of the high work level and failed to post the area. Respondent also

knew Young and McCleary would be entering the area in the course of their duties.

Respondent argues that the Secretary hinges some of his citations on certain areas being "active workings" and now, it is argued, the Secretary seeks to have it "both ways". Atlas asserts that salvage operations render a mine an "active working" or it does not.

Respondent apparently believes that an "inactive working", which is not otherwise defined in the regulations, is the mirror image of an "active working", as defined in § 57.2.

It is not. The radiation section of the Secretary's regulations contain elaborate directives as to when and where radiation measurements are to be taken. The scope of these regulations indicate that radon daughters are to be measured under essentially all circumstances and conditions in a uranium mine such as this one. For example, § 57.5-37 requires measurements at least every two weeks at random times in all active working areas such as stopes, etc., and all other places where persons work, travel or congregate. (Emphasis added). No persons were in this area until Young and McCleary performed their salvage work. On the record this area was factually less than an "active working" but more than an "abandoned working" as defined in § 57.2.

Since the radon concentration was above 1.0 WL and since the area was not abandoned, nor posted, the regulation was violated.

Citation 2084509 should be affirmed.

Citation 2084510

This citation alleges Young and McCleary were not issued respirators nor trained for their use in work areas above 1 WL.

It is further alleged that the miners were so exposed (above 1 WL) on the following occasions:

<u>Mine</u>	<u>Week Ending</u>	<u>Working Level</u>
Calliham	January 16, 1982	2.87 (Tr. 433)
Rim	March 20, 1982	1.06 (Tr. 433, 434)
Sage	March 27, 1982	1.07 and 4.07 (Tr. 434, 435)

As a threshold matter Young and McCleary testified they were not furnished protective respirators (such as is photographed in Exhibit P26) during the months of January through April 1982 (Tr. 435, 439-440).

The secondary issues are whether any miners were exposed above 1 WL on the occasions alleged in the citation. I find they were so exposed.

During the week ending January 16, 1982 Young spent one hour each day in the east haulage of the Calliham mine for a total of 14.35 WL. This would result in a radon concentration of 2.87 (Tr. 433; Ex. P10-2).

During the week ending March 20, 1982 Young's revised radon card shows he had been exposed in the Rim mine for four hours to a concentration of 5.24. Mathematically, this would result in an exposure of 1.06 WL (Tr. 433; Ex. P10-14). McCleary's testimony and timecard for the same week in the Rim mine also indicates a WL exposure of 1.31 (Tr. 438; Ex. P11-12).

During the week ending March 27, 1982 Young worked in the Sage for four hours in a concentration of 4.28. This would indicate a exposure of 1.07 WL hours. During the same week Young was in Section 10 of the Rim mine for eight hours in a concentration of 32.56. This would indicate an exposure of 4.07 WL hours (Tr. 434, 435; Ex. P10-16). McCleary's activities parallel those of Young (Tr. 438, 439; Ex. P11-13). The Secretary's post-trial brief (page 15) also cites the exposures to electricians Wells, Flynn and Stubblefield. But this incident, recited in the summary of the evidence, was not alleged to be a violation in the citation. Accordingly, it is not necessary to explore that facet of the evidence.

Concerning the initial incident: Respondent contends that at the time of the monitoring on January 19 the fans in the Calliham were off to allow the water lines to thaw (Ex. P19-1). When the fans were turned on again on January 20 the reading was .03 WL (Ex. P19-2). Since the Secretary failed to establish that the fans were off it is argued the radon level could as easily have been .03 WL.

I am not persuaded. Respondent cannot impeach its own records which show the radon exposures to its miners. In addition, respondent's record keeping does not reflect any effort to overestimate the radon exposure to the miners. The incident involving the week ending January 16, 1982 should be affirmed.

Concerning the incident in the week ending March 20 in the Rim mine: Respondent contends that the Rim was monitored on March 11 and again on March 26. Since the readings range from .02 WL to 2.44 WL (depending on the operation of the fan) and since the radon cards of Young and McCleary do not identify the specific locations in which they worked, it is argued that the Secretary failed to prove that a violation occurred. I agree.

The radon daughter sample exhibit, an Atlas record, amply illustrates respondent's argument. The exhibit reads as follows:

Radon Daughter Samples

Mine Rim Shaft Date March 11, 1982
/s/ Roy C.

<u>Location</u>	<u>Time</u>	<u>Zone</u>	<u>W.L.</u>	
Shaft Sta. area	9:45		5.23	The borehole fan was not in operation when these two samples were taken. No one working during time of sampling.
Shaft work area	9:56		4.68	
Shaft work area	10:48		0.04	Fan turned on at 10:15
Shaft station	10:56		1.74	

The following samples were taken by MSHA inspector Ken Joslin on the same day as the above samples.

Shaft work area	11:25	0.02
Back pump area	11:45	2.33
Shaft sta. pump area	12:03	2.44

Action Taken & Other Remarks

Company personnel who visit the Rim will be given the average of the last five samples which is 1.31 WL.

Exhibit P22-2

Analysis of the Evidence

Witnesses Young and McCleary indicated they worked in the Rim mine during the week ending March 20 (Tr. 433, 438). But they did not identify their specific work area. In addition, the radon exposure shown on the radon cards is, in fact, the mine average of 1.31 WL.

The standard, 30 C.F.R. § 57.5-39, does not deal in mine "averages". Proof of where the miners worked in the Rim during that week was pivotal to the Secretary's proof. This portion of the citation concerning the week ending March 20, 1982 should be vacated.

Concerning the week ending March 27, 1982: respondent asserts that the Secretary merely proved that the work level in the Sage mine exceeded 1 on March 24 (Wednesday on the radon cards) but it is alleged there is no proof that the two miners worked in that atmosphere on that date "as alleged in the citation."

I am not persuaded. The citation alleges, in part, exposures "in the Sage mine during the week ending March 27, 1982. March 24 was on Wednesday during that week. On that date two measurements were taken in the Sage. The Section 10 drift showed a 4.07 WL (Ex. 20-2). Young and McCleary were in the Sage mine the following day, March 21.

The events concerning the radon exposures during the week ending March 27, 1982 establish a violation of the regulation. This portion of the citation should be affirmed.

Citation 2084511

This citation alleges miners were exposed to air containing concentrations of radon daughters exceeding 1.0 WL as follows:

<u>Mine</u>	<u>Date</u>	<u>Alleged Exposure</u>
Calliham	January 19, 1982	1.5 WL
	August 5, 1982	1.2 WL
	August 19, 1982	1.7 WL
	September 1, 1982	48.6 WL
Patti Ann	June 17-18, 1982	2.7
	June 21, 1982	2.4

It is alleged the foregoing exposures constituted a violation of 30 C.F.R. § 57.5-39.

In order to arrive at a conclusion concerning these allegations it is necessary to review and evaluate the timecards and the radon sampling sheets. As a general premise Young testified that he, McCleary, Flynn and Wells worked in the Calliham and Patti Ann on the dates in issue (Tr. 444-446).

Tuesday, January 19, 1982: Young and McCleary each worked one hour in east haulage on this date. At 1:26 the exposure in east haulage was measured at 2.87 WL (Ex. P10-3, P11-2, P19).

Thursday, August 5, 1982: Young and McCleary each worked five hours in the east haulage of the Calliham. On the same date, at 9:30 and 9:36, measurements indicated radon concentrations of 1.05 WL in the "E Haul by 1990" and .13 WL in the "E Haul" (P10-43, P11-38, P19-20).

Thursday, August 19, 1982: On this date Young and McCleary each worked five hours in the west haulage of the Calliham. On that date seven measures were taken. At 9:52 the "W Haulage" was sampled at .01 WL and the notation appears of "removing pipe". On August 19 the "west" average was assigned at 1.69 and the mine average at 1.22 (Ex. P19-22).

Wednesday, September 1, 1982: On this date the timecards and the testimony reflects that Young and McCleary each spent five hours in the N700W area of the Calliham. At 12:51 on that date the sample in the N700W area was 48.63 WL. It was further noted on the sample sheet that the activities consisted of "removing pipe." Further, radon respirators were used (Ex. P19-23). Five samples were taken by the radon technician and he assigned a "north average" of 12.70 and a mine average of 10.16 WL.

Patti Ann Mine

Thursday, June 17, 1982: On this date Young and McCleary each spent two hours in the Patti Ann mine. On the same day four measurements were taken at different locations in the mine. The recorded exposures ranged from .01 WL to 6.98 WL. A mine average of 2.71 WL was assigned to the mine (Ex. P10-31, P11-28, P21-5).

Friday, June 18, 1982: On this date Young spent four hours and McCleary five hours in the Patti Ann. No measurements were taken for this date. The exposures calculations, appearing on the timecards, are based on the mine average of the 2.71 WL.

Monday, June 21, 1982: On this date Young and McCleary each worked four hours in the Patti Ann. On that date three samples were taken. Exposures ranged from .17 WL to 5.71 WL. After the entry of the lower figure the following notation appears: "Removing cable." An average of 2.36 was assigned for that date (Ex. P21-6).

As previously discussed a "mine average" is generally insufficient to support a violation of this regulation. Specifically, it is incumbent on the Secretary to show that the miners were in a particular area where the radon concentration was exceeded. This is so because radon daughter concentrations can vary greatly in any mine. It is not within the intent of the regulations to impose stringent conditions when no hazard exists. We will accordingly analyze each date in issue here.

Calliham Mine

January 19, 1982: The facts recited above establish a prima facie violation of the regulation. Two miners were in the east haulage area and exposed above 1 WL.

Respondent argues that the single high reading on this date (2.87 WL) was caused by the fans not operating. Further, he testified the men were not in this area when he sampled. He, in fact, assigned a value .03 on the radon cards (Tr. 125-126; Ex. P19-1).

On this issue I find Crowson to be a credible witness. It accordingly follows that the Secretary failed to prove Young and

McCleary were exposed on this date. In addition, I further note that the miners were each in east haulage for only one hour on the contested date.

The allegations of the violation on January 19, 1982 should be vacated.

August 5, 1982: The violation was not proven. The location of the miners within the mine was not established. They could have been in the east haulage "by 1990" or in the east haulage. The respective concentrations there were 1.05 WL and .13 WL.

The Secretary's proof is insufficient in that he failed to establish the location of the miners in the mine on this date. The allegations of a violation on August 5, 1982 should be vacated.

August 19, 1982: The allegations concerning this incident should be vacated because the Secretary failed to prove the radon concentrations to which the miners were exposed.

September 1, 1982: The evidence here establishes a prima facie violation of the regulation. Respondent's brief also states that "clearly there was an exposure in excess of 1.0 WL" (Brief, page 52).

The allegations concerning the violation on September 1, 1982 should be affirmed.

Patti Ann Mine

Thursday, June 17, 1982: For the reasons stated above the Secretary has failed to establish a violation of the regulation. This portion of the citation should be vacated.

Friday, June 18, 1982: The allegations concerning this date should be vacated. As previously stated, generally a "mine average" cannot support a violation of this regulation.

Monday, June 21, 1982: For the reasons stated above, the Secretary failed to prove the allegations concerning the exposures of June 21, 1982. Such allegations should be vacated.

Citation 2084513

This citation alleges a violation of 30 C.F.R. § 57.5-40.

Respondent's motion to withdraw its notice of contest as to this citation was granted (Tr. 449, 450). Accordingly, the citation and the proposed penalty of \$20.00 should be affirmed.

Citation 3084314

This citation alleges a violation of Section 109(a) of the Act, which provides:

Posting of Orders and Decisions

Sec. 109(a) At each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine. There shall be a bulletin board at such office or located at a conspicuous place near an entrance of such mine, in such manner that orders, citations, notices and decisions required by law or regulation to be posted, may be posted thereon, and be easily visible to all persons desiring to read them, and be protected against damage by weather and against unauthorized removal. A copy of any order, citation, notice or decision required by this Act to be given to an operator shall be delivered to the office of the affected mine, and a copy shall be immediately posted on the bulletin board of such mine by the operator or his agent.

The Secretary's proof of the violation alleged here consisted of the admission by respondent in its answer to the complaint. The answer states that "[b]ecause of a good faith disagreement between the inspector and Atlas with regard to the location of the mine office, the posting was not accomplished until two days after the citations were issued" (Tr. 451, Respondent's Answer, Eighth Defense, page 6, paragraph 2). The answer was filed with the Commission on August 26, 1983.

During the hearing the parties agreed that respondent's evidence could not be presented out of turn. Accordingly, the respondent's evidence was heard before the Secretary's evidence (Tr. 211-223). For his proof of a violation the Secretary offered only respondent's admission in its answer.

After the Secretary rested his case as to this citation, respondent moved to withdraw its answer (Tr. 455). The judge denied the motion on the basis that it was untimely (Tr. 455). Respondent further moved to amend its answer to conform to the evidence. This motion was taken as submitted with the case (Tr. 452).

Respondent's evidence relating to this citation follows: Tom Richards, an Atlas safety engineer, testified that citations were given to the company on January 27 (Tr. 211-223). The meeting was at the company's Far West office or the Mill (Tr. 213).

The company wanted the citations posted at the Calliham mine, since it was there that the alleged violative conditions had occurred (Tr. 213). After checking with counsel the

citations were posted at the Calliham mine the day after they were issued (Tr. 214, 216). At that time the Calliham mine, some 55 miles from the office, had been completely shot down. There were no miners at that location (Tr. 216-219).

MSHA inspector Ben Johnson wanted the citations posted at the Far West office ^{4/} (Tr. 213).

The citation in contest here was subsequently issued to respondent for failure to post Citation 2084514 which is the citation in WEST 83-87-M. The citation was abated by posting the citations at the mill office. None of the citations concerned the mill office which is 45 miles from the Velvet mine (Tr. 214, 215).

Richards was not aware of the Atlas answer filed in the case stating that the citations were posted two days after they were issued. At the times these citations were issued only the Velvet mine and the mill office, about 45 to 50 miles apart, were in operation. If you wanted to convey information to miners you would post the information at either of those locations (Tr. 220). A few miners had gone from the Calliham mine to the Velvet mine (Tr. 219, 220).

Richards had been told by Tom Wilson that he had taken the citations to Kenny Partridge for him to post them (Tr. 221-223).

Discussion

On the merits of the evidence concerning this citation respondent cannot prevail. The defense shows, at best, that the citations were posted at the Calliham mine office. But there were no miners present at that location nor was there any activity at that mine.

The good faith disagreement referred to in respondent's answer is no doubt the disagreement over whether the posting should be at the Calliham or the mill or the Velvet.

In order that this issue may be reviewed, respondent's motion to amend its answer to conform to the evidence is granted. On the complete record I conclude that respondent violated Section 109(a) of the Act. Posting a citation at a mine where no miners are located does not comply with the Act.

Citation 2084514 should be affirmed.

Does the record support the proposition that the violations should be classified as S & S?

4/ Richards testified that the inspector wanted the citations posted at the Far West office; at other times he indicated the inspector wanted them posted at the Velvet mine (Tr. 218).

Respondent contends that the testimony of Dr. Archer shows that the radon exposures to Young and McCleary were not likely to result in an illness. Therefore, it is argued that the citations cannot be "S & S".

This position lacks merit. The nature of the injury has already been discussed. Simply restated, the Secretary is not required to identify the particular individual in the class who might incur lung cancer from radiation exposure. National Gypsum Company, 3 FMSHRC 822 (April 1981), cited by respondent, is not inopposite.

Multiple Violations Were Alleged Arising From A Single Series of Events

Respondent states that the citations here allege violations that arose from the same sequence of events and a number of them allege the same hazard. Respondent urges this is improper. Further, such a procedure penalizes it more than once for the same event and hazard.

Respondent's arguments are rejected. On these points the Commission case law holds directly contrary to such a view. Southern Ohio Coal Company, 4 FMSHRC 1459 (August, 1982); Crawford County Mining, Inc., 3 FMSHRC 1211 (May, 1981); Quarto Mining Com ny, 4 FMSHRC 931 (May, 1982).

Evidentiary Ruling

The Secretary at the hearing entered various objections to Exhibit R3, a transcription of a meeting on November 23, 1982 between Young, McCleary, and two MSHA officials.

An issue arises as to whether the exhibit was properly admissible under the Federal Rules of Evidence. But the Commission has ruled that hearsay evidence is admissible in proceedings before the Commission as long as it is material and relevant. Kenny Richardson, 3 FMSHRC 8, 12n. 7, aff'd, 689 F.2d 632 (6th Cir. 1982), cert denied _____ U.S. 77 L.Ed 2d 299 (1983), Mid-Continent Resources, Inc., 5 FMSHRC 261 (1983).

Exhibit R3 was properly received in evidence.

Civil Penalties

Procedural History

On July 18, 1983 the Secretary filed a Petition for Assessment of Civil Penalty. Respondent's answer was filed on August 25, 1983.

On March 7, 1983, the Secretary filed an Amended Proposal for Penalty asking that Citation 2084508 be designated as a 104(d)(1) citation and that the proposed penalties be raised as follows:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Original Assessment</u>	<u>Proposed Penalty</u>
2084505	57.5-46	\$500.00	\$6,500.00
2084506	57.5-38	500.00	9,000.00
2084507	57.5-37	98.00	1,500.00
2084508	57.5-34	98.00	9,000.00
2084509	57.5-45	98.00	1,500.00
2084510	57.5-44	98.00	4,000.00
2084511	57.5-3	98.00	4,000.00
2084513	57.5-40	20.00	20.00
2084514	109A	20.00	20.00

On March 28, 1984, respondent filed its opposition to the Secretary's Amended Proposal for Penalty.

After considering the briefs filed by the parties the judge granted the Secretary's motion to amend. Sellerburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147, (1984); El Paso Rock Quarries, 3 FMSHRC 35, 38 (1981); Consolidation Coal Company, 2 FMSHRC 3 (1980); Judge's Order, April 11, 1984.

Having resolved the propriety of the Secretary's motion to amend, we will turn to the assessment of civil penalties.

The mandate to assess civil penalties is contained in Section 110(i) [now 30 U.S.C. 820(i)] of the Act. It provides:

(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

We will initially consider the three broad statutory categories of good faith, history, size and ability to continue in business. The evidence in these areas is generally uncontroverted. An extensive computer printout (Ex. P33) shows respondent's inspections and violations. The printout begins with violations in January, 1972. But since the Secretary's evidence generally encompasses only the two years before any contested inspection the evidence considered is limited to the same time frame and the mines involved in these cases.

<u>Mine Inspected</u>	<u>Number of Violations</u>
Rim	4
Snow Shaft) Emery County)	11
Calliham	0
Dunn	0
Pandora	14
Patti Ann	0
Probe	3
Velvet	15
Sage	0

(Ex. P33)

The foregoing evidence indicates respondent's prior history is not high particularly in view of the number of mines at this site.

Respondent's size and ability to continue in business is reflected in part in its annual report to its shareholders (Ex. P6). It is indicated that in 1983, the year the citations were issued, the company had assets of \$118,569,000 and revenues of \$94,066,000. Further, the company's net worth was \$89,238,000 or \$30.15 per share (Ex. P6, 1983 report).

The company's asset, revenue and net worth positions indicate the operator's size is substantial and even the imposition of the full penalties sought by the Secretary in the Amended Proposal for Penalty should not affect the operator's ability to continue in business.

The evidence concerning the gravity focuses on the testimony of Victor E. Archer, M.D., as set forth in the summary of the evidence. Dr. Archer's uncontroverted testimony establishes the hazards to miners when they are exposed to radon daughters.

Atlas asserts that Dr. Archer's testimony was generally irrelevant because there was no testimony that McCleary and Young experienced any actual harm or risk of harm as a result of the alleged violations.

It is true that Dr. Archer did not specifically identify Young or McCleary or any other miner who might be harmed by the radon daughter exposures. But it is not a necessity that specific injury must be shown to an identified miner before a violation exists. If this was a safety violation, for example, involving loose ground, the Secretary would not be required to show that miner X or Y was subject to the hazard. Dr. Archer's testimony addresses the potential injury here on the basis of the miners constituting a class of persons. There is no question but that an injury will occur to some members of the class.

The statutory good faith of respondent is noted in the record. The company rapidly abated the defective condition when it was notified of a violation.

The principal dispute concerning the assessment of civil penalties centers on the evaluation of the company's negligence.

The various citations are hereafter considered individually in conjunction with the various issues.

Citation 2084505

This citation involves the failure of Atlas to furnish proper respirators to its miners.

The Secretary seeks a penalty of \$6,500.

Atlas claims (Brief, pages 7-13) that its miners were not exposed as the Secretary claims. In addition, any high levels of radon concentration were unforeseeable. Hence, it argues that no amount exceeding the original assessment would be appropriate.

I reject Atlas' views. The facts set forth above concerning this citation indicate the company's negligence was substantial. Proper respiratory protection was not in use in three instances as noted in the evidence.

The defense that the instances of exposures above 10 WLMs were unexpected and unforeseeable cannot be sustained.

It is a well established case law that the Act imposes absolute liability without regard to fault. El Paso Quarries, Inc., supra.

Considering the statutory criteria a civil penalty of \$5,000 is appropriate.

Citation 2084506

In connection with this violation the Secretary seeks a civil penalty of \$9,000. Respondent violated the regulation in permitting Young and McCleary to receive an exposure in excess of 4 WLM in a single calendar year.

Respondent states (Brief, page 27) that the proposed penalty is excessive in that the overexposure was the result of a single event occurring on September 1. In addition, the two experienced miners, ignoring their common sense, went into an area they knew was not ventilated.

I find these views are without merit. The exposure of September 1 was certainly substantial. But it was only a part

of the total accumulation for that year. Contrary to the arguments, I consider the gravity and negligence to be high for this violation.

A penalty of \$7,500 is appropriate.

Citation 2084507

This citation concerns the failure of the operator to sample active working areas when concentrations were above a .30 WL.

Respondent asserts that both the assessed penalty of \$98 and the amended proposal of \$1,500 is not justified because there was no proof that miners were overexposed. Further, respondent asserts it was acting reasonably in that it was monitoring the various inactive mines.

The detailed evidence concerning this citation establishes a set of facts contrary to respondent's assertions. As noted in the record the miners were overexposed and respondent's sampling activities in the Sage, Rim, Patti Ann, Small Fry and Calliham mines were not exceptional.

A civil penalty of \$1,200 is appropriate.

Citation 2084508

This citation involves the radon daughter concentration of 48.63 WL's on September 1, 1982.

The Secretary in his amended proposal seeks a civil penalty of \$9,000 for this violation.

In the previous evaluation of this citation it was concluded that the evidence failed to establish a finding of unwarrantable failure.

Nevertheless, the negligence is particularly high since after the two men had worked four hours in this high concentration, they were not told to get appropriate respirator protection. In fact, they reentered the mine and remained underground for an additional hour.

I deem that a civil penalty of \$5,000 is appropriate.

Citation 2084509

This citation addresses the failure of respondent to post certain mines.

Respondent's post trial brief in the main attacks the testimony of witness Young. It is asserted that Young's testimony at the hearing directly conflicted with his prior statements to MSHA that signs were posted.

Young's testimony on direct examination was precise on this issue (Tr. 427-429). On the other hand, Young's statements to MSHA (Ex. R3, pages 8, 12-14, 22-24) do not clearly impeach the direct testimony. I believe the confusion in the record arises due to the fact that at some point in time the area was in fact posted. But the evidence is clear the area was not posted at the times of the alleged violations.

Considering all of the statutory criteria I believe that a civil penalty of \$500 is appropriate.

Citation 2084510

This citation involves the failure of respondent to issue respirators in work areas above 1.0 WL during the first five months of 1982. Further, the workers were not trained in the use of such equipment.

The Secretary in his amended proposal seeks a civil penalty of \$4,000 for this violation.

Respondent asserts that the exposures here were insignificant in view of the low radon levels in its mines. In fact, respondent claims that the Secretary failed to show any significant overexposures except in the section 10 drift of the Sage mine (Ex. page 8).

The evidence does not support respondent's position. The overexposures were relatively high.

On balance, I believe a civil penalty of \$3,000 is appropriate for this citation.

Citation 2084511

The Secretary in his amended proposal seeks \$4,000 for this violation.

As previously stated in reviewing this citation, the Secretary proved only the violation of the 48.6 WL concentration that occurred on September 1, 1982. The balance of the allegations were vacated. The negligence factor should be reduced.

Respondent's post-trial brief contends the overexposure on September 1 was the result of a single fan not being turned on and as a result of Young and McCleary willfully going into an area they knew was not fully ventilated.

These same contentions were previously found to be without merit. The same ruling applies.

Considering the statutory criteria I deem that a civil penalty of \$500 is appropriate.

Citation 2084513

The Secretary seeks a minimal \$20 penalty for the violation of 30 C.F.R. § 57.5-40. The proposal appears to be in order and it should be affirmed.

Citation 2084514

The Secretary seeks a minimal penalty of \$20 for this posting violation. That amount is appropriate and it should be affirmed.

Briefs

The Solicitor and respondent's counsel have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent that they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide these cases.
2. Violations of the mandatory standards in contest here occurred as is set forth in the order of this decision.
3. For each such violation a civil penalty is assessed as provided in the order.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

In WEST 83-105-M:

1. Citation 2084505 is affirmed and a civil penalty of \$5,000 is assessed.

The allegations relating to the unwarrantable failure of respondent to comply with the regulation are affirmed.

2. Citation 2084500 is affirmed and a civil penalty of \$7,500 is assessed.

The allegations relating to the unwarrantable failure of respondent to comply with the regulation are affirmed.

In WEST 83-87-M:

3. Citation 2084507 is affirmed and a civil penalty of \$1,200 is assessed.

4. Citation 2084508 is affirmed and a penalty of \$5,000 is assessed.

The allegations relating to the unwarrantable failure of respondent to comply with the regulation are stricken.

5. Citation 2084509 is affirmed and a penalty of \$500 is assessed.

6. Citation 2084510 as it relates to alleged violations during the weeks ending January 16, 1982 and March 27, 1982 is affirmed.

A civil penalty of \$3,000 is assessed for the foregoing violations.

Citation 2084510, as it relates to an alleged violation during the week ending March 20, 1982, is vacated. All proposed penalties therefor are vacated.

7. Citation 2084511 as it relates to the incident that occurred on September 1, 1982 is affirmed.

A civil penalty of \$500 is assessed for the foregoing violation.

Citation 2084511 as it relates to all other incidents that occurred in the Calliham and Patti Ann mines together with all proposed penalties therefor are vacated.

8. Citation 2084513 is affirmed and a civil penalty of \$20 is assessed.

9. Citation 2084514 is affirmed and a civil penalty of \$20 is assessed.


John J. Morris
Administrative Law Judge

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/blc

Appendix A

SAGE MINE

<u>Week Ending</u>	<u>Present</u>	<u>Exhibit No.</u>	<u># Hrs.</u>	<u>McCleary Week Ending</u>	<u>Present</u>	<u>Exhibit No.</u>	<u># Hrs.</u>	<u>Sampling Date</u>	<u>Exhibit No.</u>	<u>Concentration</u>
1-30-82		P 10-4	2	1-30-82		P 11-3	2			
2-6-82		P 10-55	3	2-6-82		P 11-4	3			
3-10-82								3-10-82	P 20-1	Above .30
3-24-82								3-24-82	P 20-2	Same
3-31-82								3-31-82	P 20-3	Same
4-3-82		P 10-17	5	4-3-82		P 11-14	5			
4-10-82		P 10-18	2	4-10-82		P 11-15	2			
4-17-82		P 10-19 ¹ / ₁	1	4-17-82		P 11-17	1			
		P 10-20	[11]			P 11-16	[11]	5-17-82	P 19-21	Below .30
		P 10-28	1							
6-5-82		P 10-29	[11]	6-5-82		P 11-26	11			
6-12-82		P 10-30	[22]	6-12-82		P 11-27	22			
6-19-82		P 10-31	13	6-19-82		P 11-28	13	6-14-82	P 20-4	Below .30

where duplicate exhibit numbers are cited one of the exhibits is a "revised" radon card and the other is a regular radon card originally prepared by the miner.

RIM MINE

<u>Week Ending</u>	<u>Present</u>	<u>Exhibit No.</u>	<u># Hrs.</u>	<u>McCleary Present</u>	<u>Exhibit No.</u>	<u># Hrs.</u>	<u>Sampling Date</u>	<u>Exhibit No.</u>	<u>Concentration</u>
1-30-82				P 11-3		3	2-26-82	P 22-1	Above Under .30
3-11-82		P 10-12	2				3-11-82	P 22-2	+ .30 ² / Av. 1.31
3-20-82		P 10-15 P 10-14	5 [4]		P 11-12	2	3-26-82	P 22-4	+ .30 Av. 1.34
							4-8-82	P 22-5	+ .30
							4-22-82	P 22-6	+ .30 Av. .76
							5-6-82	P 22-7	+ .30
							5-14-82	P 22-8	+ .30
							5-20-82	P 22-9	+ .30
							5-21-82	P 22-10,	+ .30
									11-12
							5-29-82	P 11-25	1

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± means some samplings indicated exposures above .30 WL while others were below that figure

RIM MINE

<u>Young Present Week Ending</u>	<u>Exhibit No.</u>	<u># Hrs.</u>	<u>McCleary Present Week Ending</u>	<u>Exhibit No.</u>	<u># Hrs.</u>	<u>Sampling Date</u>	<u>Exhibit No.</u>	<u>Concen- tration</u>
6-3-82	P 10-34 P 10-33	1 [1]	7-3-82	P 11-52 P 11-30	1 [1]	6-3-82	P 22-13	+ .30 Av. 0.19
7-10-82	P 10-37 P 10-36	[1] 1	7-10-82	P 11-31 P 11-32	1 [1]	7-7-82	P 22-14	+ .30 Av. 9.23
						7-15-82	P 22-15	+ .30 Respirators Worn
						8-19-82	P 22-16	+ .30 Av. 0.79

PATTI ANN AND SMALL FRY MINES

<u>County Present Week Ending</u>	<u>Exhibit No.</u>	<u># Hrs.</u>	<u>McCleary Present Week Ending</u>	<u>Exhibit No.</u>	<u># Hrs.</u>	<u>Sampling Date</u>	<u>Exhibit No.</u>	<u>Concen- tration</u>
5-3-82	P 10-25 P 10-26	1 [1]	5-15-82 5-15-83	P 11-22 P 11-23	1 [1]	5-3-82 5-14-82	P 21-1 P 21-2	+ .30 + .30 Av. 1.70
5-22-82	P 10-27	15	5-22-82	P 11-24	15	5-21-82	P 21-3	+ .30 Av. 1.71
5-29-82	P 10-28	17	5-29-82	P 11-25	15	5-21-82	P 21-4	+ .30 Respirators
6-19-82	P 10-31	6	6-19-82	P 11-28	7	6-17-82	P 21-5	+ .30 Av. 2.71
6-26-82	P 10-32	20	6-26-81	P 11-29	20	6-21-82	P 21-6	+ .30
7-3-82	P 10-34 P 10-33	13 [11]	7-3-82	P 11-30 P 11-52	[11] 13			

CALLIHAM MINE

<u>Sampling Week Ending</u>	<u>Exhibit No.</u>	<u># Hrs.</u>	<u>McCleary Present Week Ending</u>	<u>Exhibit No.</u>	<u># Hrs.</u>	<u>Sampling Date</u>	<u>Exhibit No.</u>	<u>Concentration</u>
1-8-82	P 10-1	26	1-9-82	P 11-50	28	1-19-82	P 19-1	+ .30 Av. 0.85
1-16-82	P 10-2	21	1-16-82	P 11-1	20	1-20-82	P 19-2	- .30 Av. .04
1-23-82	P 10-3	27	1-23-82	P 11-2	23			
1-30-82	P 10-4	6	1-30-82	P 11-3	12			
2-6-82	P 10-55	17	2-6-82	P 11-4	17	2-12-82	P 19-3	+ .30 Av. .27
2-13-82	P 10-6 P 10-5	34 [28]	2-13-82	P 11-6 P 11-7	28 [32]			
2-20-82	P 10-8 P 10-7	22 [20]	2-20-82	P 11-8 P 11-9	22 [24]	2-26-82	P 19-4	- .30 Av. 0.10
2-27-82	P 10-9	19	2-27-82	P 11-10	19			
3-6-82	P 10-10	13	3-6-82	P 11-51	15	3-10-82	P 19-5	- .30
3-13-82	P 10-13 P 10-12	18 [18]	3-13-82	P 11-11	18	3-11-82	P 19-6	- .30 Av. .07

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CALLIHAM MINE

<u>Young Present Week Ending</u>	<u>Exhibit No.</u>	<u># Hrs.</u>	<u>McCleary Present Week Ending</u>	<u>Exhibit No.</u>	<u># Hrs.</u>	<u>Sampling Date</u>	<u>Exhibit No.</u>	<u>Concen- tration</u>
3-20-82	P 10-15 P 10-14	12 [12]	3-20-82	P 11-12	10	3-24-82	P 19-7	-.30 AV. .03
3-27-82	P 10-16	12	3-27-82	P 11-13	12			
4-3-82	P 10-17	10	4-3-82	P 11-14	10	4-8-82	P 19-8	-.30 AV. .09
4-10-82	P 10-18	12	4-10-82	P 11-15	12			
4-17-82	P 10-19 P 10-20	25 [19]	4-17-82	P 11-16 P 11-17	25 [19]	4-22-82	P 19-9	-.30 AV. .05
4-24-82	P 10-21	20	4-24-82 5-1-82	P 11-18 P 11-19	20 10			
5-8-82	P 10-23 P 10-24	7 8	5-8-82	P 11-20 P 11-21	7 [8]			
5-15-82	P 10-25 P 10-26	8 [8]	5-15-82	P 11-22 P 11-23	8 [8]	5-17-82	P 19-10, 11, 13	-.30
5-22-82	P 10-27		5-22-82	P 11-24	5	5-20-82	P 19-14	-.30 AV. .04
5-29-82	P 10-28	5	5-29-82	P 11-25	4			

CALLIHAM MINE

<u>Young Present Week Ending</u>	<u>Exhibit No.</u>	<u># Hrs.</u>	<u>McCleary Present Week Ending</u>	<u>Exhibit No.</u>	<u># Hrs.</u>	<u>Sampling Date</u>	<u>Exhibit No.</u>	<u>Concen- tration</u>
6-5-82	P 10-29	5	6-5-82	P 11-26	5	6-14-82	P 19-15	- .30 Av. .05
6-12-82	P 10-30	5	6-12-82	P 11-27	5			
6-19-82	P 10-31	5	6-19-82	P 11-28	5			
6-26-82	P 10-32	5	6-26-82	P 11-29	5			
7-3-82	P 10-34 P 10-33	5 [5]	7-3-82	P 11-52 P 11-30	5 [5]			
7-10-82	P 10-37 P 10-36	4 [4]	7-10-82	P 11-31	4			
7-17-82	P 10-39 P 10-38	14 [13]	7-17-82	P 11-33 P 11-34	[13] 15	7-13-82 7-13-82 7-13-82	P 19-16 P 19-17 P 19-18	- .30 - .30 - .30
7-24-82	P 10-41 P 10-40	[12] 15	7-24-82	P 11-35 P 11-36	15 [12]			
7-31-82	P 10-42	25	7-31-82	P 11-37	25	7-26-82	P 19-19	+ .30 Av. .51

CALLIHAM MINE

<u>Young Present Week Ending</u>	<u>Exhibit No.</u>	<u># Hrs.</u>	<u>McCleary Present Week Ending</u>	<u>Exhibit No.</u>	<u># Hrs.</u>	<u>Sampling Date</u>	<u>Exhibit No.</u>	<u>Concen- tration</u>
8-7-82	P 10-43	25	8-7-82	P 11-38	[25]	8-5-82	P 19-20	+ .30 Av. 1.22
8-14-82	P 10-44	25	8-14-82	P 11-39	25	8-13-82	P 19-21	+ .30 Av. 1.33
8-21-82	P 10-45	25	8-21-82	P 11-40	25	8-19-82	P 19-22	+ .30 Av. 1.33
8-28-82	P 10-46	24	8-28-82	P 11-41	20	9-1-82	P 19-23	+ .30 Respiration
9-4-82	P 10-47	26	9-4-82	P 11-42	24			
9-11-82	P 10-48	17	9-11-82	P 11-43	17			
9-18-82	P 10-49	2	9-18-82	P 11-44	2			
9-25-82	P 10-50	7						
10-2-82	P 10-51	18						

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAY 31 1985

ALLEN E. YOUNG,	:	DISCRIMINATION PROCEEDINGS
Complainant	:	
v.	:	Docket No. WEST 84-4-DM
	:	MSHA Case No. MD 83-07
ATLAS MINERALS,	:	
Respondent	:	
	:	
JESS T. McCLEARY,	:	Docket No. WEST 84-5-DM
Complainant	:	MSHA Case No. MD 83-08
v.	:	(Consolidated)
	:	
ATLAS MINERALS,	:	
Respondent	:	

DECISION

Appearances: Mr. Allen E. Young, Dove Creek, Colorado,
pro se,
Mr. Jess T. McCleary, Dove Creek, Colorado,
pro se;
John A. Snow, Esq., VanCott, Bagley, Cornwall and
McCarthy, Salt Lake City, Utah,
for Respondent.

Before: Judge Morris

Complainants Allen E. Young and Jess T. McCleary bring this action on their own behalf alleging they were discriminated against by their employer, Atlas Minerals, in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The applicable statutory provision, Section 105(c)(1) of the Act, now codified at 30 U.S.C. § 815(c)(1), in its pertinent part provides as follows:

No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act or has testified

or is about to testify in any such proceeding, or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act.

Procedural History

The Young case was heard in Grand Junction, Colorado on June 12, 1984. The McCleary case was not presented at that time.

Subsequently, the judge prepared a summary of the evidence in the Young case. The summary was circulated among all interested parties.

Thereafter, the parties in the McCleary case adopted the record in the Young case and filed a stipulation relating to other relevant facts.

A post-trial brief was filed by respondent.

Issues

The issues in these cases are whether respondent discriminated against complainants in violation of the Act.

Summary of the Evidence presented in Complainant Young's Case

Allen E. Young, 34 years of age, an underground uranium miner, began working for Atlas in May 1978 and was terminated in November, 1979. He was re-employed in April 1980 and finally terminated in October, 1982 (Transcript at pages 13-15).

On January 4, 1982 Young and co-worker Jess McCleary (both supervisors) avoided a general worker layoff when Atlas placed them on standby status (Tr. 37-39). Standby duties included general maintenance work in keeping areas of the mine open to minimize both time and effort if production was resumed (Tr. 37-38, 74). At the time of this layoff all miners under Young's supervision, except for David Utley, were terminated. Utley was responsible to Mr. Edington, who was also Young's supervisor (Tr. 72, 73). Utley was later transferred to control maintenance when an opening occurred (Tr. 102).

In the spring of 1982, the standby duties for Young and McCleary were terminated and the men began to do salvage work (Tr. 74). Salvage basically involved removing everything salvageable from the mine. Young and McCleary worked together in this endeavor in nine Atlas mines in the area (Tr. 41, 42).

In August or September, 1982, Young stated to some Atlas officials that his exposure to radon daughters was "coming up fast". No management official replied to his statement. Shortly

thereafter Young and McCleary were exposed to 48 WLH's $\frac{1}{3}$, an exposure that readily exceeded the legal limit (Tr. 23, 36).

Shortly after the 48 WLH exposure, two meetings took place with management officials and the two men. Present at the meeting were Dave Axtell (superintendent), John Clements (general mine foreman), Leo Yates (mine foreman), Nick Torres, Young and McCleary (Tr. 23-27, 37, 40, 41). Roy Crowson (radon technician) was in and out of the meeting (Tr. 28).

The general thrust of the questions by management officials sought to reduce the exposure to radon daughters. They sought to reduce the time that been recorded by Young and McCleary on their radon cards (Tr. 23, 24).

Young felt his integrity was being questioned. He disagreed and became mad and upset (Tr. 23, 24, 33). The company officials denied that they were questioning Young's credibility (Tr. 34). Nick Torres and Young did most of the talking (Tr. 24).

After some of the radon cards had been changed someone suggested the proper way to make any revisions was to enter any changes on a revised card. This method was believed to be preferable rather than altering the original cards (Tr. 24). Some radon cards were changed (Tr. 26).

At the meetings Young and McCleary were not threatened. But Young "felt" the line of questioning meant they could keep their jobs if the exposure hours could be reduced (Tr. 27). No one said anything to that effect (Tr. 28).

Young estimated that 25 cards were changed. Some changes were entered on the original cards. Some new cards were made to show the revisions. Any revised cards were attached to the originals (Tr. 33). The entire record of radon cards from January 1, 1982 to September, 1982 were reviewed (Tr. 32). Young signed the revised cards under protest (Tr. 33, 80). After the radon cards were revised Young still recorded an overexposure to radon daughters (Tr. 92).

A radon card is a record kept by the worker. He notes the time he spends in a given area. The radon technician later calculates, from other data, the working level hours to which the worker has been exposed. The card then becomes part of the company's records (Tr. 25).

1/ Exposure to radon daughters is expressed working level hours (WLH) or working level months (WLM). For a detailed explanation of radon exposure see the related cases of Secretary v. Atlas Minerals, WEST 83-87-M and WEST 83-105-M, which are filed contemporaneously with the instant cases.

It is claimed by Young that he and McCleary were discriminated against because they were overexposed to radon daughters (Tr. 29). According to Young, everyone went "paranoid" after the excessive exposure of 48 WLM occurred (Tr. 37).

Young was terminated on October 20, 1982 (Tr. 15, 41). The notice he received from Atlas indicated he was being terminated because his assignment was finished and his job had been eliminated (Tr. 61-63; Exhibit R1). Leo Yates, supervisor for the two men, was also laid off at the same time (Tr. 39). Yates, who had greater seniority than Young, had not been overexposed to radon daughters (Tr. 81).

Young believed Atlas had singled them out (Tr. 40). Further, Atlas never asked them if they would like a transfer to another Atlas mine. Young thought one worker with seniority had been transferred. One shift boss was transferred to the status of a miner (Tr. 43, 50). Young agreed that he was not treated any differently than any other worker at the Calliham mine (Tr. 50). Another general layoff occurred on November 4, 1982 two weeks after Young and McCleary were terminated (Tr. 40, 68).

Young's salary was \$2,240 per month, or \$106.66 a day. In addition, he believed he lost \$853.28 in accumulated vacation pay (Tr. 44-46). But there was no written contract concerning vacation pay (Tr. 47). Young was employed elsewhere in March, 1982. He also received unemployment compensation while he was laid off (Tr. 82, 83).

In March, 1984 Atlas shut down all mining operations and laid off all of its workers (Tr. 49).

Respondent's Evidence

John Panos, Leo Yates, Dennis Wells, and Thomas Wilson testified for respondent.

John Panos, the administrative manager for Atlas, coordinated and implemented the Atlas layoff of January, 1982 (Tr. 95, 96). At that time the Probe, Snow and Calliham mines were shut down. The Pandora mine was reduced to one production shift from two. The Velvet mine continued as a three shift operation (Tr. 97).

It was company policy not to transfer miners from one mine to another. This would disrupt teamwork, cause resentment, and constitute a possible safety hazard (Tr. 97, 98). At the time of the reduction in force in January 1982 no miners were transferred to different mines. The work force of 223 was reduced at that time to 106 workers (Tr. 98, 99). Similar layoffs occurred with the mill, with administrative personnel and with other support staff (Tr. 99).

Young, McCleary and other supervisors were retained to do standby work (Tr. 100). In January, 1982, there was one shift boss laid off at the Probe mine and one at the Snow mine (Tr. 100, 101). At the Pandora mine, Cruz Maórid, a shift boss employed there, was demoted to the position of miner (Tr. 101). It did not cause a disruption to transfer him (Tr. 101).

Four-fifths of the miners at the Calliham mine had longer service in the company than did Young (Tr. 102). At the Probe and Snow mines at least twelve miners were laid off who had more seniority than Young (Tr. 103). At the Pandora, with a single remaining shift, no miners were laid off that were senior to Young (Tr. 102).

When the salvage work was completed on October 20, 1982 Young, McCleary, Yates as well as three workers in the Probe and Snow mines were terminated. No workers were transferred to other positions (Tr. 103, 104).

Two weeks after Young and McCleary were terminated most of the operation was closed. The Pandora mine, which had been operating on one shift, was shut down. The Velvet mine went to one shift from three shifts. The central shops were closed and a number of support staff personnel were terminated. Thirty seven miners remained. Possibly twenty of those remaining engaged in "hands on" mining (Tr. 105, 106).

Young's service date was April, 1979. In November, 1982, thirteen or fourteen shift supervisors, with service dates prior to Young, were terminated. These included: John Clements (foreman with a 1956 service date), Jack Erwin (1975); Jim Vaughn (1976); Leo Yates (1977); Larry Riley (1968); Dee Bachelder (1967); Leroy Walker (1976); Richard Eubanks (1978). Bill Fredericks, with a service date of May 1980, was also laid off (Tr. 106, 107).

After November, 1982, two shift bosses with service dates in 1975 and 1976 returned as miners. They had been initially employed in the Velvet mine and they returned there (Tr. 108, 109). Two shift bosses also returned as mechanics. Young was not a mechanic (Tr. 108).

Radon exposure was not a factor in Atlas' decision to terminate Young and McCleary (Tr. 109).

Panos testified that Young, as a salaried employee, was not entitled to any accumulated vacation pay when he was terminated (Tr. 116).

In January, 1982, Leo Yates was directed by Clements to do repair work with Young and McCleary in the Calliham mine (Tr. 127, 128). In a few months he joined the two men for salvage work duties.

Wilson advised Yates that they would be laid off when the salvage work was completed (Tr. 129). Yates related this information to Young and McCleary. The men discussed future plans on two or three occasions (Tr. 130).

Yates was present at a meeting about September 16, 1982 when the radon cards were discussed. The question at hand concerned the accuracy of the cards. It was an effort to account for the actual radon exposure (Tr. 131-133). The cards did not take into account the time the men spent on the surface and while traveling on the decline (Tr. 133). There were no threats to Young or McCleary. Further, there was no talk of termination if they refused to cooperate (Tr. 133, 134). At the meeting Young was upset and he asked if management didn't trust him (Tr. 134). Yates explained to him that they wanted a closer record (Tr. 134).

Dennis Wells, an electrician, discussed with Young and McCleary that a layoff would occur when the salvage work was completed (Tr. 143). Young and McCleary agreed that they would be laid off at the completion of such work (Tr. 143).

Thomas W. Wilson, chief engineer for Atlas, indicated that one of the criterion for the January/November 1982 layoffs was that there would be no transfer of workers between mines (Tr. 149-150).

The Velvet mine is relatively dangerous. If personnel transfers were permitted only ten percent of the original Velvet work force would remain (Tr. 150). Witness Wilson felt this could be a definite hazard (Tr. 150).

In February, or March, the decision was made, due to market conditions, to close the mines indefinitely. The decision was also made at that time to salvage the equipment. Further, it was decided that those involved in salvage work would be terminated when the work was completed (Tr. 151).

Wilson knew Young and McCleary had been overexposed to radon in September, 1982. His immediate reactions were to keep the two men out of the mine and to check the radon cards for any inaccuracies (Tr. 151, 152). Discrepancies in the cards were found but they did not reduce the exposures to within permissible limits (Tr. 153). Wilson instructed that the two men stay on the surface or in areas where there was no exposure to radon (Tr. 153).

Radon overexposure to Young did not effect the company's decision to let him go (Tr. 153, 154).

Stipulation

Jess McCleary and respondent entered into the following stipulation:

1. McCleary and Atlas stipulate and agree that the above captioned matter, pursuant to 29 C.F.R. § 2700.12, shall be consolidated for all purposes with the matter entitled Allen E. Young v. Atlas Minerals, Docket No. WEST 84-4-DM (hereinafter the "Young proceeding"), and that all testimony and exhibits received into evidence at the hearing in the Young proceeding held on June 12, 1984, be considered and shall constitute the record for this proceeding, except that the additional stipulations contained herein shall also be included in such record for purpose of the claim of McCleary against Atlas.

2. The parties hereby stipulate that for purposes of this matter, the following facts are accurate:

a. McCleary is presently 47 years old.

b. McCleary has worked as a miner for various mining companies, but McCleary does not recall specific dates of employment for all such companies. However, until the date of the termination of the employment of McCleary at Atlas (which was October 20, 1982), McCleary had spent approximately 14 years as a miner.

c. McCleary commenced employment with Atlas on October 25, 1977, as a miner, and held such position until 1978, when McCleary was made a shift boss at the Calliham Mine of Atlas. McCleary held such position at the Calliham mine until January, 1982, when he and Allen Young ("Young") were assigned "standby" work. However, McCleary retained the title and pay of a shift boss until he was laid off on October 20, 1982.

d. During his employment after January, 1982, McCleary and Young essentially worked together in connection with "standby" work and subsequently "salvage" work.

e. Attached hereto as Exhibit "R-A" and by reference made a part hereof is a copy of a "Separation Notice" relating to the termination of employment of McCleary at Atlas on October 20, 1982.

f. Attached hereto as Exhibit "R-B" is a copy of a letter from Atlas to McCleary, dated October 21, 1982, received by McCleary shortly after said date. McCleary was paid the sum set forth in said letter.

g. McCleary claims, as damages for the alleged discrimination by Atlas, two months salary at the rate of \$2,349.00 per month and three weeks vacation pay. McCleary claims he is entitled to such sum because he was unable to work in a mine from

the date of his termination of employment with Atlas until January 1, 1983. McCleary claims he was unable to work underground in a mine because of overexposure to radon. (Atlas does not stipulate to the substance of the claims of McCleary contained in this subparagraph, but only to the fact that McCleary makes the claims).

h. McCleary did obtain employment with another employer on February 8, 1983, at a pay of \$13.00 per hour. McCleary received unemployment compensation after his termination with Atlas.

Discussion and Evaluation of the Evidence

In numerous decisions the Commission has ruled that in order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co. v. Marshall, 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1937 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Constr. Co., No. 83-1566, D.C. Cir. (April 20, 1984) (specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., ___ U.S. ___, 76 L.Ed. 2d 667 (1983).

Young claims he was discriminated against when Atlas permitted him to be overexposed to radon daughters. Young's initial claim is without merit. As noted by the above stated case law discrimination does not arise by virtue of a mere violation of a health or safety standard.

The next question here centers on the issues of whether Young and McCleary were engaged in a protected activity.

It appears from the evidence that after the radon exposure of Young and McCleary to 48 WLH two meetings took place between the two workers and management. It is uncontroverted that at the meetings Young protested the revision of the radon cards. The net result of the changing of these cards resulted in a lower radon exposure to the two workers. However, after the revisions, there was still a net overexposure.

The Act provides protection to a miner who complains of "an alleged danger or safety or health violation", Section 105(c)(1). The Act should be broadly construed. In addition, records such as the radon cards relate to the health hazard involved in radon exposure.

The Commission has broadly construed the Act in the matter of good faith safety complaints. The complaints by Young were protected under the Act.

The next question is whether the complaints by Young also encompassed McCleary and thereby placed him in a protected status. In this connection I note that Young and McCleary were essentially partners in their work activities and both were overexposed. Further, the purpose of the meeting with management was to review and to seek a method to lower the exposures recorded by the company. The presence of McCleary at the meeting under these conditions placed him in a protected status.

The next issue, respondent's affirmative defense, is whether the adverse action taken against Young and McCleary was motivated by the protected activity.

Respondent's evidence on this point is essentially uncontroverted. Atlas was in a reduction in force mode that began in January 1982. At that time Young and McCleary went to standby work. When the salvage work was completed in October, 1982 all the involved workers were terminated. None of the workers were transferred to other mines (Tr. 103, 104).

Young claims he was treated in a disparate manner because some miners were transferred to other Atlas mines in the area. It is true there were a few instances of transfers and demotions in connection with the company's other mines (Tr. 43, 51). But Young himself agrees that he was not treated differently than anyone else at the Calliham mine (Tr. 50).

The record in the Young case has failed to establish a violation. Accordingly, that case should be dismissed. The McCleary case, supplemented by the stipulation of the parties is likewise fatally defective. In short, the Act protects against discrimination. It does not vest any bumping rights in favor of the miner authorizing him to replace miners at other mines owned by the company and located elsewhere.

For the reasons stated herein, I conclude that both complaints herein should be dismissed.

Brief

Respondent filed a post-trial brief which has been helpful in analyzing the record and defining the issues. I have reviewed and considered this excellent brief. However, to the extent that it is inconsistent with this decision, it is rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide these cases.
2. Respondent did not violate Section 105(c)(1) of the Act.

ORDER

Based on the facts as stated in the narrative portion of this decision and the conclusions of law herein, I enter the following order:

1. The complaint of discrimination filed by Allen E. Young in Docket No. WEST 84-8-DM is dismissed.
2. The complaint of discrimination filed by Jess T. McCleary in Docket No. WEST 84-5-DM is dismissed.


John J. Morris
Administrative Law Judge

Distribution:

Mr. Allen E. Young, P.O. Box 773, Dove Creek, Colorado 81324
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/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

MAY 31 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 83-43-M
Petitioner	:	A.C. No. 05-00417-05505
	:	
	:	Docket No. WEST 83-115-M
v.	:	A.C. No. 05-00417-05511
	:	
STANDARD METALS CORPORATION,	:	Sunnyside Mine
Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Zach C. Miller, Esq., Davis, Graham & Stubbs, Denver, Colorado, for Respondent.

Before: Judge Carlson

This consolidated case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act), arose from federal safety and health inspections of respondent's underground precious metals mine and surface mill located near Silverton, Colorado. Docket No. WEST 83-115-M concerns the handling of explosives in the mine. Docket No. WEST 83-43-M concerns airborne dust concentrations emanating from the crusher at the mill.

The case was heard in Denver, Colorado. Following the hearing, representatives of both parties notified the judge that they did not wish to submit post-hearing briefs.

DOCKET NO. WEST 83-115-M

Citation No. 2096966

On June 1, 1983, Inspector Porfy C. Tafoya inspected the underground precious metals mine of Standard Metals Corporation (Standard Metals). In the course of that inspection, he discovered an open box of crystallized explosives at the rear of an underground magazine. The explosives had clearly deteriorated to a point where they were unsafe to handle. Standard Metals has admitted from the outset that the explosives were unsafe.

In his citation, the inspector charged Standard Metals with a violation of the mandatory standard published at 30 C.F.R. § 57.6-7(a). That standard provides:

Explosives, detonators, and related materials such as safety fuse and detonating cord shall be:

- (a) Stored in a manner to facilitate use of oldest stocks first.

Standard Metals, in its answer, confessed that the powder in question was crystallized, but denied that the cited standard was applicable. The operator alleged that the "correct standard" was 30 C.F.R. § 57.6-92, which provides:

Damaged or deteriorated explosives and blasting agents shall be destroyed in a safe manner under the instructions of the explosives or blasting agent manufacturer or its designated agent.

The Secretary ultimately moved to amend his petition to allege violation of the two standards in the alternative. The motion was granted since Standard Metals had raised the applicability of the other standard at the outset.

Additionally, the Secretary moved to increase the penalty from the \$20 originally proposed to \$500 and to reclassify the alleged violation to "significant and substantial" under the Act. These motions were likewise granted with the provision that should the amendments prove in any way to prejudice Standard Metals' ability to defend, a continuance would be granted to provide additional time.

David A. Moody, Standard Metals' production manager at the mine, testified that the magazine in question was at the end of a dead-end drift, some 1,000 to 1,200 feet away from all mining activity. He maintained that if all the explosives in the magazine were to have been detonated in place, the explosion would not have had a force sufficient to injure anyone where mining activity was in progress. These assertions were not contradicted by the Secretary.

Mr. Moody did not know how the unstable explosives came to be in the magazine. He testified that he was certain, however, that they had been there less than three days because a supervisor had inspected and inventoried the contents of the magazine on the Monday preceding the Wednesday of the inspection. Had the open box of crystallized dynamite been there, Moody claimed, the supervisor would have noticed it and taken proper steps to dispose of it.

Mr. Moody further testified that the explosives were destroyed by a foreman, the only person at the mine experienced in that task. Moody had no knowledge of whether the foreman was on duty when the explosives in question were first discovered, but acknowledged that if he was not working at the time he could have been called back (Tr. 47). The evidence shows that in the normal course of mine activity no one would have been in the drift where the magazine was located except for "nippers" who were sent for new supplies of explosives as they were needed in working areas of the mine.

First, I must agree with Standard Metals that 30 C.F.R. § 57.6-7(a) does not apply to the facts. The standard, by its plain language, regulates only the order of use of stocks of explosives when stored. Older stocks are to be used first to prevent deterioration in storage. The crystallized dynamite found by the inspector, however, can scarcely be considered a part of the stocks intended for use. I accept Standard Metals' contention that the box in question had not been in the magazine more than three days, and that someone put it there as the safest storage place available until it could be destroyed safely. The most plausible explanation for the deteriorated condition of the explosives was that a part of the contents of the box had been used somewhere in the large underground mine complex, probably long before the citation. The remainder of the box was then simply left there. At the time of the citation, however, or during any reasonable period before that, respondent's fault was not that it failed to put the explosives to use before newer stocks. The clear fault lay in failing to use the remaining stock when the box was first opened.

Upon the facts before me, I must conclude that Standard Metals did violate 20 C.F.R. § 57.6-92, the standard relating to the destruction of damaged or deteriorated explosives. Given the remedial purposes of the Act, the standard must be read to imply that mine operators not only have a duty to know of the condition of all explosives in their possession, and to destroy damaged explosives, but that the destruction, once the condition of the explosives is known, must be carried out with dispatch. Otherwise, the standard would mean little. Once the box of deteriorating dynamite was discovered and placed in the magazine, it follows that the operator should have destroyed it immediately to eliminate the hazard. The evidence, however, indicates that no effort was made to locate the miner qualified to neutralize the explosives until after the box was discovered by the inspector.

We now turn to the matter of a proper penalty. Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to remain in business, and the gravity of the violation itself.

At the times here in question, the mine and mill complex were of average size, employing about 150 miners. The negligence was moderate-to-high since it is plain that the defective explosives should not have been left in the magazine without arrangements for their destruction having been made. Neither should they have been allowed to deteriorate no matter where they were before they were moved to the magazine.

The company did show good faith in achieving speedy abatement once the citation was issued. The history of prior violations as revealed by MSHA records was unfavorable. In the two years prior to the violations here, Standard Metals was charged with 128 violations for which it paid total penalties of \$12,786.00. Although Standard Metals was in extensive financial difficulty at the time of the hearing, there was no evidence that the payment of substantial civil penalties in connection with the present case would in itself adversely affect its ability to remain in business. Finally, the gravity of the violation appears moderate. The evidence shows that there was no great danger that the defective explosives would detonate unless they were moved or handled.

The Secretary maintains that Standard Metals' prior record of job-related injuries should be considered as an adverse factor affecting penalty. To this end, counsel adduced testimony that respondent had been a part of MSHA's "PAR" program. Based on data for quarterly accident reports, MSHA rates all mines. At the times material here, the 60 mines with the worst records were placed on a PAR listing and received special attention from MSHA. From 1980 onward the Standard Metals operation ranked toward the top of the PAR list.

Counsel for Standard Metals correctly contends that section 110(i) of the Act makes no reference to injury records as a part of a mine operator's adverse prior history. The only reference is to the prior history of violations. Moreover, respondent contends that the Secretary's own regulation, published at 30 C.F.R. § 100.3, which limits consideration of a history of previous violations to those violations finally adjudicated or paid within the 24 months preceding the violation in contest, must prevail.

Counsel for the Secretary suggests that the injury record was relevant to the issues of operator negligence and good faith, rather than prior history.

At the hearing Standard Metals was granted a continuing objection to the PAR evidence, and a ruling on its ultimate relevance was deferred. The parties shed no more light upon the matter since they declined to file post-hearing briefs.

I would first note that the Secretary's two-year limitation on records of prior history is not technically binding upon the Commission or its judges. It is a part of the Secretary's internal administrative scheme for weighing the various elements that go

into the determination of proposed penalty amounts. That scheme (a point system) has been repeatedly held to have no binding effect upon the Commission, which must make a de novo determination of penalty based upon the evidence brought forward during hearing.

I reject the Secretary's suggestion that a general history of lost-time injuries is relevant to either negligence or a lack of good faith. Those considerations are customarily applied to the mine operator's conduct relating to the specific violation under adjudication, not its general conduct through the years. One must distinguish here between a general record of prior injuries, as the Secretary offers here, and a specific history of injuries arising out of prior violations of the same standard as the one in contest. In the latter instance, prior injuries would doubtless show the operator had a prior knowledge suggestive of negligence.

The real question raised, then, is whether the statutory penalty criteria set out in section 110(i) of the Act are exclusive, or whether other factors not mentioned in that section properly may be considered. Neither the Act nor its legislative history offers any helpful clues as to Congressional intent. Section 110(i) simply declares that the Commission "shall consider" six named criteria. Nothing in the language of the section, however, fairly implies that the Congress, while telling the Commission what it must consider, was also telling it that it could consider nothing else. Put another way, the words of 110(i) do not suggest that the Commission may not sometimes consider facts which fall outside the mandatory criteria but nevertheless appear to bear reasonably and significantly upon the issue of sanctions. In the present case, at any rate, I am not prepared to hold that Congress intended to imbue the six criteria in 110(i) with absolute exclusivity.

Having said this, however, I am not convinced that Standard Metals' PAR ratings should be given any weight in this case. By mentioning a prior history of violations in the statute, the Congress clearly bestowed a sort of primacy upon violations as a measurement of past conduct in the penalty assessment calculation. In the present case, we have a clear-cut showing that Standard Metals' history of violations was bad. That the injury rate per hours worked was also bad does not add greatly to an already unfavorable impression. Beyond that, the raw figures on injury do not relate as directly to improper mine operator conduct under the Act as does a record of actual paid or adjudicated violations. It does not necessarily follow that any particular employee injury in a mine involved a significant degree of operator dereliction, or indeed, resulted from a violation of the Act. In short, under the circumstances of this case, at least, I find the history of prior violations to be a more solidly reliable gauge of Standard Metals' conduct than its record of injuries. That being so, the PAR evidence is given scant weight in the assessment of this present penalty, or the penalties with respect to other violations in this consolidated case.

One more matter requires consideration. The Secretary urges that this violation be classified "significant and substantial"

within the meaning of the Act. The Commission in Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981) set out the test to be used in determining whether a violation, in the words of the statute, "... could significantly and substantially contribute to the cause and effect of ... a mine safety or health hazard." The violation, the Commission held, must be one where there exists "... a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." In the present case, I must hold that the violation was significant and substantial. The likelihood of an explosion was not great since it depended on the possibility of someone entering the magazine and moving the box of defective materials. There is at least a reasonable likelihood, however, that a miner sent to get dynamite could have handled the open box even though it was placed at the rear of the storage area. Had the box or the explosives been handled or moved, or had a miner carrying another box, for example, stumbled or tripped over the defective explosives, a large explosion could well have ensued. In the event of an explosion while a miner was in the magazine, serious injury or death would have been almost inevitable.

On balance, based upon the weighing of the evidence relating to the statutory penalty criteria, I conclude that a civil penalty of \$150.00 is appropriate for Citation No. 2096966.

Citation No. 2096840

On June 2, 1983 a federal mine inspector issued a citation charging that Standard Metals had violated the standard published at 30 C.F.R. § 57.6-27, which concerns the use of "box type" explosive magazines used for temporary storage near working faces. The standard provides:

Box-type underground-distribution storage magazines used to store explosives or detonators near working faces shall be constructed with only nonsparking material inside and equipped with covers or doors and shall be located out of the line of blasts.

Specifically, the inspector alleged that the box was in direct line of secondary blasting on the grizzly, which was 20 feet away. The citation also asserted that the cover was seriously damaged, and that approximately one-half box of powder was in the magazine. Standard Metals, in its answer to the Secretary's petition, admits that the magazine "was in the wrong location," but suggests that the violation cannot be considered "significant and substantial" as the citation alleged. No testimony was produced by either party. Counsel for the Secretary asked that the citation be affirmed on the basis of Standard Metals' admission in the pleadings. He explained that the mine inspector who wrote the citation was unavailable for testimony.

I conclude that Standard Metals did admit the violation in terms of an improper location of the portable magazine. The words of the answer can scarcely be construed in any other way. The clear intent of the mine operator was to confess violation while denying the

"significant and substantial" classification in the citation and challenging the size of the penalty. (The Secretary proposes a penalty of \$112.00.)

In view of the total lack of testimony or other evidence relating to the circumstances surrounding the violation, I must conclude that the government has made out no case for a "significant and substantial" finding under Section 104(d)(1) of the Act. Similarly, the lack of evidence concerning the particulars allows no informed findings as to the gravity of the violation or the degree of the mine operator's negligence. Without knowledge of these important elements, the reasonableness of the Secretary's penalty proposal cannot be fully weighed. Based upon the bare admission of violation contained in the pleadings, then, and those general statutory penalty factors such as the size of the mine and prior history of violation proved elsewhere in the record, I conclude the \$35.00 is the appropriate penalty.

DOCKET NO. WEST 83-115-M

Citation Nos. 572109 and 572110

The two citations in this docket are virtually identical. Standard Metals was issued the citations for failure to comply with the harmful airborne contaminants standard published at 30 C.F.R. § 57.5-5. ^{1/} More particularly, an MSHA inspector found, through sampling that the air in the crushing plant at the mill exceeded permissible limits of respirable silica dust. He issued Citation No. 572110 for unlawful exposure of the crusher operator and Citation No. 572109 for the crusher helper.

1/ 30 C.F.R. § 57.5-5, as pertinent to this case, provides:

Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. Whenever respiratory protective equipment is used, a program for selection, maintenance, training, fitting, supervision, cleaning, and use shall meet the following minimum requirements:

(a) Mine Safety and Health Administration approved respirators which are applicable and suitable for the purpose intended shall be furnished, and employees shall use the protective equipment in accordance with training and instruction.

Most of the facts are not in dispute. Standard Metals' crushing facility is located in a separate building. Normally, only two employees work in the building: the crusher operator and his helper.

Footnote 1 continued.

(b) A respirator program consistent with the requirements of ANSI Z88.2-1969, published by the American National Standards Institute and entitled "American National Standards Practices for Respiratory Protection ANSI Z88.2-1969," approved August 11, 1969, which is hereby incorporated by reference and made a part hereof. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York 10018, or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration.

The cited standard must be read in connection with 30 C.F.R. § 57.5-1, the pertinent portion of which provides:

Except as permitted by § 57.5-5: (a) Except as provided in paragraph (b), the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1 through 54, which are hereby incorporated by reference and made a part hereof. This publication may be obtained from the American Conference of Governmental Industrial Hygienists by writing to the Secretary-Treasurer, P.O. Box 1937, Cincinnati, Ohio 45201 or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration. Excursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference.

The ACGIH publication referred to in the standard sets out the following formula at page 32 for determination of silica dust TLV's:

TLV for respirable dust
in mg/m^3 :

$10 \text{ mg}/\text{m}^3k$

$\% \text{ Respirable quartz} + 2$

Both workers are stationary while the crusher operates. The operator is at a control panel; the helper stands near the belt coming from the bin feeder.

On October 29, 1981 Collin R. Galloway, a mine inspector employed by the Secretary, inspected the crusher and took air samples. At the time of his visit he observed dust suspended in the air and significant accumulations on the floor and other surfaces.

The inspector issued the citations on December 11, 1981. The delay was occasioned by the time it took to analyze the samples. The testing showed the percentage of silica (quartz) in the operator's sample to be 15.1. The TWA (time weighted average) was calculated at 1.11 milligrams per cubic meter; the TLV (threshold limit value) was calculated at .58 milligrams per cubic meter. For the helper, the percent silica was 20.6 percent, the TWA .74 milligrams per cubic meter, and the TLV .44 milligrams per cubic meter. The TWA's for both workers considerably exceeded the TLV's. Consequently, both workers were considerably overexposed. Standard Metals has never questioned the validity of the Secretary's figures or the fact that the results showed impermissible concentrations of silica. On October 29, 1981 when the inspector was present he noted that both the operator and his helper were wearing respirators.

The inspector attributed the excessive dust concentrations to a failure to maintain the crusher's existing dust control system adequately. The citations therefore specified an abatement date of January 11, 1982 for abatement of the violations. The inspector believed it should take a month, in other words, to repair or restore the dust control system. Exhibit P-2 is a sketch of the system, which was installed in the late 1960's. The manufacturer designed the system to suppress dust in two principal ways: (1) by curtains over the points where the crushing operation generated dust, and (2) by an elaborate exhaust system which pulled dust from hoods located over dust generating points, then through individual ducts to a main duct and then into a "Multiclone" collector. A high-speed fan moved the exhaust air.

The inspector did not return on the January 11 abatement date set in the citations. Rather, he returned March 18, 1982 and conducted more tests. On that visit he saw more dust than before, and his tests showed that, indeed, worker exposure remained high. The operator's sample showed 25.8 percent silica, the TWA was 2.47 milligrams per cubic meter, and the TLV was .35 milligrams per cubic meter. The helper's sample showed 21.9 percent silica, the TWA was 3.27 milligrams per cubic meter, and the TLV was .42 milligrams per cubic meter. None of these figures are disputed by Standard Metals.

Inspector Galloway questioned Mr. Al Thaxton, who at that time served as Standard Metals' safety director, about efforts which had been made toward abatement. Thaxton informed him that water sprays were tried on the screens, but that the wet ore plugged the screens and the experiment was abandoned.

The inspector threatened to close down the crusher with a non-abatement withdrawal order under section 104(b) of the Act, but did not. Instead, he agreed with management (over Thaxton's initial objections) to invite experts from the Denver Safety and Health Technology Center ("Tech Support") to do a study of the dust control system. He extended the abatement times on the citations to July 10, 1982 to allow time for the study.

A team led by Mr. George W. Weems, an industrial hygienist specializing in dust control conducted the study on May 11 and 12, 1982. The report (Exhibit P-3) was presented to Standard Metals on June 10, 1982. Its authors made five specific recommendations aimed at solving the dust control problem. Found on page 5 of the report, these were as follows:

1. Remove dust accumulations from ducts, beams, pipes, floors, and equipment. This must be done as soon as possible and then done on a regularly scheduled basis. Suggest vacuum system or washing with sprays.
2. Repair leaks in ducts and chutes and maintain a regular repair and inspection program.
3. Install covers and skirting on tops of cone crushers. (Dust generation noted).
4. Consider the installation of covers and skirting on screens. (Dust will be generated at these points when material is dry).
5. Improve the efficiency of the dust collection system by:
 - a. Checking the "Multiclone" collector system for obstructions and removing debris that may be plugging this system.
 - b. Repair leaks in the fan housing.
 - c. Remove the portion of the intake pipe that extends into the fan housing.
 - d. Increase the fan speed. This should be done only after contacting the Buffalo Forge Fan representatives. We would suggest the fan speed be increased to the maximum to exhaust at least 13,500 cubic feet of air per minute at a minimum of 9.0 inches static pressure. (This recommendation is based on the assumption that the "Multiclone" is offering a resistance of 6.0 inches static pressure).

Inspector Galloway next appeared at the crusher building on September 2, 1982. He found that Standard Metals had not carried out several of the Tech Support recommendations. He also took more air samples on that day. Those tests showed that the operator's percent silica was 24; that his TWA was 1.39 milligrams per cubic meter; and that his TLV was .3 milligrams per cubic meter. The helper's percent silica was 22.2; his TWA was 1.01 milligrams per cubic meter; and his TLV was .41 per cubic meter. Again, the silica dust exposure significantly exceeded the allowable limits. After these results became available, later in September, Inspector Galloway determined that Standard Metals' failure to bring the dust in the crusher building down to acceptable levels required more stringent government action. He therefore prepared a withdrawal order under section 104(b) of the Act. That section requires closure of parts of mines (or mills) affected by a violation which the operator has not abated by the time allowed. 2/ Galloway closed down the crushing plant. His order was served by Donald Lee Chadd, another mine inspector, on September 22, 1982. Chadd recommended the installation of a temporary booth to isolate the crusher operator and helper from the dust sources on the crusher. The quickly constructed booth, consisting of a framework covered by brattice cloth, was provided with a fan to bring in outdoor air. This arrangement worked well enough that Inspector Chadd was able to terminate the withdrawal order on September 23, 1982. In early 1983, Standard Metals built a permanent booth for the crusher workers.

The facts related up to this point are not in controversy. Standard Metals defends against the citations on several grounds. First, it maintains that the Secretary failed to establish that the violations occurred since he made no showing that "feasible" engineering controls existed as required by the standard. Thus, according to respondent, it was justified in having the crusher operator and helper use respiratory protective equipment as an alternative to dust suppression measures. Second, it maintains that even if the violations occurred, the proposed penalties of \$690.00 for each of the two citations are excessive in that neither the operator nor his helper was truly exposed to a substantial hazard since both wore their respirators on the job. A lesser argument bearing on penalty is that during the times surrounding the citations and abatement Standard Metals experienced a large turnover in management personnel, and that the Secretary's enforcement agents should have gone beyond Mr. Thaxton, the safety director, in discussing abatement problems. Finally, respondent showed that at the time of the hearing it was in a Chapter 11 bankruptcy proceeding, a status which would impair its ability to pay large penalties.

2/ The withdrawal order was not specifically contested by Standard Metals and is not directly in issue in this case. Its validity, that is to say, will not be decided here. It is relevant, however, in the sense that it is one episode in the history of abatement or attempted abatement of the alleged dust violations. The facts relating to abatement are in issue.

We will examine each of these defenses in turn, together with the details of Standard Metals compliance efforts including those few factual matters which were in dispute.

The parties were in agreement that between the time that Inspector Galloway issued the original citations and the time that he extended the abatement date to allow for the technical support study, Standard Metals had done nothing other than some unsuccessful experimentation with water sprays. Witnesses were not in full accord, however, about the steps the company took to comply with the recommendations of the Tech Support group.

Mr. George Weems, the industrial hygienist with 14 years' experience in conducting studies of dust control systems for MSHA, was the government's chief witness on his own technical study of the Standard Metals' crusher. He believed that dust levels could be reduced to permissible or near-permissible limits by restoring the 15-year-old control system to its original specifications. He believed the old system was of an "excellent" design, and similar to many others used successfully for crushers. His recommendations are found in the excerpt from the formal study report set out earlier in this decision. He found these deficiencies in the system in May of 1982: holes in the ducts caused air leaks; skirts were missing from hoods; the fan vibrated "violently" and was moving only about one-half the 10,000 cubic feet of air per minute for which it was designed; and housekeeping had been neglected. Weems explained that his recommendations did not include curtains, skirts or covers over the crusher conveyors, but did call for them around the primary crusher and cone crusher.

Weems himself did not make a subsequent visit to find how well his recommendations had been carried out. He acknowledged, however, that his study recommendations, when implemented, do not always achieve the desired result. Were that so in the case of the Standard Metals' system, however, he was certain that the addition of more exhaust hoods and ducts and another fan would have brought dust levels down to the desired limits.

Mr. Weems testified that he recognized a number of drawbacks with booths, and therefore would not recommend them except as a final resort. A booth, he asserted, could actually collect respirable dust "and create more exposure than the ambient air inside the crusher building" (Tr. 192). This is so because booths require pressurization, and if there is either a fan or filter failure, workers in the enclosure can suffer extraordinarily high exposures. In March of 1984, according to Weems, he saw the two permanent booths in Standard Metals' crusher plant. The one booth was drawing nearly all of the available air, while the other drew but 200 cubic feet per minute (Tr. 193). The dust in the poorly ventilated booth was above permissible limits. In Weems' opinion, this situation illustrated the problem with booths. He was certain, however, that the dust problem could have been solved without resort to booths by simply "fine tuning" his original recommendations. He also indicated Mr. Olin, the mill supervisor during the time of the study, cooperated well, and that he had advised Olin that if more measures were necessary, that Olin should contact him.

Weems testified that he does not ordinarily consider costs in his studies, but that the costs at Standard Metals "didn't appear to be that great."

Eric Olin, Standard Metals' mill superintendent at the time of the Tech Support study and report, maintained that the company had made a bona fide effort to comply with Weems' recommendations. Olin indicated that the company believed that implementation of those recommendations would bring dust levels down to an acceptable level. He testified that Standard Metals implemented all the numbered recommendations in the report except for numbers 3, 4 and 5(c). More specifically, he testified that company personnel had closed and hosed down the plant to remove dust accumulations (recommendation 1). They had also "repaired as many of the leaks in the ducts and the chutes as they could" (recommendation 2). They installed skirts over the crushers but found them unsatisfactory because the operator could not see the crusher load. This resulted in hourly shutdowns owing to "stuck crushers." Hence, the skirts were removed and there was no compliance with recommendation 3. No skirts and covers were placed over the screens for fear the same vision problem would be experienced there (recommendation 4). All of the four-part recommendation number 5 for the fan and collector were accomplished except for removal of the intake pipe or shroud. This was not done, Olin testified, because the fan manufacturer recommended against it.

Olin did not tell Inspector Galloway of the reasons for failure to carry out all of the recommendations when Galloway found that some of the study recommendations had not been followed. He did not do so, Olin testified, because he believed that the Tech Support personnel were to follow up on their report. Inspector Galloway's assessment of what Standard Metals had accomplished differed in several respects from Mr. Olin's account, but the chief difference was about the patching of holes in the ducts. Galloway insisted he saw no leak repairs. Ultimately, Olin acknowledged that there may not have been "100% coverage" (Tr. 266).

After Galloway issued the 104(b) withdrawal order, Olin believed that the solution to the dust problem lay in the use of isolation booths for the crusher crew, as recommended by Inspector Chadd.

In deciding whether the Secretary has made out a case for violation of the dust standard, we must bear in mind that the citations were issued based upon conditions existing on October 29, 1981. Standard Metals concedes that the dusty conditions were as the inspector described them, and that air samples showed silica dust levels significantly above permissible levels.

As best I can determine, the Commission has never engaged in an extensive analysis of 30 C.F.R. § 57.5-5 with regard to the requirement that airborne contaminants shall be removed "insofar as feasible." The concept of "feasibility" has been examined exhaustively, however, in connection with the health standard relating to excessive noise exposure.

The noise standard, 30 C.F.R. § 57.5-50, requires that employee exposure to noise be kept within certain limits by feasible engineering controls unless such controls fail to reduce exposure to those limits. Personal protective equipment may then be used.

In Todilto Exploration and Development Corporation, 5 FMSHRC 1894 (1983), the Commission held "that an engineering control may be 'feasible even though it fails to reduce a miner's exposure to noise to permissible levels contained in the standard." In Callanan Industries, Inc., 5 FMSHRC 1900 (1983), the Commission adopted the Supreme Court's definition of "feasible" as a thing "capable of being done, executed, or effected." With respect to the noise standard, the Commission held that to be feasible, the engineering control must be technologically and economically achievable. The burden of proof was outlined thusly:

We hold that in order to establish his case the Secretary must provide: (1) sufficient credible evidence of a miner's exposure to noise levels in excess of the limits specified in the standard; (2) sufficient credible evidence of a technologically achievable engineering control that could be applied to the noise source; (3) sufficient credible evidence of the reduction in the noise level that would be obtained through implementation of the engineering control; (4) sufficient credible evidence supporting a reasoned estimate of the expected economic costs of the implementation of the control; and (5) a reasoned demonstration that, in view of elements 1 through 4 above, the costs of the control are not wholly out of proportion to the expected benefits.

The Callanan rule was later followed in A.H. Smith, 6 FMSHRC 199 (1984).

The regulatory schemes set out in the airborne contaminants standard and the noise standard differ in no significant respect. The assumption must be, then, that the concept of "feasibility" is the same for both.

Standard Metals contends that because the implementation of the Tech Support recommendations did not result in a reduction of dust levels to permissible limits, it follows that engineering controls were not feasible and that the company could thus rely on personal protective equipment (respirators) without violating the standard. I disagree. As established in Todilto, a "feasible" engineering control need not reduce a health hazard to a fully safe level. Put another way, the Act gives a preference to engineering controls because they address the hazard at its source.

In Standard Metals' case, the original dust control system had been allowed to deteriorate markedly over the many years it had been in place. Witnesses for both parties professed that the original system was "good" or even "excellent." Yet, in October of 1981, the exhaust hoods and ducts had multiple leaks, the covers and skirts around the cones had

disappeared, and the fan, which vibrated violently, was moving only half the volume of air which the design specifications required. None of this is disputed by Standard Metals, and I find it to be true.

I accept Standard Metals' view that implementation of all Tech Support's study recommendations may not have fully resolved the dust problem. Be that as it may, given the mutual endorsement of the general efficacy of the original system, it must be assumed that if the system were restored to full working order, significant reductions would result.

Tech Support did not invent the notion of the skirts or curtains around the primary and cone crushers. Skirts were a part of the original design installed by the respondent many years before. It may well be that material clogging was more frequent and bothersome with skirts and covers in place. That merely demonstrates the proposition that in mining, implementation of desirable safety or health measures may sometimes interfere with optimal production.

While full implementation ^{3/} of Tech Support's plan may not have achieved a full solution to the dust problem, I generally give much credence to the expert opinion of Mr. Weems, whose 30 years with MSHA and its predecessors and 14 years as a dust control specialist gave him by far the best credentials. He made no guarantees that the suggested Tech Support program would bring the dust down to permissible limits. I found wholly credible, however, his assertion that a "fine tuning" of those recommendations with the possible addition of more hoods, ducts, and another fan would achieve compliance. It must be remembered that the evidence showed that the original dust control system at the crusher was of a type that was common and effective in the industry over a period of years. Weems and his colleagues were not suggesting any novel techniques, nor were they pushing any "technology forcing" or experimental solutions. The credible evidence convinces me that an effective exhaust system would, as Weems contends, achieve substantial reduction in silica dust levels.

I also conclude that the Secretary sustained his burden of proof as outlined in Callanan, supra. The crusher workers were subject to excessive respirable silica dust levels. No one disputes that. The engineering controls in terms of exhaust mechanisms, skirting, etc., were time-tested and were clearly "technologically achievable." Expert testimony demonstrated that with adequate exhausting and skirts around the primary and cone crushers, dust levels could not only be reduced, but could be brought into compliance with the standard. With regard to the elements regarding cost, no specific cash figures were introduced. In the context of this case, however, none were necessary. Mr. Weems was only suggesting that an existing system be

^{3/} I must assume that respondent was justified in leaving the fan shroud on in accordance with the manufacturer's suggestions, and I note that covering the screens was merely a matter for "consideration," not a frank recommendation.

restored to its former condition and, if necessary after that, improved in small ways. None of the proposals could have involved large outlays of money and surely no outlays "wholly out of proportion to expected benefits."

As of the time of the inspection resulting in the two citations, Standard Metals was in clear violation of that part of the standard requiring control of dust through feasible engineering control measures.

We must now decide whether the violation was "significant and substantial" under 104(d)(1) as the citations allege. The Commission's holding on the nature of a "significant and substantial violation" has been set forth earlier in this decision. Cement Division, National Gypsum Company, supra. That case involved a series of safety violations. Some have questioned whether the National Gypsum test is truly applicable to health cases where the hazard is chronic exposure to harmful substances which may eventually lead to severe deterioration of health or to death. In such cases, where the deleterious effect insidiously builds in small increments, each exposure, or each series of exposures, may not "cause" or even "significantly contribute" to a health hazard in the most literal sense.

In the present case Mr. Richard L. Durand, an industrial hygienist with a degree in chemical engineering, testified for the Secretary. His uncontradicted testimony showed that repeated inhalation of low concentrations of silica-bearing dusts will tend to build fibrotic tissue in the lungs, a condition known as chronic silicosis. Simple chronic silicosis is characterized by discrete fibrotic nodules which replace normal lung tissue. With repeated exposure, progressive, massive fibrosis occurs over large areas of the lung. At some point, the fibrosis will progress spontaneously without further exposure to silica particles. Advanced silicosis results in severe respiratory disfunction and may result in death. Victims of silicosis are also highly susceptible to tuberculosis.

Acute (as opposed to chronic) silicosis results from short-term inhalation of high concentrations of silica dusts. A few weeks or months of such exposure may lead to death in as few as two years. A concentration of as much as 25 percent silica may trigger the acute disease.

Mr. Durand testified that any silica concentration exceeding one percent silica is considered hazardous in some individuals (susceptibilities differ somewhat); and 15 to 20 percent concentration can definitely trigger the disease with long exposures. All silica damage to the lungs is irreversible. Durand was familiar with the air sampling done at the Standard Metals' crusher and was of the opinion that the operator and his helper were in jeopardy.

Mr. Durand was a knowledgeable witness. I accept his undisputed testimony as true.

Faced with a similar case, where medical evidence showed that long-term exposure to excessive dust levels in an underground coal mine could lead to life-threatening chronic bronchitis or pneumoconiosis, Judge Broderick of this Commission held that an excessive exposure of two-month's duration to miners should be considered as "significant and substantial." This was so, he reasoned, because the cumulative effects of the exposure could lead to illnesses of a "reasonably serious nature." Consolidation Coal Company, 5 FMSHRC 378 (1983) (ALJ) (Commission review pending).

I conclude that the reasoning in that case is correct. Each increment of exposure which adds to the possibility of contracting or of worsening a serious disease is significant and substantial. Otherwise, violation of most of the mandatory health standards promulgated under the Act would lose any practical meaning in preventing chronic occupational disease. Standard Metals' failure to comply with 30 C.F.R. § 57.5-5 was significant and substantial.

Respondent's remaining defenses are relevant to determination of a reasonable civil penalty. The criteria for penalty assessment were discussed earlier in this decision and need not be set out again. Those elements common to all citations, that is, Standard Metals' size, its prior history of violations and its ability to continue in business, have been discussed and decided earlier. All that need be added is the respondent's status as a bankrupt does not show an inability to pay the penalties, per se. The mine was still operating at the time of the hearing, and its status was not such that payment of the total penalties originally proposed would have been enough to cause it to close down (Tr. 191-194).

I conclude that the gravity of the dust violation was moderate-to-high. Only two men were involved, but the exposure of these men to respirable silica was significantly above permissible limits. Further, the deteriorated condition of the dust system strongly implies that the exposures had existed for some time before the initial inspection. The record shows that respondent did nothing more than experiment with water sprays between Inspector Galloway's first visit and his second. This haphazard response added to the duration of the exposure.

On the other hand, Standard Metals did have a respirator program in effect during the entire time in question here. For reasons already made apparent, use of respirators did not constitute a defense against the alleged violations. The respirators, however, doubtless reduced the actual amount of respirable silica dust reaching the workers' lungs. In reaching this conclusion I do not ignore testimony by various of the Secretary's witnesses that the respiratory program was not truly effective because the face-pieces did not have a tight enough fit, and the respirators were not properly stored nor adequately cleaned. Those charges were never adequately rebutted, and I find them true. Nevertheless, I am persuaded that the operator and helper wore their respirators the overwhelming part of the time, and that even with imperfect fits and maintenance, the devices reduced the individual exposures.

I conclude that Standard Metals' negligence was moderate. Its management should have known from the condition of its dust control system and the visible concentrations of airborne dust, that a significant dust problem existed. The negligence was mitigated to some extent by the company's respirator policy.

The record presents a mixed picture concerning Standard Metals' abatement efforts. The credible evidence convinces me that the respondent's initial efforts showed a considerable amount of foot-dragging, if not plain indifference. After the extension was granted for completion of the Tech Support study, the evidence shows at least a reasonable effort, if not a fully enthusiastic one.

In this regard I must note that Standard Metals' management had some justification for confusion. The overall evidence indicates that the proper path to abatement was not as well marked as the Secretary would have us believe. One can understand, for example, why the respondent greeted the idea of booths for the workers as the ultimate answer to its dust problems. It was endorsed by the very MSHA official who delivered the 104(b) withdrawal notice. On the whole, I classify the respondent's good faith in seeking abatement as low-to-moderate.

Having carefully considered the evidence relating to all the statutory penalty elements, I conclude that \$675.00 is the appropriate civil penalty for each dust violation. In reaching this conclusion, I decline to assess the greater sums (\$5,000 each) which the government ultimately asked, principally because I am convinced that the respondent was as much confused as recalcitrant in trying to abate during and after the time MSHA extended the initial abatement date on the citations.

I must also note, however, that I give no favorable weight to Standard Metals' suggestion that its difficulties in compliance were in part occasioned by a high turnover in management personnel and a safety officer whose attitudes toward MSHA were unduly confrontational. The mine operator alone must surely bear the responsibility for its internal problems.

CONCLUSIONS OF LAW

Based upon the entire record herein, and in accordance with the findings of fact contained in the narrative portions of this decision, the following conclusions of law are made:

(1) This Commission has the jurisdiction necessary to decide this case.

(2) Standard Metals violated the mandatory safety standard published at 30 C.F.R. § 57.6-92 as alleged in the Secretary's amended petition for Citation 2096966.

(3) The violation was significant and substantial within the meaning of section 104(d)(1) of the Act.

(4) The appropriate civil penalty for the violation is \$150.00.

(5) Standard Metals violated the mandatory safety standard published at 30 C.F.R. § 57.6-27 as alleged in Citation 2096840.

(6) The violation was not significant and substantial within the meaning of section 104(d)(1) of the Act.

(7) The appropriate civil penalty for the violation is \$35.00

(8) Standard Metals violated the mandatory health standard published at 30 C.F.R. § 57.5-5 as alleged in Citation 572109.

(9) The violation was significant and substantial within the meaning of section 104(d)(1) of the Act.

(10) The appropriate civil penalty for the violation is \$675.00.

(11) Standard Metals violated the mandatory health standard published at 30 C.F.R. § 57.5-5 as alleged in Citation 572110.

(12) The violation was significant and substantial within the meaning of section 104(d)(1) of the Act.

(13) The appropriate civil penalty for the violation is \$675.00.

ORDER

Accordingly, all citations in this case are ORDERED affirmed, and Standard Metals is ORDERED to pay civil penalties totalling \$1,535.00 within 30 days of the date of this decision.


John A. Carlson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 31 1985

TUNNELTON MINING COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. PENN 84-149-R
	:	Order No. 2254824; 4/13/84
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 84-150-R
ADMINISTRATION (MSHA),	:	Order No. 2254825; 4/13/84
Respondent	:	
	:	Marion Mine

ORDER OF DISMISSAL

Before: Judge Kennedy

For good cause shown, it is ORDERED that the operator's motion to withdraw the captioned matters be, and hereby is, GRANTED and the cases DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 31 1985

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 85-68-D
ON BEHALF OF	:	
WILLIAM C. BEVERIDGE,	:	MSHC Case No. MORG CD 84-3
Complainant	:	
	:	Blacksville No. 1 Mine
v.	:	
	:	
GLOBE ENTERPRISES,	:	
Respondent	:	

DECISION

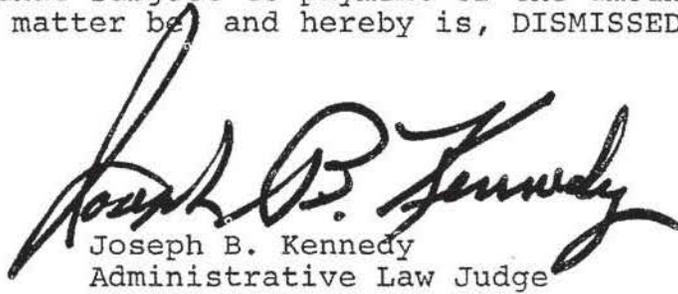
Appearances: Howard K. Agran, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Complainant;
Ralph K. Johnson, Office Manager and Chief
Accountant for Globe Enterprises, for
Respondent.

Before: Judge Kennedy

This matter was heard in Morgantown, West Virginia on Tuesday, May 21, 1985. At the close of the case, the parties conferred for the purpose of settlement and thereafter moved for approval of a settlement of this matter. The settlement proposed was to pay complainant the amount of \$500 in two installments of \$250 each within 30 and 60 days respectively and to withdraw the proposal for penalty.

Based on the evidence adduced, I found the settlement proposed was in accord with the purposes and policy of the Act. Accordingly, it was ORDERED that the motion be APPROVED and that the operator pay the amount of the settlement agreed upon on or before Saturday, July 20, 1985.

The premises considered, it is ORDERED that the disposition approved be, and hereby is, CONFIRMED and ADOPTED as the final order in this matter and that subject to payment of the amount agreed upon the captioned matter be and hereby is, DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 31 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 85-35
Petitioner : A.C. No. 46-04723-03522
v. :
: Docket No. WEVA 85-36
EAST GULF FUEL CORPORATION, : A.C. No. 46-04723-03523
Respondent :
: East Gulf No. 4 Mine

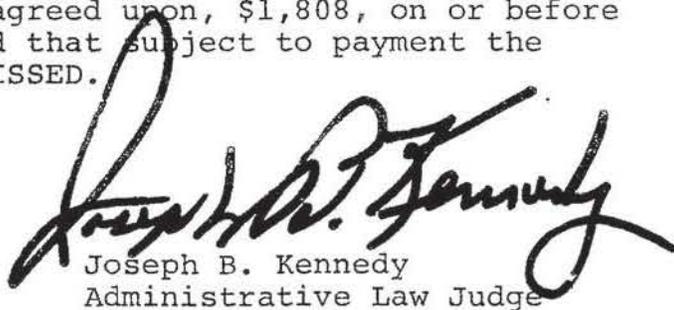
DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

These matters are before me on the parties' motion to approve settlement of the captioned matters at the amounts initially assessed.

Based on an independent evaluation and de novo review of the circumstances, I find the settlement proposed is acceptable.

Accordingly, it is ORDERED that the operator pay the amount of the settlement agreed upon, \$1,808, on or before Friday, June 14, 1985, and that subject to payment the captioned matters be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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