

JULY 1984

Commission Decisions

7-02-84	FMC Corporation	WEST 82-146-RM	Pg. 1566
7-05-84	Badger Coal Company	WEVA 81-36-R	Pg. 1571
7-11-84	U.S. Steel Mining Co., Inc.	PENN 82-336	Pg. 1573
7-12-84	Freeman United Coal Mining Co.	LAKE 82-89	Pg. 1577
7-17-84	Roy Glenn (Climax Molybdenum Co.)	WEST 80-158-M	Pg. 1583
7-18-84	Kitt Energy Corporation	WEVA 83-65-R	Pg. 1596

Administrative Law Judge Decisions

7-02-84	Carbon County Coal Company	WEST 83-106	Pg. 1607
7-03-84	Grandview Dock Corporation	LAKE 84-24	Pg. 1611
7-03-84	U.S. Steel Mining Co., Inc.	PENN 83-96	Pg. 1617
7-05-84	Earth Coal Company	LAKE 84-14	Pg. 1627
7-06-84	H J and H Coal Company, Inc.	VA 83-56	Pg. 1629
7-11-84	UMWA for James Rowe, <u>et al.</u> v. Peabody Coal Company	KENT 82-103-D	Pg. 1634
7-11-84	James L. Dowdell v. Consolidation Coal	LAKE 83-96-D	Pg. 1651
7-11-84	U.S. Steel Mining Company, Inc.	PENN 83-121	Pg. 1664
7-11-84	Westmoreland Coal Company	WEVA 83-260-R	Pg. 1717
7-16-84	MSHA for Paul Sedgmer, <u>et al.</u> v. Consolidation Coal Company	LAKE 82-105-D	Pg. 1740
7-17-84	Louisiana Industries, Inc.	CENT 84-43-M	Pg. 1747
7-17-84	Cobra Resources, Inc.	KENT 83-54	Pg. 1749
7-18-84	Buckeye Coal Mining Company	LAKE 84-2	Pg. 1751
7-19-84	Emiliano Rosa Cruz v. Puerto Rican Cement Company, Inc.	SE 83-62-DM	Pg. 1753
7-20-84	Industrial Mining Company	LAKE 84-69	Pg. 1778
7-20-84	Lee Lime Corporation	YORK 84-9-M	Pg. 1780
7-23-84	Local 2274, UMWA v. Clinchfield Coal	VA 83-55-C	Pg. 1782
7-24-84	Freeman United Coal Mining Company	LAKE 84-38	Pg. 1785
7-24-84	Vesta Mining Company	PENN 83-212-R	Pg. 1787
7-26-84	Pyro Mining Company	KENT 84-151	Pg. 1789
7-26-84	MSHA for Z.B. Houser v. Northwestern Resources Company	WEST 83-101-D	Pg. 1798
7-30-84	Jim Walters Resources, Inc.	SE 84-11	Pg. 1815
7-30-84	Glinn Gates & Peter Johnstone	WEST 83-31-M	Pg. 1826
7-31-84	Cicconi Coal Company	PENN 83-158	Pg. 1829

JULY 1984

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

Secretary of Labor, MSHA v. Magma Copper Company, Docket No. WEST 83-17-M.
(Judge Vail, June 14, 1984)

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

Lonnie Jones v. D & R Contractors, Docket No. KENT 83-257-D(A). (Judge Melick,
Interlocutory Review of May 15, 1984 order.)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 2, 1984

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 82-146-RM
	:	WEST 82-207-M
FMC CORPORATION	:	

DECISION

This consolidated proceeding involves the interpretation and application of 30 C.F.R. § 57.6-5, a mandatory safety standard dealing with storage of blasting agents. 1/ A Commission administrative law judge held that the operator, FMC Corporation ("FMC"), violated the standard and assessed a civil penalty. 5 FMSHRC 627 (April 1983)(ALJ). We granted FMC's petition for discretionary review. We affirm.

The relevant facts were stipulated. On March 10, 1982, during an inspection of FMC's trona mine located in Green River, Wyoming, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued FMC a citation alleging a violation of section 57.6-5. The citation stated, in relevant part, that ammonium nitrate fuel oil ("ANFO"), a blasting agent, was stored impermissibly close to combustible hydraulic oil. 2/

1/ 30 C.F.R. § 57.6-5 provides:

Mandatory. Areas surrounding magazines and facilities for the storage of blasting agents shall be kept clear of rubbish, brush, dry grass, or trees (other than live trees 10 or more feet tall), for a distance not less than 25 feet in all directions, and other unnecessary combustible materials for a distance of not less than 50 feet.

2/ ANFO is a blasting agent as defined by 30 C.F.R. § 57.2, which incorporates by reference the Department of Transportation's classification scheme for blasting agents set forth at 49 C.F.R. § 173.114a. Ammonium nitrate is an essential ingredient in nearly all commercial explosives, including dynamite and water gels. Its predominant use is in the form of AN prill, a small porous pellet mixed with fuel oil for use as a blasting agent. Du Pont Co., Blasters' Handbook 12-15, 55-66 (16th ed. 1977). This ammonium nitrate fuel oil mixture is referred to as ANFO. The most widely used ANFO product is an oxygen-balanced, free-flowing mixture of about 94 percent ammonium nitrate prills and six percent No. 2 diesel fuel oil. Id. at 55.

At approximately 9:40 a.m. the inspector observed 9.5 pallets of ANFO within the supply yard located near the No. 3 shaft. The ANFO, which had an approximate total weight of 10 tons, was located within eight feet of a portable 500-gallon oil dispensing tank that was filled with combustible hydraulic oil. ^{3/} The inspector further observed that a small quantity of the hydraulic oil was located on the ground under the tank. Vehicular traffic in the area presented a possible ignition source.

Upon making the foregoing observation the inspector informed FMC personnel of the condition. Thereafter the inspector issued the subject citation charging a violation of 30 C.F.R. § 57.6-5 because hydraulic oil was located within eight feet of ANFO; because the operator failed to place a warning sign in the area; and because the supply yard was not guarded. The operator removed the hydraulic oil from the supply yard within minutes and indicated that the oil had been mistakenly located there. The operator further contended that the supply yard had been routinely used over the years for the placement of materials to be taken to the underground work areas and that ordinarily the materials would be located therein for approximately 5 hours. However on this day, because of unspecified problems, the process of removing the materials underground had been delayed. In fact the ANFO, which had been delivered into the supply yard at approximately 8:00 a.m., was not completely removed from the supply yard and taken into the mine until sometime between 4:00 p.m. and 5:00 p.m.

The sole issue litigated by the parties before the Commission's administrative law judge was "whether the agreed upon facts show that 9.5 pallets of ANFO, a blasting agent, w[ere] in 'storage' as that term is used in the mandatory safety standard set forth in 30 C.F.R. § 57.6-5." 5 FMSHRC at 627. The judge found that the supply yard near the No. 3 shaft was a "facility" used as a holding area for materials, including blasting agents, intended for use in the underground parts of the mine. 5 FMSHRC at 629. The judge stated, "All storage connotes a temporary placement awaiting further movement or transport to the place of ultimate rest or use." *Id.* The judge further found that for an hour and a half, 9.5 pallets of ANFO had been stored in impermissible proximity to combustible hydraulic oil. *Id.* Based on these findings, the judge concluded that the operator had violated section 57.6-5, and assessed a civil penalty of \$119, an amount stipulated to by the parties. The judge also held that the other conditions described in the citation, the absence of a guard and a danger sign, were not covered by the cited standard. The Secretary of Labor has not appealed this latter aspect of the judge's decision.

On review, FMC argues that "storage," for the purpose of the safety standards governing explosives, means "the setting aside of blasting agents and explosives in a building or structure until needed." FMC contends that because the supply yard in question was neither a structure

^{3/} "Combustible" is defined in 30 C.F.R. § 57.2 as "capable of being ignited and consumed by fire."

nor a building it was not a "facilit[y] for the storage of blasting agents" within the meaning of section 57.6-5. FMC argues also that the ANFO in question was in the process of delivery to the mine when the citation was issued and, accordingly, was not subject to the standards governing storage of explosives and blasting agents. Rather, FMC asserts that the delivery process is governed by the standards dealing with the transportation of explosives and blasting agents. 30 C.F.R. §§ 57.6-40 through 57.6-77. On the facts of this case, we do not agree.

There is no dispute that some 10 tons of ANFO, a blasting agent, were placed for a period of time within eight feet of a tank filled with 500 gallons of hydraulic oil, a combustible material. Therefore, the issues to be decided on review are whether the No. 3 shaft supply yard was a "facilit[y] for the storage of blasting agents" within the meaning of section 57.6-5, and whether FMC's temporary placement of the ANFO in the supply yard constituted "storage" within the meaning of the standard.

Section 57.6-5 applies to the storage of blasting agents in "magazines" and "facilities for the storage of blasting agents." The term "magazine" is defined in 30 C.F.R. § 57.2 as "a facility for the storage of explosives, blasting agents, or detonators." 30 C.F.R. § 57.6-20 provides detailed criteria for the construction of magazines. However, there is no comparable definition of the term "facilities." While it is clear that the word facility may connote an enclosed structure, its meaning in ordinary usage is broader. Facility is defined as "something ... that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end." Webster's Third New International Dictionary (Unabridged) 812 (1981). In other words, the primary significance of the term is functional rather than structural. Therefore, while a magazine is a structure that must meet the specifications set forth in section 57.6-20, a facility, considered from the standpoint of ordinary usage, can be either an enclosed structure like a magazine, or simply an area designated for storage.

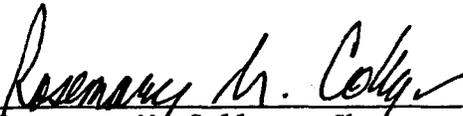
The No. 3 shaft supply yard was a demarcated area regularly used for the holding of supplies, including blasting agents to be transported underground. Thus, we conclude that the supply yard was a storage facility. When blasting agents were stored therein, such storage was required to be in conformity with section 57.6-5. 4/

4/ In relevant part, the citation in this case dealt only with the impermissible presence of a combustible material. This case does not require us to, and we do not, reach the question of whether, under the cited standard or other standards, "facilities for the storage of blasting agents" must also be enclosed. We conclude merely that the supply yard as used at the FMC mine was a storage facility for blasting agents, not that it was a storage facility conforming to all possibly applicable requirements.

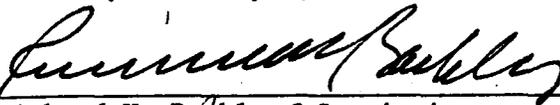
The next question is whether FMC's temporary placement of the ANFO in the supply yard facility constituted storage. In ordinary usage, the term storage, "the act of storing or the state of being stored," covers a wide variety of meanings, including, to accumulate, to supply, to amass, or to keep for future use. Webster's, at 2252. Thus, the term is sufficiently broad to include short-term, long-term and semi-permanent storage, and as used in section 57.6-5, encompasses both short-term and long-term storage.

Applying the foregoing construction of the standard to these facts, we conclude that the ANFO was stored in the supply yard within the meaning of the standard. Although FMC argues that the ANFO was in transit, the 9.5 pallets of ANFO observed by the inspector had been in the supply yard for over an hour and some of those pallets were not moved below for more than six hours. This situation was not placement for a de minimis period of time during an essentially uninterrupted transit process. The standard was developed to prevent the very situation that existed in this case--the storage of blasting agents in close proximity to a combustible material. The judge's application of the standard in this case properly effectuates that purpose. Because the ANFO was stored in impermissible proximity to the hydraulic oil, a violation of section 57.6-5 occurred.

Accordingly, on the bases discussed above, we affirm the judge's decision. 5/



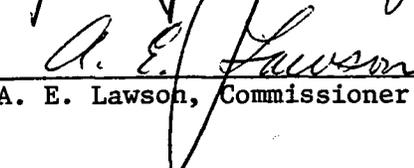
Rosemary M. Collyer, Chairman



Richard V. Backley, Commissioner



Frank F. Jestrab, Commissioner



A. E. Lawson, Commissioner

5/ Commissioner Nelson did not participate in the consideration or disposition of this case.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 5, 1984

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

v.

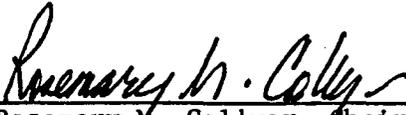
BADGER COAL COMPANY

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: Docket Nos. WEVA 81-36-R
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: WEVA 81-37-R
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: WEVA 81-277
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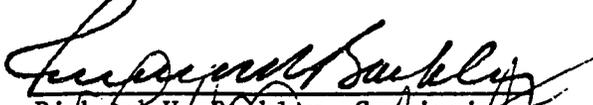
ORDER

Badger Coal Company's petition for discretionary review of the administrative law judge's final decision in this matter was granted by this Commission on May 21, 1984. Subsequently, by motion dated June 22, 1984, counsel for the operator requested that its petition for review be dismissed by the Commission. The Secretary of Labor has responded stating that he has no objection to Badger's motion.

Accordingly, our order granting review in this case is vacated and the operator's petition for discretionary review is dismissed. By operation of law, the administrative law judge's April 11, 1984, decision (6 FMSHRC 874) constitutes the Commission's final decision in this matter. 30 U.S.C. § 823(d)(1).



Rosemary M. Collyer, Chairman



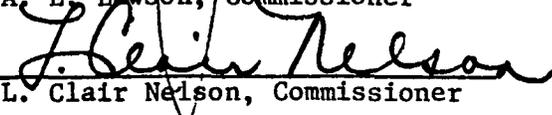
Richard V. Backley, Commissioner



Frank F. Jastrab, Commissioner



A. E. Lawson, Commissioner



L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 11, 1984

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. PENN 82-336
	:	
v.	:	
	:	
U.S. STEEL MINING CO., INC.	:	

DECISION

In this case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), United States Steel Mining ("USSM") has challenged a finding by the Commission's administrative law judge that a violation was "significant and substantial" as that term is used in section 104(d)(1) of the Act. 30 U.S.C. § 814(d)(1).

USSM's Maple Creek No. 1 coal mine was inspected in May 1982 by an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"). During the inspection a six-inch gash was discovered in the outer jacket of insulation of a trailing cable leading to a continuous mining machine. Approximately two inches of the gash had been covered by electrical tape, leaving exposed about four inches of ground wire. Three live power wires carrying 480 volts of current also were contained within the trailing cable but each of them was covered by a separate layer of insulation; there was no visible damage to that insulation at the time of the inspection. The inspector issued a citation alleging a violation of 30 C.F.R. § 75.517, and he indicated that the violation was "significant and substantial." 1/

USSM contested the designation of the violation as "significant and substantial" and the matter came before an administrative law judge of this independent Commission. USSM did not contest the underlying violation. At the hearing, witnesses for both MSHA and USSM agreed that because the power wires remained individually insulated at the time of inspection there was no immediate danger of electrical shock even if a miner should inadvertently grab the cable. However, the witnesses

1/ 30 C.F.R. § 75.517 in part provides:

Power wires and cables ... shall be insulated adequately and fully protected.

also agreed that a tear in the outer jacket weakened the overall system of protective insulation and increased the risk of danger to the internal layer of insulation on the power wires. Tr. 19, 27-29. 2/

The administrative law judge found that the violations were of a "significant and substantial" ("S&S") nature because a trailing cable is subject to "extraordinary abuse" in the harsh environment of a coal mine. 5 FMSHRC at 1569. For this reason "both the outer jacket and the conductor wire insulation are important." Id. 3/ The judge stated further that a determination of "significant and substantial" must be made at the time the citation is issued (without any assumptions as to abatement), but in the context of "continued normal mining operations." Id.

USSM challenges those findings on review. It argues that the gash in the trailing cable insulation observed by the inspector would not have resulted in injury absent the occurrence of some future additional aggravating condition. Therefore, USSM submits that there was no likelihood that serious injury would have resulted from the cable condition, as it existed at the time of inspection and citation. In essence, USSM argues that the scope of consideration, for determining whether a significant and substantial violation exists, should be limited solely to consideration of the condition as it exists at the precise moment of inspection.

We reject this narrow interpretation of the statutory language. Section 104(d)(1) specifies that a violation is to be designated S&S if it "significantly and substantially contribute[s]" to a mine hazard. 4/ This contribution is measured according to whether there is a "reasonable likelihood that the hazard contributed to will result in an injury ... of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). Such a measurement cannot ignore the relevant dynamics of the mining environment or processes; indeed this cable was in normal use at the time it was observed by the inspector. Under these circumstances, it was not error for the judge to evaluate the cited violation in terms of "continued normal mining operations."

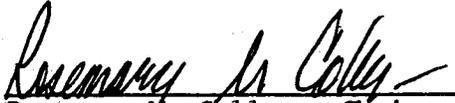
2/ USSM provided testimony as to the presence of a ground fault system in the trailing cable used at this mine. The ground fault system is designed to deenergize the trailing cable if a power wire comes in contact with the ground wire. The administrative law judge found that despite this system, electrical shock of some degree could occur. United States Steel Mining Co., Inc., 5 FMSHRC 1567, 1569 (September 1983)(ALJ).

3/ The judge also discussed the effect of water, if present, upon the electrical hazard posed by the violation. 5 FMSHRC at 1569. We regard this discussion as an example of how conditions could develop in the mining environment which could cause an improperly protected cable to become more hazardous.

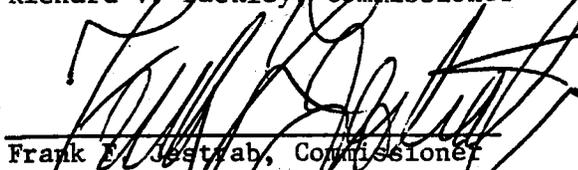
4/ The Mine Act states that violations that are "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety and health hazard" may serve as the basis for certain enforcement mechanisms. 30 U.S.C. §§ 814(d)(1) and (e) (emphasis added).

The administrative law judge considered those mining conditions to which the damaged cable predictably would be exposed. He found that both the outer and inner layers of insulation provided important protection against electrical shock. These findings are fully supported by the testimony of the MSHA inspector and the operator's witness, each of whom stated that the mining environment is harsh and that damage to the outer layer of insulation weakened the protection afforded by the inner layer.

Accordingly, we conclude that the violation in this case properly was designated "significant and substantial" in that there was a reasonable likelihood that the condition of the trailing cable could contribute, significantly and substantially, to the cause and effect of a safety hazard. The decision of the administrative law judge is affirmed.


Rosemary V. Collyer, Chairman


Richard V. Backley, Commissioner


Frank E. Jestrab, Commissioner

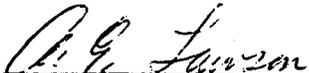

L. Clair Nelson, Commissioner

Commissioner Lawson concurring:

On the basis of the criteria set forth in my separate opinion in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), I concur in finding the violation in this case to be significant and substantial within the meaning of section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1).

I join my colleagues in rejecting USSM's invitation to consider "spatial-temporal variables" in determining whether the violation was significant and substantial. At the time of citation the continuous mining machine was in operation and the damaged trailing cable was in use. It is reasonable to conclude that absent intervention by a federal enforcement official operations would have continued and miners would have remained exposed to the electrical hazard the cited standard was designed to protect against. If, as USSM suggests, all factors necessary for the occurrence of an occupational injury must be present before a significant and substantial finding can be made, the violation would constitute an imminent danger subject to a section 107(a) withdrawal order. As the Secretary maintains, this interpretation would be inconsistent with the enforcement scheme of the Mine Act and its preventive goals. In order to be designated significant and substantial, under section 104(d)(1) of the Mine Act, a violation must "contribute to the cause and effect of a ... mine safety or health hazard," it need not constitute one.

Accordingly, the administrative law judge properly considered whether the violation was significant and substantial in light of the extraordinary abuse to which a continuous miner trailing cable is subjected during continued normal mining operations.



A. E. Lawson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 12, 1984

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

v.

FREEMAN UNITED COAL MINING
COMPANY

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Docket No. LAKE 82-89

DECISION

This civil penalty proceeding involves the interpretation and application of the requirement in 30 C.F.R. § 50.20(a) that an operator report to the Department of Labor's Mine Safety and Health Administration ("MSHA") each "occupational injury ... at the mine." ^{1/} The Commission's administrative law judge concluded that Freeman United Coal Mining Company ("Freeman") violated the regulation, and assessed a civil penalty. 5 FMSHRC 505 (March 1983) (ALJ). For the reasons that follow, we affirm the judge's decision.

1/ 30 C.F.R. § 50.20(a) provides in part:

Preparation and submission of MSHA Report Form 7000-1--Mine Accident, Injury, and Illness Report.

Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1. ... Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in § 50.20-1 through § 50.20-7. ... The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed.

30 C.F.R. § 50.2(e) defines an "occupational injury" as follows:

"Occupational injury" means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

The facts are undisputed and were stipulated below. On February 18, 1982, at about 11:00 p.m., approximately one hour before the beginning of his shift, Fred Albers, a plant cleaner who had worked for Freeman for about 12 years, experienced back pain while putting on his work boots in the wash house at Freeman's Orient No. 6 Mine. He was taken by ambulance to a hospital emergency room and subsequently admitted as an inpatient. Albers, who had a history of back trouble, was diagnosed as having acute lumbosacral (lower back) strain, and was treated with physiotherapy, a muscle relaxant, and a pain reliever. He was discharged from the hospital on February 24, 1982. Albers returned to work on March 10, 1982, after missing 13 work days. Freeman did not report Albers' injury to MSHA.

On March 25, 1982, an MSHA inspector cited Freeman for a violation of 30 C.F.R. § 50.20(a) because it had not completed and mailed Form 7000-1 to report Albers' injury within ten working days after the occurrence of the injury. Freeman abated the violation the same day by completing and mailing the form to MSHA.

The principal issue considered by the Commission administrative law judge was whether Albers' injury was an "occupational injury" within the meaning of the cited regulation and as that term is defined in section 50.2(e). The judge found that the facts established an occupational injury because (1) there was an injury to a miner; (2) it occurred at a mine; and (3) medical treatment was required and it caused disability. He stated that "the facts fit the definition and the definition is controlling." 5 FMSHRC at 508.

In urging reversal, Freeman argues that the section 50.2(e) definition of occupational injury contemplates that there must be a causal nexus between the miner's work and the injury sustained. Freeman contends that Albers' injury was not work-related and, consequently, Freeman was not required to report the injury to MSHA pursuant to section 50.20(a). Freeman argues in the alternative that the regulation is invalid to the extent that it requires reporting injuries lacking a causal nexus with the miner's work. We reject both arguments.

I.

In interpreting the term "occupational injury," as defined in section 50.2(e), we look first to the plain language of the regulation. Absent a clearly expressed legislative or regulatory intent to the contrary, that language ordinarily is conclusive. As noted above, section 50.2(e) defines an occupational injury as "any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job." The term "injury" is not further defined. The ordinary meaning of injury is: "an act that damages, harms,

or hurts"; or "hurt, damage, or loss sustained." Webster's Third New International Dictionary (Unabridged) 1164 (1977). The remainder of the definition in section 50.2(e) refers only to the location where the injury occurred ("at a mine"), and to the result of an injury ("medical treatment," "death," etc.). Thus, sections 50.2(e) and 50.20(a), when read together, require the reporting of an injury if the injury--a hurt or damage to a miner--occurs at a mine and if it results in any of the specified serious consequences to the miner. These regulations do not require a showing of a causal nexus.

Nor does the regulatory history show any intent to require such a specific causal connection. In fact, just the opposite is true. 30 C.F.R. Part 50, in which sections 50.2(e) and 50.20(a) are contained, was originally promulgated by the Department of the Interior's Mining Enforcement and Safety Administration ("MESA," the predecessor agency to MSHA) under the authority of the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. § 721 et seq. (1966) (repealed 1977) ("Metal Act"), and the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 801 et seq. (1976) (amended 1977) ("Coal Act"). 2/ Part 50 revised and consolidated previously separate reporting requirements under the Part 58 standards for metal and nonmetal mines and the Part 80 standards for coal mines. 42 Fed. Reg. 55568 (October 17, 1977). When promulgated by MESA, section 50.2(e) deleted the Parts 58 and 80 requirement that an occupational injury arise out of and/or in the course of work and added the present requirement that, to be reportable, an occupational injury need only occur at a mine. See 42 Fed. Reg. 65534. MESA's deletion of a more specific work-related criterion militates against our according such a construction to these regulations. See, e.g., U.S. v. Guthrie, 387 F.2d 569, 571 (4th Cir. 1967). We conclude that the above-noted regulatory history and the plain language of the section 50.2(e) definition of occupational injury control in construing the related reporting requirement of section 50.20(a). 3/

II.

It is well settled that when considering the validity of an administrative regulation, the proper standard of review is whether the regulation is consistent with, and reasonably related to, the statutory

2/ After the Mine Act took effect on March 9, 1978, the Secretary of Labor made only minor nomenclature changes in Part 50. 42 Fed. Reg. 65535 (December 30, 1977); 43 Fed. Reg. 12318 (March 24, 1978).

3/ In oral argument before the Commission, both Freeman and the American Mining Congress, as amicus curiae, argued that the Part 50 reporting requirements apply only to preventable work-related injuries. In Freeman's view, it could not have prevented the injury involved in this case. However, the Secretary asserts that it is the compilation of data regarding all injuries occurring at mines that provides MSHA with a basis for determining which injuries may be prevented.

provisions under which it was promulgated and is not in conflict with any other statutory provisions. See Sewell Coal Co., 3 FMSHRC 1402, 1405-08 (June 1981). 4/ Section 111(b) of the Coal Act and sections 4 and 13 of the Metal Act broadly empowered the Secretary of the Interior to require operators to maintain and submit accident, injury, and illness data, without imposing limitations on the types of data. Similarly, the legislative histories of these Acts discussed the reporting requirement in extremely broad terms. See S. Rep. No. 411, 91st Cong., 1st Sess. 92 (1959), reprinted in Senate Subcommittee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969 at 218 (1975), and Legislative History of the Federal Metal and Nonmetallic Mine Safety Act, 1966 U.S. Code Cong. and Ad. News 2856-57. We conclude that section 50.20(a) is consistent with and reasonably related to the statutory provisions under which it was promulgated. 5/

III.

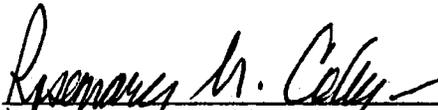
The Secretary asserts that Freeman is precluded under the Mine Act from challenging the regulation's validity because the operator did not raise the question below. 30 U.S.C. § 823(d)(2)(A)(iii). We disagree. Before the administrative law judge, Freeman asserted that the Mine Act "should not be applied in an unreasonable, illogical manner as attempted here." Freeman argued further that an interpretation of the regulation which does not require that an occupational injury be work-related "stretches the application of the Act and is not in compliance with the intention and purpose of the Act." We find that these broad statements "afforded the administrative law judge an opportunity to pass" upon the question, as required by 30 U.S.C. § 823(d)(2)(A)(iii).

4/ This is essentially the same standard of review applied by courts of appeals for judging the validity of rules promulgated pursuant to informal notice and comment rulemaking. (Section 50.20(a) was the product of informal rulemaking.) See, e.g., Nat'l Indus. Sand Ass'n. v. Marshall, 601 F.2d 689, 696-700 (3d Cir. 1979), citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); and American Mining Congress v. Marshall, 671 F.2d 1251, 1254-55 (10th Cir. 1982).

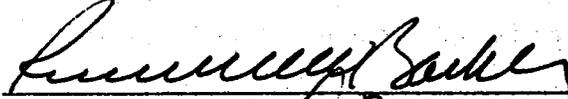
5/ Freeman's argument that section 50.20(a) conflicts with section 103(e) of the Mine Act, 30 U.S.C. § 813(e), which requires the Secretary to minimize burdensome reporting requirements, is unpersuasive because there is no evidence as to this alleged burden. Nor is there support for Freeman's argument that the requirement as interpreted needlessly duplicates the state workers' compensation reports that the operator is required to file. Workers' compensation statutes differ both in purpose and effect from the Mine Act and, in any event, in promulgating section 50.2(e), MESA expressly rejected reliance for reporting purposes on diverse state workers' compensation criteria. See 42 Fed. Reg. 65534. For these same reasons we would not find state workers' compensation statutes analogous.

The Secretary also asserts that we lack authority to review the validity of the cited regulation. Previously, we have rejected the same argument by the Secretary in the context of the validity of a mandatory safety standard promulgated under section 101(a) of the Coal Act. See Sewell Coal Co., 3 FMSHRC at 1405. Although the present case involves a reporting regulation promulgated under sections 508 and 111(b) of the Coal Act and sections 4 and 13 of the Metal Act, our reasoning in Sewell applies. We conclude that a challenge to the validity of a regulation promulgated under the Coal and Metal Acts can be raised and decided in adjudication before this Commission.

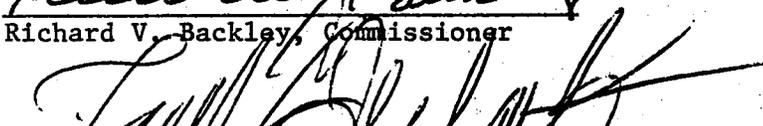
Accordingly, applying the regulation thus construed to the undisputed facts of this case, we affirm the judge's findings that a reportable injury occurred because there was an injury to a miner, which occurred at a mine, and which required medical treatment. We note that this injury also resulted in an "inability to perform all job duties...." Therefore, we affirm the judge's conclusion that Freeman violated § 50.20(a) by not reporting this occupational injury to MSHA.



Rosemary M. Collyer, Chairman



Richard V. Backley, Commissioner



Frank F. Dastig, Commissioner



A. E. Lawson, Commissioner



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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 17, 1984

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. WEST 80-158-M
v. :
 :
ROY GLENN, Employed by, and :
Agent of CLIMAX MOLYBDENUM :
COMPANY :

DECISION

This is a civil penalty case brought under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c). 1/ Roy Glenn, a shift boss employed by Climax Molybdenum Company, seeks review of the administrative law judge's finding that he violated section 110(c) of the Mine Act by knowingly authorizing a violation of 30 C.F.R. § 57.15-5. 4 FMSHRC 13 (January 1982) (ALJ).

We granted Glenn's petition for discretionary review and heard oral argument. For the reasons that follow, we reverse the decision of the judge.

At the time of the events at issue, Glenn worked as a shift boss supervising a crew of miners in the Climax mill and crusher where molybdenum ore is processed. Glenn's crew consisted of 10 miners including Chris Martinez, a first class welder, Ron Robinson, a first class mechanic and John Payne, a mechanic welder. On January 5, 1979, Glenn's

1/ Section 110(c) provides:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

crew was engaged in welding a new valve onto an oxygen line. Glenn instructed Payne to open and bleed all the existing valves on the line. Martinez and Robinson were to weld the new valve onto the line. To do this it was necessary to work from an adjacent girder which was approximately 20-21 inches wide, 5½ inches thick and 30 feet long with a vertical upright in the middle. After assigning the tasks to the crew, Glenn went to the back of the crusher and began checking each of the existing oxygen valves to be certain they had been opened. After checking the valves, Glenn walked to a place where he could observe the girder.

At the time of assignment, there were two ways for the miners to reach the workplace on the girder. It could be reached by using a 20 foot extension ladder which was approximately 40-50 feet away. (Robinson had used the ladder in the past to reach the end of the girder where the welding operation was to be performed.) Another means of reaching the girder was to ascend a staircase, climb onto the girder and walk across it. Glenn had told his crew to take their safety belts and lines with them, but he gave them no precise instructions regarding how to reach the workplace on the girder. The men were experienced and had worked on girders many times. On this occasion, Martinez and Robinson walked across the girder, with the safety belts and lines unsecured, rather than using the ladder. Upon reaching their workplace on the girder, they secured their safety belts and lines. Glenn did not return from checking the valves and observe them until after they had reached the workplace and tied-off.

Despite the fact that Payne had been assigned a task different from the task of Robinson and Martinez, on his own he decided to assist them in their work. Thus, Payne climbed the stairway and began to walk across the girder without his safety line being hooked up. As Payne was walking across the girder, Glenn saw him and waved him down with a flashlight. At this time, an MSHA inspection team arrived. The MSHA inspector thereafter issued a citation alleging a violation of 30 C.F.R. § 57.15-5 . 2/ The citation stated:

Three welders were observed working on an oxygen line about 30 feet off the ground. One of them was observed walking a distance of about 30 feet on a steel girder without a safety line hooked up. Roy Glenn, shift boss, was directing the work from below. Crusher Building No. 2.

2/ 30 C.F.R. § 57.15-5 provides:

Mandatory. Safety 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 cited condition was abated by removing Robinson and Martinez from the girder with a cherry picker obtained from another department of the mine. ^{3/} (Apparently Payne had walked back across the girder and down the stairway.) On February 22, 1980, as a result of an MSHA special investigation, the Secretary filed an action against Glenn under section 110(c) of the Mine Act for knowingly authorizing, ordering, or carrying out the cited violation of 30 C.F.R. § 57.15-5. Glenn contested the Secretary's action and a hearing was held.

The administrative law judge found that insofar as the actions of Payne were concerned, Glenn had not knowingly authorized, ordered, or carried out a violation of the standard. The Secretary has not challenged this aspect of the judge's decision. As to Robinson and Martinez, the judge found that "there is no evidence to support MSHA's allegation that Glenn himself carried out the violation or directly ordered the two miners to walk across the girder without the benefit of a safety belt." 4 FMSHRC at 20. We agree. We also agree with his further finding that Glenn did not "presume" that the miners would walk across the girder. 4 FMSHRC at 21.

Nevertheless, the judge proceeded to find that Glenn violated section 110(c) of the Act because he "indirectly authorized the violation." Id. We hold that the judge's finding of a violation is incorrect as a matter of law and, further, that a finding of corporate agent liability cannot be sustained on the facts of this case even when the appropriate legal test is applied.

Regarding the statutory language of section 110(c), we have held previously that the proper legal inquiry for purposes of determining corporate agent liability is whether the corporate agent "knew or had reason to know" of a violative condition. Secretary v. Kenny Richardson, 3 FMSHRC 8, 16 (January 1981), aff'd, 689 F.2d 623 (6th Cir. 1982), cert. denied, 77 L.Ed. 2d (1983). There, we stated:

If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

3/ The abatement notice stated:

Lift truck was brought in to take the other two welders down in a safe way. The work was completed with the use of the lift truck.

A penalty proceeding brought against the corporate operator for the violation was settled by the parties. FMSHRC Docket No. WEST 79-375-M.

In Kenny Richardson the underlying violation of a mandatory standard existed at the time that the section 110(c) corporate agent violation occurred (use of unsafe equipment). Here, however, Robinson and Martinez had not yet violated the involved mandatory safety standard by walking the girder at the time of Glenn's alleged violation of section 110(c).

We now apply our holding in Kenny Richardson to those situations where, as here, a violation of a mandatory standard does not exist at the time of the corporate agent's failure to act, but occurs subsequent to that failure. Accordingly, we hold that a corporate agent in a position to protect employee safety and health has acted "knowingly", in violation of section 110(c) when, based upon facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventive steps. To knowingly ignore that work will be performed in violation of an applicable standard would be to reward a see-no-evil approach to mine safety, contrary to the strictures of the Mine Act.

Our decision is supported by the legislative history of the 1969 Coal Act, in which Congress first set forth the basis for establishing personal liability for agents of corporate operators. The House Committee on Education and Labor stated:

The Committee expended considerable time in discussing the role of an agent of a corporate operator and the extent to which he should be penalized and punished for his violation of the act....

... The Committee chose to qualify the agent as one who could be penalized and punished for violations, because it did not want to break the chain of responsibility for such violations after penetrating the corporate shield.

H.R. Rep. No. 563, 91st Cong., 2d Sess. 11-12 (1969), reprinted in Legislative History of Federal Coal Mine Health and Safety Act, at 568, 569 (1970).

In passing the 1977 Mine Act, Congress evidenced its concern over the continuing high rates of preventable death and injury. Quoting a study by a Special Mine Safety Board appointed by the Secretary of the Interior, Congress observed:

On the basis of this analysis, 50.7 percent of the fatal injuries were classified as resulting "from circumstances over which the workmen had no control, but which were within the scope and range of supervisory responsibility." That is: approximately half of the 270 men killed were victims of inadequate supervision, failure to provide safety devices,

defective equipment, collapses of roof which supervisors permitted to be unsupported, inadequate ventilation, and other hazardous environmental conditions reasonably within the power of management to prevent. (emphasis added)

H.R. Rep. No. 312, 95th Cong., 1st Sess. 4 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 360 (1977).

Consistent with this expressed legislative intent, the Commission held in Kenny Richardson that a supervisor's blind acquiescence in unsafe working conditions would not be tolerated. Onsite supervisors were put on notice by our decision that they could not close their eyes to violations, and then assert lack of responsibility for those violations because of self-induced ignorance. Our decision here today is buttressed by the same concerns and principles.

Under Kenny Richardson, the question is whether, given the facts found in this case, Glenn either "knew or had reason to know" that Robinson and Martinez would, in fact, walk the girder instead of climbing the ladder and thereby violate the standard.

We answer this question in the negative. The judge specifically found, and we agree, that there is no evidence that Glenn "carried out the violation or directly ordered the miners to walk across the girder without the benefit of a safety belt." 4 FMSHRC at 20. Nor does the record establish that Glenn indirectly authorized the violation. Glenn instructed Robinson and Martinez to take their safety belts and lines with them in working on the oxygen line. 4 FMSHRC at 17; Tr. 241. Glenn did not observe either man actually cross the girder. 4 FMSHRC at 20; Tr. 289. Glenn did not presume that Robinson and Martinez would use the girder. 4 FMSHRC at 21. Glenn relied on Robinson and Martinez to complete their assigned task safely; both were experienced and highly skilled miners who had worked on a girder many times prior to the incident in question. 4 FMSHRC at 20; Tr. 263, 269, 270-71. Robinson had used the ladder on occasion to get up to the girder. 4 FMSHRC at 17. When Robinson and Martinez crossed the girder, Glenn was busy ensuring their safety otherwise by checking to insure the oxygen line valves were shut off; Glenn did not want the crew to cut into a pressurized oxygen line. 4 FMSHRC at 16; Tr. at 116, 272-73. 4/

The findings of fact by the judge as to what Glenn had "reason to know" when he assigned Robinson and Martinez the task of welding the oxygen line do not support a legal conclusion that a violation of section 110(c) occurred. The judge found only that Glenn had "reason

4/ In 21 years of Glenn's employment by Climax, neither he nor any member of any crew that he had supervised had ever lost time from work as a result of an accident. Tr. 283, 285.

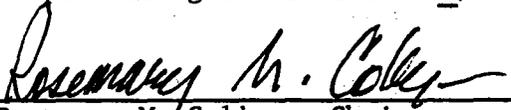
to know" that the two miners "might" use the girder without the use of safety belts and that, therefore, he had "reason to know" of a "possible violative condition" because the men "might" or "could" walk across the girder and forego use of the ladder. 4 FMSHRC at 20. As a practical matter, supervisors will always have "reason to know" that miners "might" perform tasks in an unsafe manner. This degree of knowledge, accurately phrased by the judge in the subjunctive mood, is too contingent and hypothetical to be legally sufficient under our test enunciated above that a supervisor can be held personally responsible under section 110(c) "when, based upon the facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventive steps." Moreover, for the reasons above, we reject the judge's legal conclusion that Glenn violated section 110(c) by not instructing the miners to use the ladder "because walking across the girder was at least as likely a means of getting to the oxygen line." 4 FMSHRC at 21.

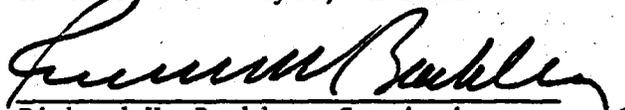
Before personal liability under section 110(c) can be imposed on an operator's agent for "knowingly" authorizing, ordering, or carrying out a violation, the Secretary's proof must rise above mere assertion that, at the time of assignment, an assigned task could have been performed by the miners in an unsafe as well as a safe manner. Adoption of this rationale could mean that, in every instance in which a miner engages in violative conduct, an operator's agent could be held personally liable under section 110(c) for failing to anticipate the miner's unsafe actions and not giving specific instructions to each miner, at the time of assignment, to avoid all of the hazardous approaches to a task that could be followed. We cannot accept as probative evidence to fill this void in the record, the assertion made by counsel for the Secretary at oral argument that "any reasonable man should have known at that time that given the situation, ... [the miners] clearly would take the easiest course to get there." Oral Arg. Tr. 36. 5/

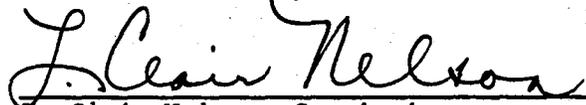
In sum, although we agree with the judge's statement that agents of corporate operators have a duty to prevent violations that they have reason to know will occur, we hold that in this case Glenn, based upon the facts available to him at the time of the work assignment, did not

5/ Although the Secretary argued in his brief that it is "obvious that walking on girders without a safety belt is a common practice at Climax," he disavowed that position at oral argument and agreed that there is no record evidence of such a practice. Oral Arg. Tr. at 46.

know, or have reason to know, that Robinson and Martinez would violate the standard. Accordingly, the judge's decision is reversed, the penalty assessment is vacated and this proceeding is dismissed. 6/


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


L. Clair Nelson, Commissioner

6/ In light of this disposition we need not reach the other issues raised by the parties.

Commissioner Jestrab dissenting:

I respectfully dissent. The statute provides in part:

Whenever a corporate operator violates a mandatory ... safety standard ... any ... agent of such corporation who knowingly authorized ... such violation ... shall be subject to the same civil penalties.... 30 U.S.C. § 820(c).

Here the experienced Administrative Law Judge weighed the evidence presented and found that the agent, Roy Glenn, knowingly authorized a violation of the standard cited and he held the agent liable. I most respectfully submit to my esteemed colleagues that there is substantial evidence to support the finding.

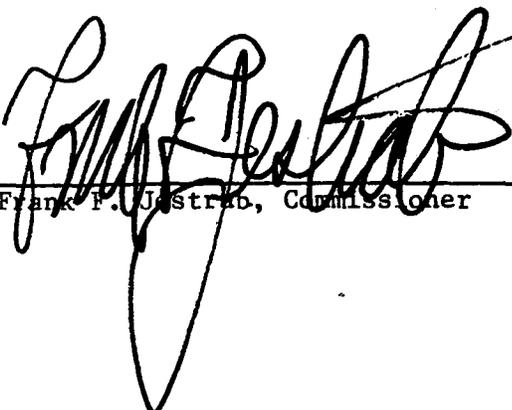
The work to be performed was a welding job on a girder over 20 feet above the floor. Tr. 22, 263. There were two ways to reach the workplace. Tr. 237. One way was to use a staircase and then walk across the girder, which had no siderails or lines to which one could tie off a safety belt. Tr. 24, 237. The other way was by use of a nearby ladder. Tr. 237, 289. The former route was selected by the workmen and thus neither workman could use his safety belt. Tr. 230, 231. The inspector cited the employer for a violation of 30 C.F.R. § 57.15-5, which provides:

Mandatory. Safety belts and lines shall be worn when there is a danger of falling....

MSHA also cited the agent, Glenn, under 30 U.S.C. § 820(c) above.

The question here is whether the agent, Roy Glenn, knowingly authorized the violation by the employer. Glenn knew of the two alternatives for reaching the site when he assigned the workman to the welding task. Tr. 289. Glenn claimed he did not know how the workmen intended to get to the workplace. See, e.g., Tr. 269, 292. Indeed, he suggested that it was of no concern to him how they proceeded to the worksite. Id. But the statute imposes upon him as an agent the duty not to authorize a violation of the standard. He is charged with knowing that which was clearly before him. His omission to eliminate the route across the girder which violated the standard, or to bring it into compliance with handrails or lines, was a knowing authorization implied in fact for the workmen and hence the corporate operator to violate the standard. There was no showing at the hearing by the agent, Glenn, that he had any expectation that the ladder would be used or if used that it would have complied with applicable safety regulations.

I would affirm the order.


Frank F. Jestrab, Commissioner

Commissioner Lawson dissenting:

Despite the rhetorical flourishes and obligatory obeisance to precedent and legislative history, today the Commission majority vitiates the principles established by Kenny Richardson. My colleagues err in concluding that the findings of the judge below are legally insufficient to support a finding of corporate agent liability under section 110(c) of the Mine Act. The Mine Act places primary responsibility for maintaining safe and healthful working conditions in our nation's mines on mine operators and their corporate agents. Sections 2(e) and 110(c). In Kenny Richardson the Commission held that a supervisor, as an agent of management, is in a position to protect the safety and health of individual miners and has a statutory duty to take affirmative action to prevent violative conduct or conditions. By their decision in this case, my colleagues have permitted corporate agents to abdicate that responsibility and permit individual miners the choice of performing their work in an unsafe manner, regardless of the hazard to them and their fellow miners. This result is inconsistent with the Mine Act's preventive goals and enforcement scheme. If through adequate supervision a violation can be prevented, it is contrary to the purpose of the Act to permit this shift of statutory responsibility.

The legislative history reflects, as the majority acknowledges, that Congress was particularly concerned over the high number of mining injuries and fatalities that resulted from inadequate supervision and hazardous workplace "conditions reasonably within the power of management to prevent" (emphasis added). H. R. Rep. No. 312, 95th Cong., 2d Sess. 4 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. 357, 360 (1978). The key is prevention--management's duty to stop violations before they occur. This requires the exercise of forethought by those responsible for maintaining safety in the mines, and is a duty that is essential to achieve the statutory purpose.

The majority in this case fails to erect any affirmative standard or framework against which one is to measure, not whether or not the admittedly violative conduct might, or could occur, but indeed whether it "would." Determining whether a violation "would" occur in the absence of supervisory action is an exercise more suited to retrospective application than to prospective intervention. If intervention is not demanded of an agent when unsafe conduct is "at least as likely" as safe conduct, but is to be required only when a violation is imminent, or has already occurred, the Act's protections would indeed be hollow. Under the majority's rationale, if the facts in this case had revealed that the miners were proceeding into an area of unsupported roof, although an alternate route was available, no supervisory duty to intervene would arise other than a last minute tackle by their supervisor, until they had actually entered the hazardous area. One searches the statute and legislative history in vain for support for such a standard.

The judge below found that Glenn had "sufficient information to give him reason to know of a possible violative condition." 4 FMSHRC 13, 20. He concluded that Glenn had a duty to instruct the miners he had ordered to go up on this girder to use the ladder, finding that "walking across the girder was at least as likely a means of getting to the oxygen lines as using the ladder." 4 FMSHRC at 21. Substantial evidence, including Glenn's own uncontroverted testimony, supports the judge's finding.

Glenn was aware of the construction of the girder, knew that there were no handrails thereon, nor cable for attachment of safety lines (Tr. 286-7). 1/ The ladder, presented as the alternative means of access, 2/ was located 40 to 50 feet distant from the job site, "up on another deck" (Tr. 286). Glenn was not only unaware of whether the ladder had been used previously to reach the girder (Tr. 286), but testified that he "did not think" about how the miners would reach the girder. According to Glenn, the miners "had two choices: they could have walked across or they could have got the ladder" (Tr. 289). He did not even believe that walking this girder, situated twenty feet above a concrete floor, presented a safety or falling hazard, despite the prohibition of the standard, of which Glenn was aware (Tr. 295). It is also undisputed that all three miners under Glenn's supervision had not used the ladder--nor safety belts or lines--but had traversed this girder without protection on the day in question. Slip op. at 2. There is no dispute as to the propriety of Payne's attempting to assist his fellow miners in the performance of the task at hand. In fact, the miners were waiting on the girder for Payne to tell them when the oxygen line had been bled and welding could begin (Tr. 130, 133). Work on this girder had been undertaken twice prior to the date of this violation, and Glenn did not know how the miners gained access to their work station on those occasions. (Tr. 251, 271, 286, 293.) Finally, and perhaps of greatest significance, if Glenn had seen miner Robinson walking across the girder, he probably would not have stopped him, "because I have seen him walk other things" (Tr. 297).

1/ It is true, as the majority states, that Glenn told his crew to take their safety belts and lines with them. However, it is also true, as Glenn acknowledged, that there was nothing to attach them to until the crew reached the assigned work area on the girder, 28 to 30 feet from the staircase.

2/ The very existence of a ladder at this mine capable of providing access to the girder is questionable. The ladder itself was, according to Glenn, "used for ventilation purposes," not for this girder. (Tr. 269.) It is most unlikely that a 20-foot extension ladder, which simple observation would reveal to have a maximum side-rail extension of 17 feet, would reach a 5-1/2 inch thick girder that is 20 feet 2 inches above the floor, even if (1) the ladder was positioned vertically rather than at the necessary angle for stability, and (2) there was something to lean it against other than the vertical support beam located 14 feet away from the work station involved in this case. See 30 C.F.R. §§ 57.11-4. It is significant that after arrival of the inspection party, rather than using this ladder to remove Robinson and Martinez from the girder, Glenn had a cable strung along the girder, upon instruction from his superior, and then personally went and obtained a cherry picker to bring the two miners down. (Tr. 280-82, 287.)

The judge below phrased Glenn's responsibility in terms of "indirect authorization." Read in context, this does not appear to differ from constructive "knowledge or reason to know," under the Kenny Richardson test, that these miners would utilize the girder to reach their work site. Indeed, it would appear that Glenn had actual knowledge of at least Robinson's earlier noncompliance with the safety standard, and had through inaction condoned such in the past. (Tr. 297.) Failing to correct an unsafe practice which is known is indistinguishable from authorizing that practice to continue.

Here, there was a "high probability of the existence of the fact in question," U.S. v. Jewell, 532 F.2d 697, 700, (9th Cir.), cert. denied. 426 U.S. 951 (1967): walking the girder without utilizing safety belts. Knowledge by Glenn of the violation of this standard by a member of his crew is thus properly imputable to him. The facts in this case do not present the situation, so alarming to the majority, in which a supervisor fails to anticipate "all of the hazardous approaches to a task that could be followed." (slip op. at 6). It is thus unnecessary to determine the outer limits of an agent's liability under some factual construct not presented by this record. The judge's finding that use of the girder to gain access to the work area was at least as likely as use of the--it would appear inadequate--ladder, is no more than a restatement of Glenn's own view of the alternatives presented. Glenn, as the judge found, did not consider it to be unsafe for Robinson and Martinez to walk across the girder without safety belts, preferring to rely on their opinion of the hazard involved, rather than insisting that there be compliance with the regulation. (Tr. 295, 4 FMSHRC at 20). This is, simply put, not only to ignore, but to condone, unsafe and violative work practices by knowingly allowing the individual miners that option.

The test under Kenny Richardson is whether Glenn had information that would lead a person exercising reasonable care, who is responsible for the proper performance by miners of their assigned duties and is in a position to forestall safety and health hazards, to be aware of the existence of a violative condition, and whether he failed to act on the basis of that information. 3 FMSHRC at 16. It is abundantly clear from this record that Glenn should have known with the exercise of reasonable, even minimal, diligence of the hazardous conduct involved in this case, as the judge below found. See Austin Building Co., v. OSHRC, 647 F.2d 1063, 1067-68, (10th Cir. 1981). To ignore work performed or to be performed, or not to think about how that work is to be done (Tr. 289), in violation of an admittedly applicable standard, is to reward the type of see-no-evil approach to mine safety that the majority claims to disavow. The judge's finding that Glenn had sufficient information to give him reason to know of the existence of a violative condition and a duty to act on the basis of that information is the relevant determination under Richardson, and is supported by substantial evidence. 3/

3/ To the extent that any doubt may have existed as to the degree of Glenn's negligence and responsibility, the response of the judge below, which was to reduce the proposed penalty from \$500.00 to \$40.00, would appear to be both equitable and eminently reasonable. 4 FMSHRC at 21, 22.

For the reasons set forth, I would affirm the decision and order of the judge. 4/

I therefore join with Commissioner Jestrab and dissent.



A. E. Lawson, Commissioner

4/ The judge's rulings on the constitutional and procedural issues raised below and renewed before the Commission are correct, for the reasons given.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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July 18, 1984

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket No. WEVA 83-65-R
KITT ENERGY CORPORATION :

DECISION

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), involves the interpretation of section 104(d) of the Mine Act. Section 104(d) authorizes the Secretary to issue mine withdrawal orders for a certain chain of violations, the chain to be broken only by an intervening "clean" inspection. The principal issue in this case is whether an inspection under section 104(d)(2) of the Mine Act, commonly referred to as a "clean inspection," must be a complete regular quarterly inspection. Also at issue is whether Kitt Energy Corporation (Kitt) unwarrantably failed to comply with 30 C.F.R. § 75.1722(a), a machine guarding standard. A Commission administrative law judge concluded that Kitt unwarrantably failed to comply with the cited standard and affirmed the section 104(d)(2) withdrawal order issued to Kitt, concluding that an intervening clean inspection of the mine had not occurred so as to break the section 104(d) withdrawal order chain. 5 FMSHRC 201 (February 1983) (ALJ). For the reasons that follow, we reverse on the clean inspection issue, but affirm the conclusion that Kitt unwarrantably failed to comply with § 75.1722(a).

On December 1, 1982, during a regular quarterly inspection of Kitt's underground coal mine, an inspector of the Department of Labor's Mine Safety and Health Administration (MSHA) issued a section 104(d)(1) citation to Kitt alleging a violation of § 75.1722(a). The citation stated that "[a] guard was missing from the eccentric on the scalping screen and the guard over the belt drive was not adequate in the bin area." 1/ The citation

1/ 30 C.F.R. § 75.1722(a) provides:

Gears; sprockets; chains; drive, head, tail, and
takeup pulleys; flywheels; couplings, shafts;
sawblades; fan inlets; and similar exposed moving
machine parts which may be contacted by persons,
and which may cause injury to persons shall be
guarded.

indicated that the violation was "significant and substantial" and caused by Kitt's "unwarrantable failure." See section 104(d)(1), 30 U.S.C. § 814(d)(1). The citation was terminated 1-1/2 hours later, after Kitt blocked access to the area with a mesh screen and posted a danger sign.

On December 22, 1982, the inspector issued a modification converting the section 104(d)(1) citation to a section 104(d)(2) withdrawal order. 2/ He did so after reviewing MSHA records and determining from those records that a clean regular inspection of the mine had not been completed since the issuance of a prior section 104(d)(2) withdrawal order on July 14, 1982. 3/

The alleged violative condition cited by the inspector involved moving parts of a vibrator machine which controlled the flow of coal and sorted it by size. The vibrator caused small pieces of coal to drop onto and through a scalping screen down onto the slope conveyor belt carrying the coal to the surface. Large pieces of coal were moved first to a crusher and then to the slope belt. The citation alleged that the belt drive on the vibrator motor was inadequately guarded and that the eccentric, a crescent-shaped wheel behind the belt drive that rotated and moved the scalping screen, was unguarded. The belt drive guard consisted of a sheet metal frame to which a mesh screen was attached. The frame was not bolted to the floor. The screen was attached loosely by wires, ended about 23 inches above the floor, and had a hole in its upper right-hand corner. The eccentric protruded above the belt guard at times during its rotation.

The inspector issued the citation during a regular inspection conducted from October 14 through December 17, 1982. MSHA had issued a prior section 104(d)(2) order on July 14, 1982, during a regular inspection conducted at Kitt's mine from July 2 through September 28, 1982. The administrative law judge construed section 104(d)(2) of the Mine Act as requiring a complete regular inspection of the entire mine, during which no "similar" violations are discovered, before an operator is removed from that section's continuing withdrawal order sanctions. Finding that no such intervening complete regular inspection had occurred here, he affirmed the order. The judge further found, however, that MSHA had "visited" all active sections of the mine in the period between the issuance of the July 14 withdrawal order and the order at issue in this proceeding.

On review, Kitt asserts that the judge's affirmance of the second section 104(d)(2) order is inconsistent with Commission case law, and that the Secretary failed to carry his burden of proving the absence of an intervening clean inspection. Kitt further argues that the judge's finding that MSHA "visited" all sections of the mine, without citing another similar violation, required him to conclude that an intervening clean inspection sufficient to remove Kitt from section 104(d)(2) sanctions had been completed.

2/ The inspector subsequently issued another modification deleting his finding that the violation was significant and substantial.

3/ The term "regular inspection" refers to the quarterly or semi-annual inspections of underground or surface mines, respectively, "in [their] entirety" mandated by section 103(a) of the Mine Act. 30 U.S.C. § 813(a).

Section 104(d)(2) of the Mine Act provides:

If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to [section 104(d)(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 [section 104(d)(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 [section 104(d)(1)] shall again be applicable to that mine.

30 U.S.C. § 814(d)(2) (emphasis added). The dispute in the present case concerns the meaning of the phrase "an inspection of such mine" as used in section 104(d)(2). The Secretary argues that the judge correctly concluded that the phrase means only a complete regular inspection conducted pursuant to section 103(a). In the Secretary's view, only a complete regular inspection is comprehensive enough to satisfy section 104(d)(2)'s requirement, because only through such an inspection is a mine inspected "in its entirety." The Secretary further asserts that to hold otherwise would impose "serious enforcement problems" upon MSHA because the task of determining whether a complete inspection has occurred since the issuance of a preceding withdrawal order is complicated if a series of separate inspections can comprise "an inspection" of the mine.

We have previously considered and rejected these same arguments in construing the identical statutory provision in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 814(c)(1976) (amended 1977). CF&I Steel Corp., 2 FMSHRC 3459 (December 1980); U.S. Steel Corp., 3 FMSHRC 5 (January 1981); Old Ben Coal Co., 3 FMSHRC 1186 (May 1981). In CF&I we stated:

The requirement of a clean inspection before an operator could avoid being subjected to section 104(c)(2) [now 104(d)(2)] withdrawal orders was intended to further public interest in promoting earnest and continuous compliance with mandatory safety and health standards. Nothing in the record, however, suggests that the Secretary's position--that only a complete regular quarterly inspection can constitute a "clean" inspection of the entire mine--is necessary to achieve this interest.

2 FMSHRC at 3461. Our conclusion on this issue was in accord with the long-standing adjudicative interpretation of the Coal Act provision by the Department of Interior's Board of Mine Operations Appeals. In Eastern Associated Coal Corp., 3 IBMA 331 (1974), the Board held that the language at issue "appears to us to direct a thorough examination of the conditions and practices throughout a mine." 3 IBMA at 358 (emphasis in original).

On reconsideration, the Board stressed that "several completed partial or completed spot inspections of a mine may be required to constitute a 'complete inspection' of a mine in order to lift the withdrawal order liability of an operator from the provisions of section 104(c)(2) [now 104(d)(2)]." 3 IBMA 383, 386 (1974)(emphasis in original).

Nothing in the text of the Mine Act or its legislative history indicates that this construction of the Coal Act's "clean inspection" provision was flawed or contrary to legislative intent. Furthermore, nothing in the arguments repeated by the Secretary here persuades us that our prior construction of this provision is inconsistent with and should not be applied to the Mine Act. In fact, as explained below, we believe that adoption of the Secretary's argument could prove a disincentive to maximum compliance efforts by mine operators.

By its terms section 104(d)(2) requires that there be "an inspection of such mine" disclosing no similar violations. A narrow, literal interpretation of the term "an inspection" to mean any inspection, including an inspection of only a portion of a mine, previously has been rejected. Eastern, 3 IBMA at 357-58. Instead, the term consistently has been construed to require the inspection of a mine in its entirety. CF&I, supra; Eastern. This construction is in complete accord with the passages in the Mine Act's legislative history cited and relied upon by the Secretary in his brief. See S. Rep. No. 181, 95th Cong., 1st Sess. 31-34 (1977), 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 619-22 (1978).

The Secretary's attempt to exclude from consideration under section 104(d)(2) all inspections other than the so-called regular inspections is unconvincing. In previous litigation the Secretary has argued successfully that "spot inspections," i.e., any inspection conducted for enforcement purposes other than regular inspections, are conducted pursuant to section 103(a). UMWA v. FMSHRC and Helen Mining Co., et al., 671 F.2d 615 (D.C. Cir. 1982), cert den. sub nom. Helen Mining Co. v. Donovan, 459 U.S. 927 (1982). In that case the Secretary asserted that his designations of inspections as "spot" or "regular" inspections are administrative designations not established in the Act and that there is "substantial overlap" between the two "types" of inspections. See Sec. Brief in UMWA v. FMSHRC at 20, 21, 24. We find this position consistent with our conclusion that inspections other than "regular" inspections can be taken into account under section 104(d)(2). Any MSHA inspector conducting any enforcement inspection authorized by the Mine Act is required to cite every observed violation of the Act or its standards. The fact that during a particular inspection an inspector may give emphasis to particular types of hazards does not serve to place blinders on the inspector or prevent the issuance of citations for other violations. For example, an inspector is required to cite roof control violations he observes even if he is present for an electrical inspection. Furthermore, the fact that a miners' representative is entitled to accompany a federal inspector during inspections (30 U.S.C. § 813(f); see UMWA v. FMSHRC, supra) lessens the possibility that an inspector conducting an inspection with a particular emphasis will fail to detect the presence of other hazards.

We also believe that adoption of the Secretary's interpretation of section 104(d)(2) could undercut the incentive for maximum compliance efforts by mine operators. Under the Secretary's interpretation, if a "similar violation" under section 104(d)(2) results in the issuance of a withdrawal order at the beginning of a regular inspection (which can last for three months), the incentive to avoid further violations may be lessened because section 104(d)(2)'s sanctions have already been triggered. Thus, there is no possibility that the operator can remove itself from the operation of section 104(d)(2) until after the completion of the following regular inspection. In contrast, applying the plain words of section 104(d)(2), an operator has an immediate incentive to avoid future "similar" violations: the operator knows that continued avoidance of similar violations will remove it from the possible sanctions of section 104(d)(2) as soon as the mine has been inspected in its entirety through any combination of regular and spot inspections.

We are not persuaded by the Secretary's argument that extending the construction consistently given to section 104(c)(2) of the Coal Act to the identical language of section 104(d)(2) of the Mine Act will result in insurmountable problems of enforcement and proof. The Secretary asserts that MSHA will be unduly burdened if, in order to sustain a section 104(d)(2) order, it is required to establish that it has not inspected a mine in its entirety, rather than simply showing that a clean regular inspection has not been completed. The burden complained of is in part caused by the fact that mines, or portions thereof, may be inspected at different times, in different sequences, by different MSHA inspectors. According to the Secretary, unless an inspector is permitted to refer to the simple benchmark of whether a complete clean regular inspection has occurred since the issuance of a prior section 104(d) order, the enforcement purpose behind section 104(d)(2) will be seriously frustrated by "complicated and time consuming problems of record keeping and proof." Sec. Brief at 16.

We have difficulty reconciling the result sought by the Secretary with the statutory requirements. Administrative convenience cannot be a basis for determining statutory rights. Section 104(d)(2) authorizes the issuance of withdrawal orders "until such time as an inspection of such mine discloses no similar violations." The burden of establishing the validity of such an order, necessarily including proof that an intervening clean inspection has not occurred, appropriately rests with the Secretary. It is not necessary to view this burden, as the Secretary asserts, as requiring proof of a negative. Rather, the Secretary must only demonstrate that when his inspector issued the contested order, portions of the mine remained to be inspected. We do not believe that this burden requires the Secretary to depend on evidence unavailable to him in order to establish his case. In order to carry out his statutory duties properly, the Secretary maintains records of all inspections conducted in a mine and the extent of those inspections. The contention that the Secretary or his representative cannot determine the areas of a mine that have been inspected in any given period, or the areas that remain to be inspected in a future period, gives us great concern. The very same record keeping, which the Secretary claims to be burdensome, is necessary in order to support the claim that a "regular" clean inspection has not occurred. If the Secretary's record keeping system is not presently

up to this task, of which we are not persuaded, proper administration of the Mine Act requires that the Secretary maintain a workable mine inspection record keeping system. 4/

For the foregoing reasons, we reject the Secretary's argument that under section 104(d)(2) of the Mine Act, a clean inspection can only be comprised of a complete regular inspection. Instead, we extend to section 104(d)(2) the prior consistent interpretation of section 104(c)(2) of the Coal Act, and hold that the essential determinant of a clean inspection under section 104(d)(2) is whether the entire mine has been inspected since the issuance of a prior 104(d) order with no "similar" violations cited. 5/

The factual question presented in this case is whether the inspections conducted by MSHA between the first section 104(d)(2) order issued on July 14, 1982, and the second order issued on December 1, 1982, comprised, in the aggregate, a clean inspection of the entire mine. The judge made three findings crucial to this question:

- [1] MSHA began a complete quarterly inspection ("AAA inspection") of the subject mine on July 2, 1982, and completed it on September 28, 1982. Another quarterly inspection was begun on October 14, 1982....
- [2] A special technical inspection ("CEF investigation") was commenced on July 19, 1982, and completed on August 6, 1982.
- [3] All the active sections of the mine were visited by MSHA inspectors (in either the regular inspection or the technical inspection) between July 19, 1982, and September 28, 1982.

5 FMSHRC at 202. If supported by substantial evidence, these findings lead to the conclusion that an intervening clean inspection had occurred between the two withdrawal orders. (The Secretary does not argue, and there is no suggestion in the record, that the judge's use of the term "visited" was intended to mean anything other than "inspected.")

Because of his view that a complete regular inspection was necessary to remove the operator from the effect of section 104(d)(2), maintained despite CF&I, U.S. Steel, and Old Ben, supra, the Secretary did not attempt to

4/ The Secretary further claims that rejection of his view would lead to section 104(d)(2) orders being issued as a "matter of hindsight." We note that in this case, where the inspector followed the Secretary's interpretation, he issued the subject 104(d)(2) order only as a modification to a citation issued three weeks earlier, after reviewing relevant MSHA records.

5/ Administrative law judges of this Commission must follow our precedent where applicable. The judge's failure in this case even to mention our prior decisions construing section 104(c)(2) of the Coal Act is inexplicable.

establish that portions of Kitt's mine had gone uninspected since the issuance of the July 14 order. Therefore, the Secretary failed to establish an essential element of his prima facie case. In addition, in this case the operator presented evidence as to the extent of the inspections made during the relevant period. The prior section 104(d)(2) withdrawal order was issued on July 14, 1982, during a regular inspection that had begun only twelve days earlier. This regular inspection was not completed until September 28, 1982. During the period of July 14 to September 28, two to three MSHA inspectors were in all active sections of the mine conducting the regular inspection as well as a combination of spot and technical inspections. During this period no other unwarrantable failure citations were issued by any of the inspectors. On October 14, 1982, another regular inspection was begun. Between that date and December 1, 1982, when the violation at issue was cited, no other unwarrantable failure citations were issued. 6/ Thus, substantial evidence supports the judge's finding that all active sections of the mine were inspected in the period between the issuance of the July 14 order and the December 1 citation. Therefore, we reverse the judge and vacate the order.

Invalidation of the order does not end the case, however. We have held that the underlying violation survives the vacation of a section 104(d) withdrawal order. Island Creek Coal Co., 2 FMSHRC 279, 280 (February 1980); see also Consolidation Coal Co., 4 FMSHRC 1791, 1793-97, (October 1982). 7/ Here, the inspector cited a violation of 30 C.F.R. § 75.1722(a). Kitt does not challenge the judge's finding that one of the conditions described by the inspector, i.e., the unguarded eccentric, violated the standard. Kitt does contest, however, the judge's finding that the belt guard was inadequate. Although our affirmation of the judge's finding of a violation of § 75.1722(a) could rest on the unguarded eccentric alone, we will address briefly Kitt's arguments regarding the belt drive.

The judge concluded that the belt guard was in violation of the cited standard because injury could result from contact with the moving belt drive due to the gap at the bottom of the screen, the hole in the upper right-hand corner of the screen and its looseness. He found further that at least one employee was in the area during each of three shifts and that a rope or wire across the area was not adequate to prevent access and in any event was not present on the day the inspector issued the citation. 5 FMSHRC at 204-05, 207. These findings are supported by substantial evidence. The record establishes that on each of three shifts a miner was in the area to remove spillage from

6/ The dates of the MSHA inspections and the sections inspected were contained in Exhibit C-18, a cumulative record of MSHA inspections of active sections of the mine during this period. The Secretary objected to the introduction of the exhibit solely because it did not specify the types of inspections conducted, particularly the regular quarterly inspections, without which in his view there could be no intervening clean inspection. The judge properly admitted the exhibit.

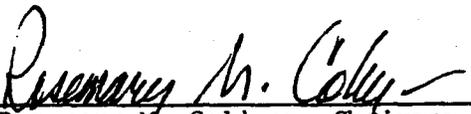
7/ Since the "significant and substantial" designation was removed from the 104(d)(2) order, it does not become a 104(d)(1) order but a 104(a) citation.

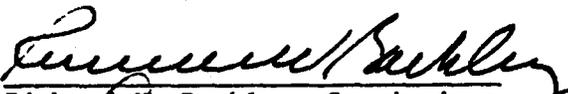
the scalping screen and other miners were intermittently in the area to perform maintenance work. These miners had access to the scalping screen; they merely lifted the rope or wire across the area when it was present. The scalping screen operated almost continuously. Although most of the spillage dropped through the metal floor grating, some spillage and grease were on the floor near the scalping screen, creating a slip and fall hazard. The defects in the screen and the level of employee exposure, taken together, support affirmance of the judge's conclusion that the condition of the belt guard violated the standard.

The judge further concluded that the lack of a guard on the eccentric, as well as the inadequate guard on the belt drive, were caused by Kitt's unwarrantable failure to comply with the standard. The judge found Kitt's awareness of the unguarded eccentric demonstrated by recurring notations of the condition in the preshift book, fabrication of replacement guards, the ordering of a new guard, and the ineffective use of a wire to block access to the area. 5 FMSHRC at 207-08. He found unwarrantable failure as to the belt guard because it was clearly visible and Kitt's chief electrician, who visited the area monthly, should have been aware of it. 5 FMSHRC at 208. Kitt challenges both of these findings.

For the reasons stated by the judge, we affirm his determination that Kitt unwarrantably failed to guard the eccentric. See U.S. Steel Corp., Docket Nos. LAKE 81-102-RM, et al., June 26, 1984. Whether the judge properly found unwarrantable failure as to the belt drive guard is a closer question, and we might have reached a different result de novo. The judge's finding is based on his apparent belief that the belt drive guard had existed in the condition observed by the inspector for some time and that the operator had to have been aware of its condition. The record sheds little direct light on the questions of how long the condition had existed and who was aware of the violative condition. Nevertheless, in view of the conspicuous nature of the defective condition of the belt guard, the testimony of Kitt's chief electrician that he was in the area periodically, and the lack of compelling contrary record evidence on these points, we conclude that substantial evidence supports the judge's unwarrantable failure finding as to the belt drive guard. We note, however, that only one citation was issued and only one violation alleged.

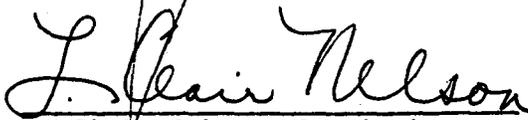
Accordingly, we reverse the judge's finding that the section 104(d)(2) withdrawal order was validly issued, but affirm his conclusions that Kitt violated the standard and that the violation was caused by Kitt's unwarrantable failure.


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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JULY 2, 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No: WEST 83-106
Petitioner : A/O No: 48-01186-03031
: :
: :
v. : Carbon Mine
: :
: :
CARBON COUNTY COAL COMPANY, :
Respondent :

RULING ON MOTION AFTER REMAND FROM THE COMMISSION
AND RECONSIDERATION

The Commission has remanded this case to me for reconsideration of Respondent's Motion for Summary Decision. The Commission did not give instructions as to what I should do subsequent to reconsideration of the motion. I am therefore, going to treat the matter as though I were ruling on it for the first time. For the reasons stated hereinafter, I will DENY respondent's motion for summary judgement and will anticipate going to trial in this case. */ If the respondent feels it to be worth while, it can again petition the Commission for interlocutory review and if the petition is granted I will again stay with the proceedings.

The holding in Zeigler Coal Company vs. Kleppe, 536 Fed. 2d. 398 (D.C. Cir. 1976) is that the violation of a non-controversial ventilation plan is the equivalent of a violation of a mandatory standard. The terms of the ventilation plan involved in that case were not in dispute. The Court went on however, to discuss hypothetical plans which might contain controversial requirements. The Court said for example at Page 406-407:

The statute makes clear that the ventilation plan is not formulated by the Secretary, but is "adopted by the operator." While the plan must be approved by the Secretary's representative who may

*/ Certain language in the Commission's opinion indicates to me that the Commission wanted me to grant the Motion for Summary Judgement in favor of Carbon County Coal. But the Commission had before it all the facts that I have before me and if it wanted the motion granted it could have done so itself or it could have ordered me to grant it.

on that account have some significant leverage in determining its contents, it does not follow that he has anything close to unrestrained power to impose terms. For even where the agency representative is adamant in his insistence that certain conditions be included, the operator retains the option to refuse to adopt the plan in the form required. Were the statute not clear enough on its face, the IBMA's recent decision in Bishop Coal Company establishes beyond doubt that adoption of the plan by the operator is an essential prerequisite to the enforcement of any of its terms.

The agency's recourse to such a refusal to adopt a particular plan appears to be invocation of the civil and criminal penalties of section 109, which require an opportunity for public hearing and, ultimately, appeal to the courts. At such a hearing, the operator may offer argument as to why certain terms sought to be included are not proper subjects for coverage in the plan. Because we believe that the statute offers sound basis for narrowly circumscribing the subject matter of ventilation plans, we conclude that this opportunity for review is a substantial safeguard against significant circumvention of the section 101 procedures.

The last paragraph quoted above describes a situation very similar to what occurred in the instant Carbon County case. The procedure in the instant case is succinctly described on pages 2 and 3 of the Commission's decision as follows:

The Carbon No. 1 Mine is located in MSHA Coal Mine Safety and Health District 9, headquartered in Denver, Colorado. District 9 had published "guidelines" regarding the contents of ventilation system and methane and dust control plans. The District 9 guideline regarding the amount of air to be made available to auxiliary exhaust fans stated "]T[he volume of intake air delivered to the fan prior to the fan being started shall be greater than the free discharge capacity of the fan." The District 9 guideline essentially restated MSHA's national guideline regarding the amount of air to be made available to exhaust fans. The national guideline stated in part: "]T[he volume of positive intake air current available . . . shall be greater than the free discharge capacity of the fan." The legal effect of the District 9 guideline, and of MSHA's possible reliance upon it during the plan review process, are at issue in this case.

By August 1981, negotiations over the free discharge capacity requirement reached an impasse, and the parties were unable to agree on a plan requirement governing the amount of air to be made available to the auxiliary fans. In a letter dated August 21, 1981, MSHA revoked its approval of Carbon County's plan dated August 25, 1980, and stated that it would not approve Carbon County's plan unless the plan contained the free discharge capacity provision. After MSHA's revocation of approval of Carbon County's plan, Carbon County failed to submit a plan containing the provision sought by MSHA and continued to operate the mine. As a result, MSHA issued a citation and withdrawal order to Carbon County, under sections 104(a) and (b) of the Mine Act, respectively, for operating without an approved ventilation plan. The violation was abated when MSHA approved, and Carbon County adopted, a plan which contained the free discharge capacity requirement. MSHA then sought a civil penalty for the alleged violation.

On Page 407, the Zeigler court stated that the ventilation plan "was not to be used to impose general requirements of a variety well suited to all or nearly all coal mines, but rather to assure there is a comprehensive scheme for realization of the statutory goals in the particular instance of each mine." This is the language principally relied on by respondent. As I understand respondent's position, inasmuch as MSHA is following a guideline which contains a requirement that is not a mandatory standard, it must be following that guideline universally in apparent violation of the language in the Zeigler opinion. As to the guidelines themselves MSHA has habitually instructed its district offices and inspectors by the various Cook, and Crawford memorandums as well as by the inspection manuals. This Commission has never felt that it or the operators were bound by such guidelines and many of them have been either set aside or ignored by the Commission and its judges. If this case ever comes to trial I may decide that the guideline in question is invalid and that the proper amount of air to be supplied at the face must exceed the capacity of the exhaust fan if the tubing fails at the worst possible place. In all likelihood such a requirement would not be "suited to all or nearly all coal mines" and would not contradict the court's dicta. In fact any quantity of air that I might decide upon, unless I uphold the MSHA guideline in its entirety, would probably not be a quantity of air suited to all or nearly all mines. But if on the other hand, I find, as a matter of engineering fact, that in order to avoid recirculation as prohibited by a mandatory standard, it is necessary to have the air at the face exceed the free

discharge capacity of the exhaust fan in any mine, then the guideline should apply to all mines and the fact that the provision is not a specific mandatory standard and the quoted language of the Ziegler case should not be allowed to stand in the way of mine safety.

I find that there are unresolved factual issues necessary for the resolution of this case and that a summary decision is not appropriate. The Motion is accordingly DENIED.

Charles C. Moore, Jr.
Charles C. Moore, 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

JUL 3 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 84-24
Petitioner : A.C. No. 12-01729-03502
v. :
: Grandview Dock
GRANDVIEW DOCK CORPORATION, :
Respondent :

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the
Solicitor, U.S. Department of Labor, Chicago,
Illinois, for Petitioner;
Cedric Hustace, Esq., Bowers, Harrison, Kent
& Miller, Evansville, Indiana, for
Respondent.

Before: Judge Melick

Hearings were held in this case on April 24, 1984, in
Evansville, Indiana. A bench decision was thereafter ren-
dered and appears below with only non-substantive changes.
That decision is now affirmed.

This case is, of course, before me upon the petition
for assessment of civil penalty, filed by the Secretary of
Labor, pursuant to section 105(d) of the Federal Mine Safety
and Health Act of 1977, for five violations of mandatory
standards. The issues before me are whether there were vio-
lations of the regulatory standards as cited, and, if so,
whether the violations were "significant and substantial,"
as set forth in the Act and as defined by the Commission.
If violations are found to exist, I must also determine the
appropriate civil penalty to be assessed. The operator in
this case, Grandview Dock Corporation (Grandview), chal-
lenges only the amount of penalty to be assessed and does
not challenge the existence of the violations or that they
were "significant and substantial."

Citation No. 2319454 charges a violation of the regula-
tory standard at 30 C.F.R. § 77.1710(d) and reads as
follows: "Kermit Harlen, miner, was not wearing a suitable

hard hat (no hat). He was in the working area of the coal crusher facilities." The cited standard provides in essence that a suitable hard hat or hard cap must be worn when in or around a mine or plant where falling objects may create a hazard.

Now, the evidence in this case indicates that during the course of a spot inspection of the Grandview facilities on October 5, 1983, Inspector Stanley Ozalas observed two miners, Kermit Harlen and Richard Briggeman, working in the mine premises without hard hats. There is no dispute that the violation was accordingly committed by the operator.

According to the undisputed testimony of Inspector Ozalas, the hazard here was created by the fact that there was only 20 to 30 feet from where these miners were working an elevated coal conveyor belt from which chunks of coal, varying in size from the size of a fist to the size of a man's head, were falling. The conveyor was on an incline, rising to a height of approximately 25 to 30 feet. Beneath the conveyor was a travelway on which miners were walking. Considering the weight of the chunks of coal, the inspector opined that serious injuries and, indeed, a fatality could occur from such a condition. That is, a miner walking beneath the conveyor, without a hard hat, exposed to the falling chunks of coal. The inspector also observed that the conveyor rollers weighing about 15 pounds have been known to fall off the conveyor.

Foreman, Jack Crowe, also admitted in essence that he was aware of the coal chunks falling off of the conveyor inasmuch as he told the inspector that he had intended to install sideboards to prevent the coal from falling off. It is also clear from the inspector's testimony that Mr. Crowe could easily have seen the men working without their hard hats. So under all the circumstances, I do consider that this violation was of a serious nature, and was the result of operator negligence. The cited condition was abated in a timely fashion, when the miner immediately retrieved his hard hat and put it on.

It is not disputed that the violation charged in Citation No. 2319455 was the same as that charged in the prior citation except that it involved a different miner, Richard Briggeman, not wearing his hard hat. The two men were working side by side and were exposed to the same hazards. I therefore find that this violation was also serious and was caused by operator negligence.

Citation No. 2319446 charges a violation of the regulatory standard at 30 C.F.R. § 77.410, and reads as follows: "The automatic warning device did not give an audible alarm when the 988B Caterpillar No. 1 end loader was put in reverse. The end loader was operating over the entire coal crusher site."

The cited standard reads as follows: "Mobile equipment, such as trucks, fork lifts, front end loaders, tractors and graders shall be equipped with an adequate automatic warning device, which shall give an audible alarm when such equipment is put in reverse."

According to the undisputed testimony of Inspector Ozalas, there was indeed no backup alarm on the cited front-end loader. Moreover, during the course of the inspection, the loader nearly backed into the inspection party. The violation was hazardous because of the number of pedestrians moving about the premises, including truck drivers who occasionally exit their trucks, a coal sampler, the foreman, the operator of the small Bobcat front-end-loader and two other miners. The hazard was increased because of the limited visibility to the rear, and the fact that the loader was being operated carelessly. In addition, since no one was acting as a spotter, it was impossible for the machine operator to know whether pedestrians were behind him.

Although the loader operator claimed that he did not know the alarm was defective, I accept the inspector's undisputed testimony that the backup alarm is loud enough so that the operator should know when it fails. Moreover, since the foreman was situated within 20 feet of the loader, he should have been aware of the malfunctioning alarm. I find that serious and fatal injuries were likely under the circumstances and that it was therefore a serious hazard. I further find that the violation was caused by operator negligence.

Citation No. 2319457 charges a violation of the standard at 30 C.F.R. § 77.400(a) and reads as follows: "A guard was not provided to prevent a person from contacting the rotating pulley and conveyor belts, and result in injury. The conveyor belt was transferring coal from the coal crusher." Citation No. 2319458 also charges a violation of that standard and reads as follows: "A guard was not provided to prevent a person from contacting the rotating pulley and conveyor belt and result in injury. The conveyor belt was transferring coal to the coal crusher."

The cited standard provides that, "Gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, saw blades, fan inlets, and similar exposed moving machine parts, which may be contacted by persons and which may cause injury to persons shall be guarded." Inspector Ozalas testified that the exposed belt and rotating pulley noted in Citation No. 2319457 was located only 12 inches off the ground and within 2 or 3 feet of a walkway. The unguarded area was described as approximately 4 feet long, 2 feet wide, and 5 feet across the end and over the top of the belts. In other words, both the sides and the top of the exposed area needed covering or other protection.

The conveyor was in operation when cited, and the rapidly moving pulley, indeed, posed a serious hazard to miners working nearby and to passersby contacting the moving parts, becoming entangled and having limbs crushed or broken, and even causing fatalities. Indeed, according to Inspector Ozalas, there has been a history of fatalities resulting from miners caught in such moving machine parts. The greaser and the miner responsible for cleanup around the conveyor were the most likely persons exposed to the hazard. While the foreman indicated that it was the practice for the machinery to be shut down before cleanup and/or greasing operations, it is not unusual according to Ozalas for employees to nevertheless disregard such practice and to work near these dangerous exposed moving machine parts resulting injuries and, indeed, fatalities. Under the circumstances, I find that there was a serious hazard created by this violation.

I also find that the violation was the result of a high degree of negligence and in fact was a violation known by mine management. The guard was lying adjacent to the exposed area and was partially covered with coal, indicating to the inspector that it had been lying there for some time. The mine foreman also admitted to Inspector Ozalas that he knew the protective guard had been removed.

The facts surrounding Citation No. 2319458 are similar, in that the protective guard had been removed. The guard in this case had been damaged and a part was missing. The exposed conveyor and pulley were only about a foot off the ground and the pulley was only 2 or 3 feet from a walkway known as an employee short cut. It thereby posed a serious hazard to miners working on the belt or passing nearby. The fast moving conveyor was also operating when cited and under the circumstances I find that serious hazard existed. There was also a high degree of negligence, based on the admissions

of the foreman that he had, indeed, had the guard removed from the conveyor and pulley.

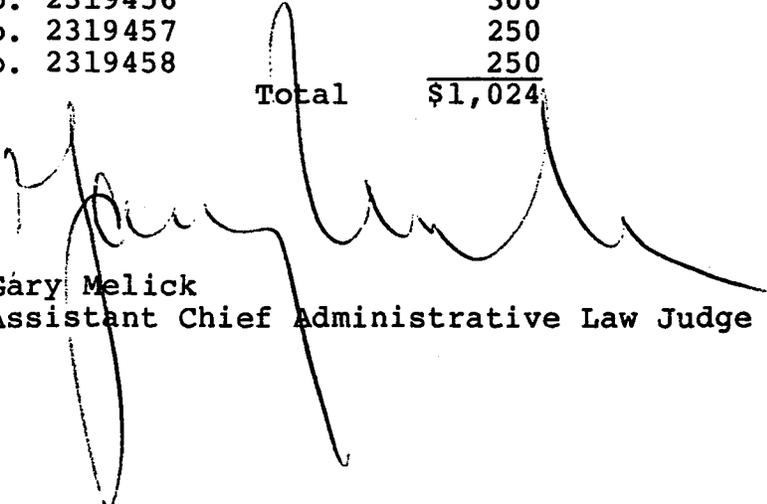
Now, in determining the amount of penalty to be assessed in this case, I must look also, of course, to the size of the mine operator, and the history of its violations. The mine operator is apparently small in size, but I am particularly concerned in this case with its history of violations. The inspector has testified, and this is supported by the computer printout of record (Petitioner's Exhibit No. 6), that there has been a pattern of prior violations of the standards cited in this case. This evidence shows that on December 15, 1981, there had been an equipment guarding violation, on January 20, 1982, there had been two equipment guarding violations, and on March 2, 1983, there had been another equipment guarding violation. In addition, with respect to the failure to have a backup alarm in this case, I note that on January 20, 1982, there were two violations for failing to have operative backup alarms and again on March 2, 1983, a violation for failing to have an operative backup alarm.

This pattern of violations, with, I note, rather small assessments given, shows to me that the mine operator has not been impacted sufficiently to take corrective measures with respect to these violations. I therefore am going to assess penalties in excess of those proposed by the Secretary of Labor in this proceeding.

ORDER

The Grandview Dock Corporation is ordered to pay the following civil penalties within 30 days of the date of this decision:

Citation No. 2319454	\$ 112
Citation No. 2319455	112
Citation No. 2319456	300
Citation No. 2319457	250
Citation No. 2319458	250
Total	<u>\$1,024</u>


Gary Melick
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 3 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	
U.S. STEEL MINING COMPANY, INC., Respondent	:	Docket No. PENN 83-96 A.C. No. 36-03425-03516 Docket No. PENN 83-97 A.C. No. 36-03425-03517 Maple Creek No. 2 Mine

DECISION

Appearances: David A. Pennington, Esq., and Thomas A. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The above cases involve alleged safety violations in the same mine cited during inspections in December 1982. The cases were consolidated for the purposes of hearing and decision. A total of eight citations are involved in the two dockets, and the parties have proposed to settle three of them. Pursuant to notice, the cases were called for hearing in Washington, Pennsylvania, on November 29 and 30, 1983. Because of the unavailability of a government witness, the cases were continued to April 24, 1984, when the hearing was completed. Alvin Shade, Okie Wolfe and Francis E. Wehr testified on behalf of Petitioner; Paul Gaydos, Brian Howarth and Wayne Croushore testified on behalf of Respondent. Both parties have filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the follow decision.

PROPOSED SETTLEMENT

Citation No. 2013974

This citation charged a violation of 30 C.F.R. § 75.503 because a conduit was out of the packing gland on the left headlight and on the methane monitor of the continuous miner. The violation was originally assessed at \$136 and was designated significant and substantial. By the settlement agreement, the parties agreed that the violation was not significant and substantial and proposed to settle for a payment of \$50. Because of the construction of the headlight, it was not possible for the condition to cause a safety hazard. I accept the representations in the motion and will approve the settlement agreement.

Citation No. 2013976

This citation charged a violation of 30 C.F.R. § 75.1105 because a battery charging station was not vented directly into return air. The violation was originally assessed at \$136. The parties propose to settle for \$100. Respondent had attempted to vent to the return by knocking holes in nearby stoppings but the inspector required a check curtain at the charging station. I accept the representations in the motion and will approve the settlement.

Citation No. 2102667

This citation charged a violation of 30 C.F.R. § 75.1403 because a locomotive being operated on track haulage was not equipped with a suitable lifting jack and bar. The violation was originally assessed at \$98. The parties propose to settle for \$50. Subsequent investigation disclosed that the locomotive was tramping to the motor barn and would have reached that destination in about 5 minutes and would have been provided with a lifting jack and bar before leaving the barn. I accept the representations in the motion and will approve the settlement agreement.

FINDINGS OF FACT COMMON TO ALL VIOLATIONS

1. At all times pertinent to this proceeding, Respondent was the owner and operator of an underground coal mine in Washington County, Pennsylvania, known as the Maple Creek No. 2 Mine.

2. Respondent is a large operator, producing in excess of 15 million tons of coal annually.

3. In the 2-year period prior to the issuance of the citations involved herein, the subject mine had 469 paid violations of mandatory safety and health standards, 394 of which were designated as significant and substantial. This history is not such that penalties otherwise appropriate should be increased because of it.

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

5. The violations involved in this case were abated timely and in good faith.

DOCKET NO. PENN 83-96

Citation No. 2013973

6. On December 9, 1982, Federal Coal Mine Inspector Francis E. Wehr issued Citation No. 2013973 alleging a violation of 30 C.F.R. § 75.503 because the battery covers on a scoop tractor being operated at the last open crosscut were not secured to the frame of the battery.

7. On December 9, 1982, the battery covers were not locked or bolted to the frame of the battery compartment on a Kersey scoop tractor used in the last open crosscut in the subject mine. The covers consisted of four separate lids made of one-quarter inch steel plate. They fit over the battery compartments "like the top of a shoe box fits over the shoe box." Two of them weighed about 80 pounds each; the other two weighed about 50 pounds each. There was a 1-inch lip around the outside edges of the compartment. Each lid has insulating material on the undersurface. The lids are approximately 1 to 1-1/4 inches from the battery terminals.

8. The subject mine liberates more than one million cubic feet of methane in a 24-hour period.

9. Devices were provided on the lids to lock the battery covers in place, but the bolts needed to secure them were missing.

10. When the scoop is in use, the batteries are normally recharged each shift. When they are recharged, the lids have to be lifted to help ventilate the battery.

11. Citations have been issued at the subject mine for the same condition as described in this citation.

12. In the normal operation of a scoop tractor, battery covers can be jarred. However, there is a lip of 1 inch on the lids and a tongue in the back that fits through the lids. Therefore, in order for the lid to pick up from its place, it would have to bounce up at least an inch and then slide back.

Citation No. 2102601

13. On December 14, 1982, Federal Coal Mine Inspector Alvin L. Shade issued Citation No. 2012601 alleging a violation of 30 C.F.R. § 75.1003 because the energized trolley feeder wire on a track haulage switch was not guarded.

14. On December 14, 1982, the trolley feeder wire on the track haulage switch in the 6 Flat 1 chute was not guarded. Miners were required to travel under this switch regularly. The wire was approximately 5 and 1/2 feet from the mine floor. It was not insulated and carried 550 volts of direct current. The section was not producing coal, but cars and supplies were stored in the area.

15. The guard boards which normally guarded the trolley wire at the switch had been dislodged and were lying on the ground when the citation was issued.

16. The area is preshift examined daily. A "shopped" mine car was parked in the chute at the time the citation was issued.

Citation No. 2102602

17. On December 15, 1982, Inspector Shade issued Citation No. 2102602 charging a violation of 30 C.F.R. § 75.516 because eight energized power wires were in contact with combustible material.

18. On December 15, 1982, eight energized power wires supplying power to signal lights and an electric switch on track haulage in the subject mine were hung on wooden planks bolted to the roof and were not insulated. The wires were also touching the coal roof.

19. The wires carried 550 volts of direct current. The area was subject to preshift examinations. The area was damp. There was no tension on the wires at the time the citation was issued.

DOCKET NO. PENN 83-97

Citation No. 2013980

20. On December 14, 1982, Inspector Wehr issued Citation No. 2013980 charging a violation of 30 C.F.R. § 75.400 because of an accumulation of combustible material around the track dusting machine.

21. On December 14, 1982, there was an accumulation of approximately 53 empty rock dust bags at No. 23 room along the 2 Flat main haulage room in the subject mine. The bags were piled in and around the track rock dusting machine.

22. The bags had apparently been left by the prior shift. The rock duster has an electric motor and its power is supplied by a cable. The cable was fully insulated. Rock dust was present on the mine floor, approximately 16 inches deep.

23. There were energized trolley wires and trolley feeder wires approximately 20 feet from the area of the empty bags. The rock duster was not operating at the time the citation was issued.

24. Respondent has a verbal clean up program which provides that the crew using the bags pick them up before they leave the mine, place them on a supply truck and park it on a side chute until the next supply crew picks up the truck and takes it to the outside.

25. Respondent has been cited for this same condition several times in the past.

Citation No. 2102666

26. On December 15, 1982, Federal Coal Mine Inspector Okey H. Wolfe issued Citation No. 2102666 charging a violation of 30 C.F.R. § 75.1106 because stored oxygen and acetylene cylinders were not properly secured.

27. On December 15, 1982, there were four oxygen and two acetylene cylinders stored in a block building at the mouth of No. 5 flat belt in the subject mine, which cylinders were not secured to prevent being accidentally tipped over. The cylinders were pressurized.

28. The storage area for the cylinders was subject to preshift examination.

29. The tanks were standing upright. The oxygen bottles contained metal caps. A chain bolted to the wall was provided to hold the cylinders but was not secured around them.

APPLICABLE REGULATORY PROVISIONS

30 C.F.R. § 75.503 provides as follows:

The operator of each coal mine shall maintain in permissible condition all electric face equipment * * * which is taken into or used in by the last open crosscut of any such mine.

30 C.F.R. § 18.44(c) provides as follows: "Battery-box covers shall be provided with a means for securing them in a closed position."

30 C.F.R. § 75.1003 provides in part as follows:

Trolley wires, trolley feeder wires, and bare signal wires shall be insulated adequately where they pass through doors and stoppings, and where they cross other power wires and cables. Trolley wires and trolley feeder wires shall be guarded adequately:

(a) At all points where men are required to work or pass regularly under the wires;

(b) On both sides of all doors and stoppings; and

(c) At man-trip stations.

30 C.F.R. § 75.516 provides as follows:

All power wires (except trailing cables on mobile equipment, specially designed cables conducting high-voltage power to underground rectifying equipment or transformers, or bare or insulated ground and return wires) shall be supported on well-insulated insulators and shall not contact combustible material, roof, or ribs.

30 C.F.R. § 75.400 provides as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

30 C.F.R. § 75.1106-3 provides in part as follows:

(a) Liquified and nonliquified compressed gas cylinders stored in an underground coal mine shall be

* * * * *

(2) [P]laced securely in storage areas designated by the operator for such purpose, and where the height of the coalbed permits, in an upright position, preferably in specially designated racks or otherwise secured against being accidentally tipped over.

ISSUES

With respect to each citation the issues are (1) whether the cited violation occurred; (2) if it did, whether it was significant and substantial; and (3) if it did, what is the appropriate penalty.

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 Maple Creek No. 2 Mine, and I have jurisdiction over the parties and subject matter of this proceeding.

2. The condition described in Findings of Fact Nos. 7 through 12 did not constitute a violation of 30 C.F.R. § 75.503.

DISCUSSION

Two Administrative Law Judges have considered similar alleged violations of 75.503 and ruled that the lip around the covers and the tongues on the covers constituted means for securing the battery box covers in a closed position. Secretary v. U.S. Steel, 6 FMSHRC 155 (1984) (ALJ). Secretary v. U.S. Steel, ___ FMSHRC ___ (June 8, 1984)

(ALJ). Since the issue here was decided in these prior proceedings involving the same parties, the prior decisions are res judicata. See Secretary v. U.S. Steel 5 FMSHRC 1334 (1983) (ALJ). Therefore, I conclude that the condition cited was not a violation of the mandatory standard.

3. The condition described in Findings of Fact Nos. 14 through 16 constituted a violation of 30 C.F.R. § 75.1003. Respondent does not contest the finding that the trolley feeder wire in question was not guarded.

4. The violation was significant and substantial. Miners travelled in the area regularly and could receive electric shocks if they touched the bare wire. Reasonably serious injuries would likely result from the violation.

5. The violation was serious. Respondent should have been aware of it. An appropriate penalty for this violation is \$200.

6. The condition described in Findings of Fact Nos. 18 and 19 constituted a violation of 30 C.F.R. § 75.516. The energized electric power wires going to the signal lights and electric switch had been placed on top of a wooden plank bolted to the roof. They were also in contact with the coal roof. Apparently some of the coal had potted out and the insulated hooks which held the wires had fallen down and the wires were placed on the plank.

7. The hazard created by the above violation was the possibility of a mine fire in the event of a short in the wire and a failure or melting of the fuse. I conclude that the violation was significant and substantial.

8. The violation was moderately serious. Respondent should have been aware of the condition and should have corrected it. I conclude that an appropriate penalty for the violation is \$150.

9. The condition described in Findings of Fact Nos. 21 to 25 constituted a violation of 30 C.F.R. § 75.400. The rock dust bags which are combustible had been permitted to accumulate.

10. The hazard created by the violation was a mine fire. The likelihood of such an occurrence was remote. The violation was not significant and substantial.

11. The violation was not serious. The negligence was slight - consisting in permitting the bags to be strewn on and against the rock dusting machine. Except for that, the clean up plan was being followed. I conclude that an appropriate penalty for this violation is \$50.

12. The condition described in Findings of Fact Nos. 27 to 29 constituted a violation of 30 C.F.R. § 75.1106. The oxygen and acetylene tanks were not properly secured although they were in a storage area.

13. The hazard created by this violation is that the cylinders could be knocked over and the valve broken or the cylinder ruptured. Such an occurrence is less likely in a storage area than in a roadway, compare Secretary v. U.S. Steel, 5 FMSHRC 1728, 1732 (1983) (ALJ), but it is nevertheless reasonably likely. The violation was significant and substantial.

14. The violation was serious and since it should have been known by Respondent, was caused by its negligence. I conclude that an appropriate penalty for this violation is \$125.

ORDER

Based on the above Findings of Fact and Conclusions of Law, it is ORDERED

1. Citation No. 2013973 is VACATED.
2. Citation Nos. 2013976, 2102601, 2102602, 2102667, 2012666 are AFFIRMED as properly charging significant and substantial violations.
3. Citation Nos. 2013974 and 2013980 charge violations not properly designated as significant and substantial.
4. Respondent shall within 30 days of the date of this decision pay the following civil penalties for violations found herein to have occurred.

<u>CITATION</u>	<u>PENALTY</u>
2013974	\$ 50
2013976	100
2102601	200
2102602	150

2102667	50
2102666	125
2013980	50
Total	<u>\$ 725</u>

James A Broderick
James A. Broderick
Administrative Law Judge

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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

JUL 5 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 84-14
Petitioner : A.C. No. 12-01890-03507
v. :
: Lengacher Mine No. 1
EARTH COAL COMPANY, INC., :
Respondent :

DECISION

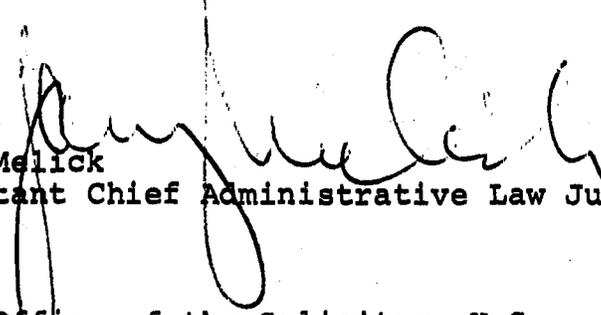
Appearances: Miguel J. Carmona, Esq., Office of the
Solicitor, U.S. Department of Labor,
Chicago, Illinois, for Petitioner;
Mr. Byron W. Terry, Tell City, Indiana,
for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearings in Evansville, Indiana, Petitioner moved to withdraw and vacate Citation No. 2353623 on the grounds that the cited Caterpillar Model 627 Scraper did not come within the scope of equipment covered by the cited regulation, 30 C.F.R. § 77.1605(b). The motion was granted at hearing and is now affirmed. Following hearings on the merits, Petitioner filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalties from \$326 to \$250 was proposed. I have considered the testimony and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

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

Citation No. 2343622	\$150
Citation No. 2353624	50
Citation No. 2353625	<u>50</u>
Total	\$250


Gary Melick
Assistant Chief 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

JUL 6 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 83-56
Petitioner : A.C. No. 44-04920-03513
v. :
H J AND H COAL COMPANY, INC., : Docket No. VA 83-57
Respondent : A.C. No. 44-04920-03514
: Docket No. VA 83-58
: A.C. No. 44-04920-03515
: Docket No. VA 83-59
: A.C. No. 44-04920-03516
: No. 3 Mine

DECISION

Appearances: Patricia L. Larkin, Esq., Office of the
Solicitor, U.S. Department of Labor, Arlington,
Virginia, for Petitioner;
John L. Bagwell, Esq., Grundy, Virginia,
for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The above cases all involve the same mine and were consolidated for the purposes of hearing and decision. Of the nine alleged violations in the four dockets, the parties moved for approval of settlement agreements concerning six of them. Pursuant to notice, the cases were heard in Abingdon, Virginia, on June 5, 1984. Respondent admitted that the violations occurred, and testimony was taken on the three which were not settled for the purpose of determining appropriate penalties. Federal Mine Inspectors Ronald Matney and Donald Shortridge testified on behalf of Petitioner. No witnesses were called by Respondent. The parties waived their rights to file posthearing briefs.

SETTLEMENT PROPOSAL

Docket No. VA 83-56

1. Citation No. 2158823 charged a violation of 30 C.F.R. § 75.313 because of an inoperative methane monitor on a cutting machine. The violation was originally assessed at \$20 and the parties propose to settle for \$60. There is no history of methane at the mine. The machine operator was carrying a methane detector. The mine is above the water table. I accepted the representations in the motion and approved the settlement.

2. Citation No. 9925742 charged a violation of 30 C.F.R. § 20.208(a) because of the failure of Respondent to take respirable dust samples for the 2-month period June and July 1982. The violation was originally assessed at \$20 and the parties propose to settle for \$40. Respondent's dust samples are now taken by a contractor. Respondent represents that the contractor is reputable, and that Respondent will see to it that samples are taken on a bi-monthly basis. I accepted the representations in the motion and approved the settlement.

Docket No. VA 83-57

1. Citation No. 2159242 charged a violation of 30 C.F.R. § 77.1103(d) because of Respondent's failure to keep a transformer station area free of weeds. The violation was originally assessed at \$20 and the parties propose to settle for \$20. The violation was stated not to be serious. The weeds had just begun to grow and were not high. The condition had not been cited in the past. I accepted the representations in the motion and approved the settlement.

2. Citation No. 2159243 charged a violation of 30 C.F.R. § 77.509 because of Respondent's failure to keep a transformer station locked against unauthorized entry. The violation was originally assessed at \$20 and the parties propose to settle for \$80. The area is somewhat isolated, and unauthorized entry is unlikely. However, the condition has been cited in the past, and serious injury is possible. I accepted the representations in the motion and approved the settlement.

3. Citation No. 2159244 charged a violation of 30 C.F.R. § 75.403 because of Respondent's failure to record the results of onshift daily inspections. The violation was originally assessed at \$20, and the parties propose to settle for \$20. The inspections had in fact been made, but not recorded. I accepted the representations in the motion and approved the settlement.

Docket No. VA 83-58

1. Citation No. 936387 charged a violation of 30 C.F.R. § 75.305 for failure to make weekly examinations for hazardous conditions in an abandoned section. The violation was originally assessed at \$20, and the parties propose to settle for \$20. The operator believed the area was unsafe for entry to conduct the tests and filed a petition for check points to conduct the examinations. Ultimately the area was ordered sealed. I accepted the representations in the motion and approved the settlement.

CITATIONS IN WHICH THE PENALTY IS CONTESTED

1. Respondent does not contest the fact of violation in any of the three citations involved.

2. Between August 24, 1980 and August 23, 1982, there were 11 violations assessed and paid at the subject mine. This is a moderate history of prior violations.

3. The subject mine produces 200 to 300 tons of coal daily and employs from 7 to 15 miners. Respondent is a small operator.

4. There is no evidence that penalties assessed herein will affect Respondent's ability to continue in business.

5. The mine employs a conventional mining system with one section. The coal is removed by conveyor belt. The coal seam is 36 to 40 inches high.

6. The mine is 2,000 to 4,000 feet deep. It has a very hazardous slate roof and a history of roof falls.

7. On June 6, 1983, Inspector Matney issued Citation No. 2159241 charging a violation of 30 C.F.R. § 75.1714(a).

8. On June 6, 1983, there were ten miners working underground. Only three self-contained self rescuers were present. Coal was being produced.

9. Respondent had an approved self-contained self rescuer storage plan which required that such devices be stored not more than 400 feet outby the face at the power station on intake air with two approaches.

10. An investigation and checking of serial numbers disclosed that Respondent had sent the self rescuers to a nearby mine owned by M P & M Coal Company to enable the latter to abate a citation for failure to have a self rescuer for each employee.

11. The violation was deliberate.
12. The violation was very serious. The mine had seals erected in it, and there was a high degree of possibility of cutting into oxygen deficient atmosphere. Without an adequate number of self rescuers, this could result in fatal injuries to miners.
13. I conclude that an appropriate penalty for the violation is \$2,500.
14. On July 12, 1983, Inspector Matney issued Citation No. 2159249 charging a violation of 30 C.F.R. § 75.202.
15. On July 12, 1983, there were four or five dislodged timbers in the main haulage area of the subject mine. They had probably been knocked out by a scoop.
16. The roof in the area was not bad. This is a heavily travelled area and Respondent should have been aware of it.
17. An injury was not likely to occur as a result of the violation.
18. I conclude that an appropriate penalty for the violation is \$50.
19. On July 12, 1983, Inspector Matney issued Citation No. 2159250 charging a violation of 30 C.F.R. § 75.200.
20. On July 12, 1983, at numbers 5, 6 and 7 entries and adjoining crosscuts on the working section, the roof bolts were spaced from 53 inches to 60 inches at several locations.
21. The approved roof-control plan at the subject mine required that roof bolts be installed on 4 foot centers.
22. The roof was composed of slate and was fragile. A number of unplanned roof falls have occurred at the subject mine.
23. The operator should have been aware of the condition. It occurred on the working section which was heavily travelled.
24. The violation was serious. Because of the condition of the roof, strict following of the roof-control plan is imperative.
25. I conclude that an appropriate penalty for this violation is \$150.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ordered to pay the following civil penalties within 30 days of the date of this decision.

<u>CITATION</u>	<u>PENALTY</u>
2158823	\$ 60
9925742	40
2159242	20
2159243	80
2159244	20
936387	20
2159241	2,500
2159249	50
2159250	150
Total	<u>\$2,940</u>

James A. Broderick
James A. Broderick
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

July 11, 1984

UNITED MINE WORKERS OF AMERICA (UMWA), ON BEHALF OF JAMES ROWE, <u>et al.</u> ,	:	DISCRIMINATION PROCEEDINGS
	:	
	:	Docket No. KENT 82-103-D
	:	MADI CD 81-23
	:	
JERRY D. MOORE,	:	Docket No. KENT 82-105-D
	:	MADI CD 82-05
	:	
LARRY D. KESSINGER,	:	Docket No. KENT 82-106-D
	:	MADI CD 82-04
Complainants	:	
v.	:	Eastern Division Operations
	:	
PEABODY COAL COMPANY, Respondents	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF THOMAS L. WILLIAMS, Complainant	:	Docket No. LAKE 83-69-D
	:	VINC CD 83-04
	:	
v.	:	Eastern Division Operations
	:	
PEABODY COAL COMPANY, Respondent	:	

DECISION

Appearances: Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C. on behalf of Complainants James Rowe, et al., Jerry D. Moore and Larry D. Kessinger; Frederick W. Moncrief, Esq., Office of the Solicitor, Arlington, Virginia, on behalf of Complainant, Thomas L. Williams; Michael O. McKown, Esq., Peabody Coal Company, St. Louis, Missouri, for Respondent.

Before: Judge Merlin.

These cases are before me pursuant to the Commission's order dated June 18, 1984.

Introduction

These cases present the question whether under section 105(c) of the Federal Mine Safety and Health Act of 1977 (hereinafter referred to as "the Act"), 30 U.S.C. § 815(c), the operator discriminated against laid off miners by violating their statutory rights regarding training set forth in section 115 of the Act, 30 U.S.C. § 825, and Part 48 of the Regulations, 30 C.F.R., Part 48.

The Act and the regulations set forth certain training which miners must receive. In determining which laid off miners to recall to work, the operator gave preference to miners who met the training requirements of the Act and regulations. The Complainants contend that under the Act, it was the operator's responsibility to provide the necessary training and that by not doing so with respect to laid off miners and then taking their lack of training into account in deciding who to put back to work, the operator discriminated by violating the statutory right to training.

LAKE 82-69-D is a complaint of discrimination brought by the Secretary of Labor under section 105(c)(2) on behalf of Thomas L. Williams, a laid off miner. KENT 82-105-D and KENT 82-106-D are complaints of discrimination brought by the United Mine Workers (hereinafter referred to as the "UMW") under section 105(c)(3) on behalf of Jerry D. Moore and Larry D. Kessinger, respectively, both of whom are laid off miners. KENT 82-103-D is a complaint of discrimination filed by the union as a class action on behalf of Peabody's Eastern Division laid off employees.

Statutory Provisions

Section 115 of the Act, supra, provides as follows:

Sec. 115. (a) Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary. The Secretary shall promulgate regulations with respect to such health and safety training programs not more than 180 days after the effective date of the Federal Mine Safety and Health Amendments Act of 1977. Each training program approved by the Secretary shall provide as a minimum that -

(1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground. Such training shall include instruction in the statutory rights of miners and their representatives

under this Act, use of the self-rescue device and use of respiratory devices, hazard recognition, escapeways, walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned;

(2) new miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device where appropriate and use of respiratory devices where appropriate, hazard recognition, emergency procedures, electrical hazards, first aid, walk around training and the health and safety aspects of the task to which he will be assigned;

(3) all miners shall receive no less than eight hours of refresher training no less frequently than once each 12 months, except that miners already employed on the effective date of the Federal Mine Safety and Health Amendments Act of 1977 shall receive this refresher training no more than 90 days after the date of approval of the training plan required by this section;

(4) any miner who is reassigned to a new task in which he has had no previous work experience shall receive training in accordance with a training plan approved by the Secretary under this subsection in the safety and health aspects specific to that task prior to performing that task;

(5) any training required by paragraphs (1), (2), or (4) shall include a period of training as closely related as is practicable to the work in which the miner is to be engaged.

(b) Any health and safety training provided under subsection (a) shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.

* * * * *

Part 48 of 30 C.F.R. sets forth the training requirements for underground mines (Subpart A) and surface mines (Subpart B).

Section 105(c) of the Act, supra, 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.

(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. 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 has 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 sections 108 and 110(a).

Factual and Procedural Background

On June 19, 1981, the operator sent a letter to all laid off employees in its Eastern division, advising them that Federal and state law required that they meet minimum standards prior to resuming work after having been laid off. Effective immediately, if laid off from any Peabody facility, it was their responsibility to keep their training current. If they failed to do so, they would be bypassed for recall in favor of panel members whose training was current.

The "panel" referred to in the operator's letter was established by Article XVII(d) of the National Bituminous Coal Wage Agreement of 1981 to which the operator was a party and which provides in pertinent part as follows:

Employees who are idle because of a reduction in the working force shall be placed on a panel from which they shall be returned to employment on the basis of seniority as outlined in section (a). A panel member shall be considered for every job which he has listed on his layoff form as one to which he wishes to be recalled. Each panel member may revise his panel form once a year.

Article XVII(a) of the 1981 Agreement defines seniority as "length of service and ability to step into and perform the work of the job at the time the job is awarded."

Pursuant to its letter dated June 19, 1981, the operator bypassed a laid off miner, who would otherwise be recalled for a job under the 1981 Agreement, if the operator determined that such miner required training under 30 C.F.R. Part 48, before he could "step into and perform the work of the job."

In December 1982, Joseph Lamonica, MSHA's administrator for Coal Mine Safety and Health advised the Director of Training for Peabody that the operator's policy of requiring up-to-date training status under Part 45 was inconsistent

with the Act. In April 1983, MSHA revoked approval of the operator's training plans and issued appropriate citations. The operator then discontinued its policy and the citations were terminated.

The parties have divided laid off miners involved in these suits into three categories. Category I consists of those individuals who, as a result of the operator's policy, obtained training on their own time and at their own expense, and were then recalled to work by the operator. The operator subsequently agreed to pay Category I individuals. On November 4, 1983, a Decision Approving Settlement was issued granting a monetary judgment for named miners in Category I and dismissing all suits regarding Category I with prejudice.

Category II is comprised of individuals who were bypassed on the recall panel because the operator determined they would need additional training under Part 48 to fill the job, and therefore were not considered experienced miners under the regulations. It is agreed that the named plaintiffs suing for themselves all fall within Category II, i.e., laid off miners who were "bypassed" as described above. In LAKE 83-69-D, the Complainant, Thomas L. Williams, was an experienced underground miner who, upon being laid off, was placed on a recall panel and indicated an interest in surface mine positions. Because Mr. Williams had not received the training for a surface miner required by section 115 and Part 48, the operator bypassed him in favor of a miner with fewer years of service. In KENT 83-105-D, the Complainant, Jerry D. Moore, also was a laid off underground miner who wanted a surface mine job but was bypassed by the operator because he did not satisfy the training requirements of section 115 and Part 48 of the regulations for surface mines. Similarly, the Complainant in KENT 83-106-D, Larry D. Kessinger, was a laid off underground miner who was bypassed for a surface job because the surface training he had was insufficient to meet the training requirements of the Act and regulations.

Category III is composed of individuals who, as a result of the operator's policy, obtained training on their own time and at their own expense, but whose names were not reached on the recall panel because of their relatively shorter length of service.

KENT 82-103-D is a suit by the union on behalf of all laid off Peabody employees in the Eastern Division. This includes Category II and Category III miners only since Category I was settled. It names James Rowe, a UMW official at the time KENT 82-103-D was filed, as a representative of all laid off miners in the operator's Eastern Division.

Summary Decision

All parties have moved for summary decision under Commission Rule 64, 29 C.F.R. § 2700.64, which provides that a motion for summary decision shall be granted if the entire record shows that there is no genuine issue as to any material fact and that the moving party is entitled to summary decision as a matter of law.

In the cases brought by the union, the union and the operator have entered into and submitted 68 stipulations. Although the stipulations contain material which does not belong in sets of factual stipulations, I conclude that the stipulations set forth agreed-upon facts sufficient to enable me properly to render summary decision. They also make clear that what is involved is a question of law. In the case brought by the Secretary, the operator responded to the Secretary's Request for Admission of Facts by admitting the relevant circumstances and showing that the issues of law involved are the same as those in the other cases. Accordingly, here too, I conclude that summary decision would be proper.

Class Action

In KENT 83-103-D, the United Mine Workers seeks to bring a class action on behalf of all laid off Peabody employees, Eastern Division. The procedural rules of the Commission do not specifically provide for class actions, but under 29 C.F.R. § 2700.1(b), the Commission or Administrative Law Judge is to be guided so far as practicable by the Federal Rules of Civil Procedure as appropriate.

Rule 23 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

As set forth above, a settlement has been reached with respect to Category I. The union's attempt to bring a class action for Categories II and III remains.

The burden is on the party who seeks to utilize the class action to establish his right to do so. Zeidman v. McDermott, 651 F.2d 1030 (5th Cir. 1981). After due consideration, I conclude that the union has failed to satisfy several important requirements of Rule 23.

The only named Complainant in KENT 82-103-D, which is brought by the union on behalf of all laid off Peabody employees, Eastern Division, is James Rowe. The union's motion in opposition to the operator's motion to strike admits Mr. Rowe is not a laid off miner (p. 7-8, UMW's Opposition to Motion to Dismiss). At the time suit was filed, Mr. Rowe was employed by the union but as of December 30, 1982, he had returned to his job at a Peabody surface mine. The union argued in its motion that since Mr. Rowe is a miner at a Peabody mine, he will be subjected to all Peabody policies, including the policy at issue in this case. Following the union's rationale, every active Peabody employee would be a party to this suit, although they do not fall within the class of laid off employees, as delineated by the union itself.

Assuming the union's description of Mr. Rowe's present status is correct, it does not provide a basis upon which he can serve as a representative of the specified class. Rule 23 requires that a class representative be a part of the class and possess the same interest and suffer the same injury as the class members. E. Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977). Mr. Rowe cannot qualify as a representative of the class merely because he worked in the Union Safety Division where his duties were concerned with improving the health and safety of union members. His job duties at the union, even if they had continued, would not put him in the situation of a laid off employee. Since Mr. Rowe was not a laid off miner, he could not have the same interest nor did he suffer the same injury as the putative class. Mr. Rowe must be stricken as a representative example of the class of laid off employees.

Moreover, the union itself cannot adequately and fairly represent either Category II or Category III complainants. In its motion to oppose the operator's motion to dismiss, the union asserts that because it "is an organization whose very purpose is to protect the interests of the miners it represents," it will fairly represent the interests of the class (pp. 7-8, UMW's Opposition to Motion to Dismiss). However, the dilemma of union's counsel in trying to decide what kind of relief to seek demonstrates the inability of the union to represent the diverse and conflicting interests of all members of the bypassed class. Union counsel could not decide whether to seek reinstatement of bypassed miners since such action could require "bumping" a union member with less seniority (Tr. 80-82, Hearing October 13, 1983). In Airline Stewards & Stewardesses Ass'n Local 550 TWU, AFL-CIO, v. American Airlines, 490 F.2d. 636 (7th Cir. 1973) the court held that a labor union, presumably largely under control of present employees, is not a proper representative

of all separated and present employees in an action charging discriminatory separation and seeking, inter alia, reinstatement, since there are obvious antagonistic interests among the class.

It is further clear from the "bumping" issue that not only is the union unable to represent the class but also that there are conflicting claims between the members of the class themselves. The Supreme Court has pointed out that to the extent that persons have dual and potentially conflicting interests, they cannot be regarded as in the same class. Hansberry v. Lee, 311 U.S. 32 (1940).

The union also has not met the requirements of Rule 23(a)(1) because it has failed to show that the members of Categories II and III are so numerous that joinder would be impracticable. As support for the class action, the union relied upon the affidavit dated August 9, 1981, of Mike Turner, a Peabody employee, which stated that since June 19, 1981, there had been 1000 layoffs and 380 recalls, but that it was impossible to identify instances of bypassed miners. With respect to Category II, therefore, the Turner affidavit expressly states there is no information. With respect to Category III, the figures in the affidavit are two years old and more importantly, it is not clear upon what they are based. Moreover, the information the union itself furnished strongly militates against allowance of a class action. Counsel for UMW has asserted that both Categories II and III have a finite number of members. This would appear to be so, especially since the operator has discontinued the challenged policy. At the hearings, union counsel stated that eight members of Category II and six members of Category III had been identified (Tr. 32, 56, Hearing, October 13, 1983; Tr. 6-9, Hearing, July 5, 1984). In proposed stipulations, she listed seven in Category II and six in Category III (UMW letter to Peabody counsel, dated October 3, 1983). Having fixed the class membership at such a small number of people who are readily identifiable, she has demonstrated the practicability of joinder and the lack of need for a class action.

Since Mr. Rowe must be stricken as a representative, and since the union itself does not qualify and finally because the purported class has not been shown to satisfy the requirements of Rule 23, the complaint in KENT 82-103-D must be dismissed. No class action is allowed. Because the case does not qualify as a class action and because the individuals mentioned by union counsel were never joined although it was possible to do so, they are not before me and cannot be granted relief. The claims of the individually named Category II complainants survive in the other docket numbers.

Discrimination and Right to Training in Lay Off Situation

Section 115 quoted supra, establishes the right of mine employees to receive basic safety training and the obligation of the operator to provide that training for them. Those classified as new miners are to receive 40 hours of training prior to underground assignment or 24 hours before surface assignment. The training is designed to cover the primary hazards of each and is to be as mine-related as possible. Operators are required to provide miners with at least 8 hours of refresher training once every 12 months and to provide miners with training in specific safety and health aspects of the work they are assigned.

The legislative history makes clear that the financial responsibility and economic burden of providing training are placed solely upon the operator and not upon the individual miner or the government. The Senate Report unequivocally states in this respect as follows:

It is not the Committee's contemplation that the Secretary be in the business of training miners. This is clearly the responsibility of the operator, as long as such training meets the Act's minimum requirements. S.REP. NO. 95-181, 95th Cong., 1st Sess. 50 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 95th Cong., 2nd Sess., at 638 (1978) hereinafter referred to as "Leg. Hist.".

The discussion surrounding S. 717 (the Senate version of the 1977 Act) further demonstrates that the operators were expected to assume the costs associated with the training requirements.

MR. WILLIAMS. There are certain aspects of the cost that will arise from this legislation that we feel can be quite precisely estimated. There is, at long last, a clear precise demand for training of new employees coming to work in the mines. This has been one of the great failures, as I see it, in the preparation of workers for their jobs in a very hazardous industry, preparation that will contribute to a safer work place. We do have a clear demand for training - as a matter of fact, 40 hours for new underground miners, 24 hours for surface miners, and 8 hours of annual retraining for experienced miners. This is one of the large figures that went into the total estimate of new cost to industry.

We estimated it this way: With training at \$75 a day, for the annual retraining of 478,000 miners for 1 day, that multiplies out to \$35,875,000.

I mentioned the new surface miners. There is a demand that they be trained. The training of 15,000 new surface miners at 3 days will total \$3.375 million.

Training 10,000 new underground miners -- this is the 40-hour training provision. That is 5 days. It comes to \$3.750 million. The total for this training will be \$43 million.

123 CONG. REC. S. 10219 (daily ed. June 20, 1977).

The legislative history of section 105(c) shows that the anti-discrimination provisions apply to the training provisions. The Senate Report states in this respect:

The Committee also intends to cover within the ambit of this protection any discrimination against a miner which is the result of the safety training provisions of section * * * [115] or the enforcement of those provisions under section * * * [104(g)]. Leg. Hist. at 624.

The Act and the legislative history do not specifically address the situation of the laid off miner. The operator's position is, therefore, plain and simple. Its responsibility for training under the policy in effect at the pertinent time ran only to those individuals who were actually performing work for it. The operator asserts that it had the right to hire (or rehire) individuals who had the requisite training over those who did not. The union and the Secretary argue, however, that based upon certain rights accorded laid off miners under the National Bituminous Coal Wage Agreement of 1981, those who would have been recalled but were instead bypassed because they did not have the training required by the Act and regulations, fall within the scope of sections 115 and 105(c).

As set forth above, Article XVII(d) of the Agreement establishes recall panels for laid off miners from which they are to be returned to employment on the basis of seniority. "Seniority" is defined in section (a) of Article XVII as length of service and the ability to step into and perform the work of the job at the time the job is awarded. In addition, section (f) of Article XVII provides that employees on layoff status continue to accrue seniority while

they are on the recall panel. Section (c) of Article XIV includes periods of layoff as part of one's continuous employment with a particular employer.

I adhere to the view that it is not the principal province of the Administrative Law Judges of this Commission to interpret provisions of the collective bargaining agreement. However, I also believe that the status and rights of individuals under the Mine Safety Act must not be viewed in a vacuum when to do so would stand the Act on its head by perversely transforming its protections into unforeseen and crippling liabilities.

The three named complainants in KENT 82-105-D, KENT 82-106-D, and LAKE 83-69-D were reached on recall panels for jobs to which they were entitled and which they would have been given but for the training requirements of the Act and regulations. As appears from the legislative history quoted supra, because of the hazardous nature of mining which over the years had caused a series of appalling disasters, Congress enacted the training provisions of section 115 to protect miners by making sure that operators adequately trained them. However, under Peabody's policy which is at issue here, the effect of the training requirements on laid off miners would not be to help and protect but rather to hurt and harm.

The record in the instant cases contains several decisions rendered by arbitrators in grievance proceedings brought under the 1981 Agreement by laid off miners who had been denied jobs because they lacked the required Federal training. The arbitrators denied the grievances, reasoning that the complaining miners did not have the ability to step in and perform the jobs as required by the 1981 Agreement because they were not adequately trained in accordance with the Mine Act. In response to the miners' assertion that under the Act the operator should have provided the training, the arbitrators held that it was not up to them to interpret the Federal law. Thus, the very training provisions designed to protect miners became the reason for their continued unemployment under the collective bargaining agreement. If in interpreting the Mine Act, I now were to ignore the status and rights given laid off miners under the collective bargaining agreement, they would end up in a legal "no-man's-land" between the two. I will not adopt such an unfair and unrealistic approach.

Accordingly, I conclude that in interpreting the Act in these cases, account must be taken of the provisions of the collective bargaining agreement insofar as they affect the

status of laid off miners. As set forth above, the collective bargaining agreement gives the laid off miner several very important rights, including placement on a recall panel, the right to opt for certain jobs, and the right to invoke the grievance procedure. Also, accrual of seniority continues as does continuous employment with one employer. I have considered arbitration decisions which are in conflict over whether the employment relationship continues or is severed in the lay off situation. I do not find them particularly useful or instructive and in any event, I believe that the instant cases should be decided in light of the purposes and goals of the Mine Act. I conclude that the laid off miner is certainly in a position far different and more advantageous than just anyone seeking employment in the mines. Moreover, some of the laid off miners' rights such as accrual of seniority and computation of continuous employment with one employer go beyond giving preference in applying for a job. The laid off miner clearly is more than just a preferred job applicant. I conclude that the rights accorded a laid off miner under the collective bargaining agreement contain indicia of an ongoing employment relationship sufficient for him to be considered a miner within the purview of sections 115 and 105(c) of the Act. I have not overlooked the definition of "miner" in section 3(g) of the Act. In view of the pertinent provisions of the collective bargaining agreement and the overriding purposes of the training provisions of the Act, I conclude that for present purposes, the laid off miner must be considered an individual working in a coal mine. That is where he would be if not for an interruption caused through no fault of his own.

I have, of course, considered the decision of the Commission in Secretary of Labor v. Emery Mining Corporation, 5 FMSHRC 1391 (1983) which has been discussed and analyzed at length by the parties. That decision which the Commission itself confined to the facts presented, is distinguishable from these cases because it involved miners who were "strangers" in that they had no previous relationship with the industry or the employer.

To the extent that the conclusions expressed herein may be inconsistent with the Judge's decision in United Mine Workers of America, etc. v. Peabody Coal Company, 4 FMSHRC 1338 (1982), I decline to follow it.

Accordingly, I conclude that the operator discriminated against the named Complainants in KENT 82-105-D, KENT 82-106-D, and LAKE 83-69-D, by violating their statutory rights regarding training. These Complainants must now be given the jobs they originally would have been given (or comparable jobs) and must be awarded appropriate damages.

In LAKE 82-69-D, the Secretary declined to file a motion for temporary reinstatement on behalf of Mr. Williams. In light of the finding for Mr. Williams on the merits, this issue now becomes moot; but as the analysis already set forth makes clear, the Secretary should have sought temporary reinstatement and erred in not doing so.

As set forth above in the discussion regarding class actions, no valid complaint has been made out with respect to Category III Complainants. However, in order that this matter be as comprehensively handled as possible for the benefit of the Commission, I deem it appropriate to express my views on the merits regarding Category III. Category III like Category II is composed of laid off individuals. There is, however, a difference which is crucial for present purposes. The Category II people have been reached on the recall panel and the Category III people have not. The rights given under the collective bargaining agreement and the Act regarding rehiring and training actually exist with respect to Category II, but are merely inchoate for Category III. As set forth herein, the right to a job cannot be denied for a lack of training, but the right to a job itself is predicated upon being reached on the recall panel. If there is no right to a job, there is no right to training. Whether an individual will be reached on a recall panel depends upon a multiplicity of unpredictable factors, including the state of the coal industry and the well-being of the entire economy. Indeed, an individual may never be reached. Under the circumstances, the right to training which depends on being recalled is too speculative to be allowed for Category III individuals. Finally, since, as held herein, Category II persons are entitled to training, those in Category III are not in any way jeopardized since they will be entitled to the jobs and any necessary training when they are reached on the recall panel.

ORDER

It is Ordered that the complaint in KENT 82-103-D be Dismissed.

It is further Ordered that the complaints of discrimination in KENT 82-105-D, KENT 82-106-D, and LAKE 83-69-D be Allowed.

It is further Ordered that the operator place the named Complainants in KENT 82-105-D, KENT 82-106-D, and LAKE 83-69-D in the jobs they would have been given if they had not been bypassed, or in comparable jobs, together with all necessary training.

It is further Ordered that on or before July 23, 1984, the parties submit a statement setting forth the amounts of agreed upon monetary relief for each of the named Complainants.

It is further Ordered that if agreement is not reached on monetary relief, the parties appear before me at 10:00 a.m., July 24, 1984, at 1730 K Street, N.W., Washington, DC 20006.

Finally, it is Ordered that on or before July 23, 1984, the Solicitor file petitions for the assessment of civil penalties in KENT 82-105-D, KENT 82-106-D, and LAKE 83-69-D.

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive, flowing style.

Paul Merlin
Chief 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

JUL 11 1984

JAMES L. DOWDELL, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. LAKE 83-96-D
: :
CONSOLIDATION COAL COMPANY, : MSHA Case No. VINC CD 83-11
Respondent :

DECISION

Appearances: James L. Dowdell, Scio, Ohio, pro se;
Jerry Palmer, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The initial complaint was filed with the Secretary of Labor, Mine Safety and Health Administration (MSHA), on July 25, 1983. Following an investigation, MSHA advised the complainant by letter dated August 24, 1983, that MSHA's investigation failed to disclose any violation on section 105(c).

Following receipt of MSHA's notification that it would not pursue his claim further, the complainant filed his pro se complaint with the Commission on September 9, 1983. In response to further orders issued by the Commission's chief judge, the complainant furnished additional statements concerning his complaint, and these statements included allegations of discrimination on the part of five of respondent's management employees.

Issue

The critical issue presented in this case is whether Mr. Dowdell's discharge was in any way prompted by his engaging in any protected activity under section 105(c) of the Act, or whether it resulted from a violation of company policy against fighting on mine property, as claimed by the respondent.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).
3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

DISCUSSION

Complainant's Testimony and Evidence

James L. Dowdell, the complainant in this case, testified that until his discharge in June 1983, he was employed by the respondent for approximately 12 years. At the time of his discharge, he was employed as a shuttle car operator at the Oak Park No. 7 Mine, and he earned the regular union pay of \$10 to \$11 an hour. He stated that he has been unemployed since his discharge, and that he has received unemployment benefits from the State of Ohio (Tr. 6-9).

Mr. Dowdell asserted that there was consumption of beer and alcohol in the underground mine, as well as fighting among miners, and that mine superintendent Matkovich would do nothing about it. With regard to his fight with Mr. Thompson, Mr. Dowdell stated that it took place off mine property on State Road 9 and that Mr. Thompson pulled a knife. Mr. Dowdell stated that the police were not called and that Mr. Thompson "got skinned up a little bit" (Tr. 14).

Mr. Dowdell admitted that he was wrong in fighting, but he insisted that the fight did not violate company rules because it took place off mine property. He asserted that he cannot read and write, and that at the time of his discharge, he had learned that he and other miner's were being laid off. He went to the mine to retrieve some clothing, and when he arrived he asserted that Mr. Thompson "started hollering and calling me all kinds of names and stuff, and pulled a knife on me" (Tr. 15).

Mr. Dowdell confirmed that his discharge was arbitrated under the union-management contract (Tr. 16-18). He was discharged for fighting with Mr. Thompson, and they were not drinking (Tr. 19). Mr. Dowdell alluded to several prior fights between other miners which he claimed occurred "a few years back," and one which occurred a month or two before

his fight with Mr. Thomspen, and he claimed that no one was disciplined for these fights (Tr. 21).

Mr. Dowdell alleged that miners were drinking beer on the job and that nothing was done about it (Tr. 27). When asked why the safety committee was never apprised of the alleged drinking and fighting, Mr. Dowdell stated "most union men that sees another fight don't just go out and tell on another union man" (Tr. 25), and "they're union men, the safety men, and they see them fill it up, and see them drink it. Now who am I going to report it to?" (Tr. 29).

Mr. Dowdell asserted that he was assigned certain job tasks which were not safe, including the shoveling of coal on the belt slope (Tr. 32) and working in dust (Tr. 32-36). However, he conceded that after complaints were made about the shoveling on the belt slope, and the dust, the matters were resolved and the conditions were corrected (Tr. 37). He also confirmed that when he complained, he was assigned to other work (Tr. 37).

Mr. Dowdell alluded to the fact that he was called into the mine manager's office to discuss the matter of conversation over the mine phone, including the use of profanity (Tr. 43-44). He claimed that mine foreman Sikora accused him of speaking over the phones and that he threatened to fire him over the matter (Tr. 45-46). He also alluded to the fact that shift foreman Cristini has also threatened to fire him over the conversation on the mine phones (Tr. 47). He also alluded to an incident concerning the removal of a scoop from the mine, and Mr. Dowdell believed that the procedures used by Mr. Cristini for removing the scoop were unsafe (Tr. 48-54). Mr. Dowdell alluded to instances when he was taken off different job tasks and assigned to others, and while he believed that this was improper, he never filed any grievances (Tr. 69).

On cross-examination, Mr. Dowdell confirmed that he fought with Mr. Thompson and struck him in the face. However, he asserted that Mr. Thompson had a knife and that he was simply defending himself, and that the fight took place on State highway No. 9 (Tr. 72-76). Mr. Dowdell also mentioned some previous fights among miners which he claimed took place underground, and he also claimed that he had complained about some bad brakes on a shuttle car. He claimed that he complained to the safety committee about the brakes, and as a result of his complaints, he was taken off the shuttle car and someone else was assigned that task (Tr. 78). He also claimed that he had complained to a Federal inspector, and he confirmed that the brake calipers were repaired and that no citations were issued (Tr. 80-81).

Ronald Taylor testified that he has been employed by the respondent for approximately a year as an unskilled laborer, and that he has been intermittently laid off from time to time. He was last called back to work on March 1, 1984. Mr. Taylor stated that he did not know what the present case was about other than the fact that the complainant had a fight with Mr. Thompson. As for any fighting by other miners and drinking on the job, Mr. Taylor stated that "I wasn't working there at the time, you know, it's all hearsay" (Tr. 82-87).

Mr. Taylor stated that the complainant did complain to mine management about Mr. Thompson's insistence on using a certain aisle in the wash house to reach his dressing area, and that this is what precipitated the fight with the complainant (Tr. 89). Mr. Taylor confirmed that he was not at the mine when the fight took place (Tr. 90). Mr. Taylor stated further that the complainant took the matter of Mr. Thompson insisting on using an aisle where other miners dressed to the safety committee because Mr. Thompson would bump other miners with his clothes basket, and he (Taylor) believed this was a safety issue. Mr. Taylor indicated that he too complained to a member of the safety committee (Tr. 94). The safety committee member spoke to mine management, and the superintendent and shift foreman spoke to Mr. Thompson about the matter (Tr. 95).

Mr. Taylor stated that he has personally never observed any miners fighting, and that he never observed any miners drinking on the job, nor has he ever heard of anyone having liquor in the mine (Tr. 96). Moreover, he knows of other miners, including himself, who drank beer on the parking lot and in the wash house after their shift was over, and that these areas were on company property (Tr. 96-97).

Mr. Taylor alluded to an encounter at the mine between Mr. Dowdell and one Ray Tubble. He indicated that it started as "a joke" with the two pushing each other, and Mr. Tubble got mad and upset when his belt was broken, and Mr. Dowdell offered to buy him a new one (Tr. 96, 99). He also alluded to "hearsay" of a fight between Mr. Tubble and one Tank Stall, but he did not witness the alleged incident (Tr. 101).

Mr. Taylor also alluded to an asserted "problem" about shovelling coal on the slope. Moreover, he indicated that the matter was resolved between mine management and the safety committee. Mr. Taylor indicated that Federal inspectors come to the mine, and after it was determined where it was safe to shovel, the matter was mutually resolved. Mr. Taylor also stated that he was never required to shovel

where he believed it was unsafe, and he could not recall whether Mr. Dowdell was part of the crew which complained about the shovelling on the slope (Tr. 106). He also indicated that he was never assigned to shovel on the slope as "punishment," and he conceded that this was part of his job (Tr. 107).

Mr. Taylor indicated that he had no knowledge about Mr. Dowdell being assigned to shovel on the slope after the other crew which complained was taken off that job (Tr. 107).

On cross-examination, Mr. Taylor stated that he did not know whether Mr. Dowdell or Mr. Thompson complained to mine management about their fight, nor did he know whether Mr. Stall or Mr. Tubble informed management about their alleged fight (Tr. 109).

Ronald Stall testified that he never engaged in any fights in the mine with Ray Tubble. He "has heard" about fights, including an alleged incident in 1970 involving a foreman, but Mr. Stall was not at the mine at that time (Tr. 130). He also alluded to an incident which he characterized as "horseplay," but could furnish no other details (Tr. 121).

When asked if he knew what this case was about, Mr. Stall responded "Well, he got fired. That's all I know. I know he's got a discrimination case--some kind" (Tr. 122). Mr. Stall confirmed that he was not at the mine when Mr. Dowdell and Mr. Thompson got into a fight (Tr. 125).

Dan Hoffman testified that he has been employed at the mine for approximately 14 years as a mechanic. He could not recall Mr. Dowdell being taken off his regular job as a shuttle car operator and being assigned to laborer's work, and while he "has heard" about fights in the mine, he had no personal knowledge about any of them (Tr. 132).

Although he alluded to an alleged bad brake condition on a shuttle car, Mr. Hoffman had no recollection of anything specific (Tr. 134). Further, while he "has heard" about the fight between Mr. Dowdell and Mr. Thompson, Mr. Hoffman was not at the mine when the incident occurred, and he had no personal knowledge about the matter (Tr. 134). When asked about his understanding of Mr. Dowdell's complaint in this case, Mr. Hoffman stated that "my understanding is that the fight didn't happen on company property--that's the only thing I've heard. I don't really know" (Tr. 134).

George Armstrong testified that he is employed by the respondent as a continuous-miner operator. He stated that he had no knowledge of any trouble between Mr. Dowdell and Mr. Thompson other than "walking through the aisle" in the wash house. Mr. Armstrong also stated that he has never observed any fights at the mine (Tr. 137), and he confirmed that he did not witness the fight between Mr. Dowdell and Mr. Thompson (Tr. 143).

Respondent's Testimony and Evidence

Joe Matkovich mine superintendent, testified that he hired Mr. Dowdell sometime in 1981 or 1982. He confirmed that he considered his complaints concerning Mr. Thompson and other miners in the bathhouse. One complaint concerned Mr. Thompson's insistence on using a certain aisle to walk to his dressing locker, and the other complaint concerned a complaint by Mr. Thompson that men were throwing pop cans at him in the bathhouse (Tr. 177-182).

Mr. Matkovich stated that he first learned about the fight between Mr. Dowdell and Mr. Thompson when he received a telephone call at his home from acting shift foreman Don Vanscay on the evening of June 23, 1984. Mr. Vanscay advised him that the fight took place in the bathhouse. The mine had officially gone on lay-off status that evening, and during the next few days while the mine was idle Mr. Matkovich conducted an inquiry to ascertain the facts surrounding the fight (Tr. 183).

Mr. Matkovich stated that his inquiry into the fight established that Mr. Dowdell struck Mr. Thompson in the mouth as he got out of his car in the area by the back doors of the bathhouse. As Mr. Thompson stumbled through the bathhouse doors, Mr. Dowdell kicked him in the rear. Mr. Dowdell claim that the fight took place on the State Highway road No. 9, after Mr. Dowdell confronted Mr. Thompson and invited him there. Mr. Dowdell claimed that Mr. Thompson drew a knife, and that he kicked it out of Mr. Thompson's hand and punches were exchanged. Mr. Matkovich stated that a search was conducted by five or six foremen and a representative of the company's industrial relations office, but that no knife was found (Tr. 183-185)..

Mr. Matkovich confirmed that he made the decision to discharge Mr. Dowdell for violating company policy against fighting, and he identified Exhibit R-1, as a copy of the discharge letter given to Mr. Dowdell. The letter should have been dated July 8, 1983, and the June date is simply a typographical error (Tr. 188). Mr. Matkovich also identified Exhibit R-2, as a copy of the company employee conduct

rules which are posted at the mine and which served as the basis for the discharge (Tr. 191).

Mr. Matkovich confirmed that at no time during his inquiry into the fighting incident did anyone ever mention any safety activities engaged in by Mr. Dowdell. He also confirmed that Mr. Dowdell appealed his discharge through the regular union-management contract, and after a hearing before an arbitrator, the discharge was sustained (Tr. 192, Exhibit R-3).

Mr. Matkovich stated that he has investigated past complaints of employees fighting at the mine, and in one instance his discharge of an employee in late 1981 or early 1982 was upheld after it went to arbitration (Tr. 194). As for drinking on the job, Mr. Matkovich stated that he was not aware of any drinking on mine property and that no one ever made any complaints to him about such conduct (Tr. 196). Mr. Matkovich also indicated that he had no knowledge that Mr. Dowdell received unemployment compensation after his discharge (Tr. 196).

Mr. Matkovich confirmed that he had received a complaint in August 1982, from some miners about shovelling coal on the slope belt. Miner Karen Overheart had reportedly been hit on her hard hat by a lump of coal, and the miners complained that shoveling on the slope belt was unsafe. As a result of this complaint, the safety committee and Federal inspectors visited the belt area and certain belt areas were designated as areas where shovelling could be done while the belt was idle or on a weekend (Tr. 197-199). Mr. Matkovich could not recall whether Mr. Dowdell was among the group of miner's who complained (Tr. 200). He confirmed that prior to his discharge, he had never had any problems with Mr. Dowdell concerning safety or his work (Tr. 208).

Carl Kelly testified that he is employed by the respondent as a rock duster, and that on June 23, 1983, he worked at the mine during the 4:00 p.m. to 12:00 afternoon shift. He stated that while in the bathhouse at the end of his shift he heard some commotion at the back door and as he turned around he saw Mr. Thompson on his hands and knees inside the bathhouse. He observed Mr. Dowdell "more or less hollering at Fred," and saw Mr. Dowdell kick Mr. Thompson in the rear as he was getting up. He later observed them talking to each other, and he then left the area (Tr. 210-212; 214-218). Mr. Kelly confirmed that he testified at the arbitration in Mr. Dowdell' case (Tr. 213).

Frederick C. Thompson testified that he reported for work on June 23, 1983, and as he got out of his car and

started for the bathhouse, Mr. Dowdell attacked him and struck him in the face. Mr. Thompson stated that he did not strike back because he had his dinner bucket and thermos in one hand and his car keys in the other. Prior to striking him, Mr. Dowdell told him that a member of the mine safety committee had informed him that he (Dowdell) was responsible for harassing Mr. Thompson (Tr. 223).

Mr. Thompson stated that after he was struck by Mr. Dowdell, he went down and someone kicked him from the rear, but that he did not see who did it (Tr. 224). He then entered the bathhouse and went to the shift foreman's room to tell him what happened (Tr. 225). Mr. Thompson denied that he was ever on the bathhouse floor, and he denied that he had a knife with him or that he ever pulled a knife on Mr. Dowdell (Tr. 225).

Mr. Thompson stated that he was later interviewed by the mine superintendent and told him what had happened, and that he also testified at the arbitration hearing in Mr. Dowdell's case. He also indicated that as a result of being struck by Mr. Dowdell, his lip and denture plate were broken (Tr. 226).

Mr. Thompson stated that Mr. Dowdell had never hit him with a clothes basket, push him out of the way as he made his way down the aisle of the bathhouse, nor did he ever throw pop cans at him. He also confirmed that he had never had any trouble with Mr. Dowdell in the bathhouse and he stated that "I don't know how this all came about" (Tr. 237). Mr. Thompson stated that he did not seek to prosecute Mr. Dowdell, and that he has not seen him since his arbitration case (Tr. 242).

James J. Cristini, shift foreman, testified that he worked the afternoon shift at the mine on June 23, 1983. He confirmed that he has known Mr. Dowdell since 1972, and met him at another mine operated by the respondent, but he never directly supervised him. He has supervised him from time-to-time at the Oak Park No. 7 Mine (Tr. 249).

Mr. Cristini confirmed that Mr. Dowdell and two other miner's helped him load and remove a scoop from the mine so that it could be repaired. Mr. Cristini stated that proper procedures were followed in taking out the scoop and Mr. Dowdell said nothing about these procedures (Tr. 253).

Mr. Cristini stated that on June 23, 1983, he heard Mr. Dowdell comment that "if Fred (Thompson) shows up, I'll get him" (Tr. 256). A few minutes later Mr. Thompson and Mr. Dowdell came to his office, and Mr. Thompson's shirt was

torn and "his lip was busted." He stated that Mr. Dowdell had "sucker-punched him out in the parking lot." Mr. Cristini stated that he gave a statement to mine management concerning his knowledge of the incident, but that he did not participate in the investigation (Tr. 257).

Mr. Cristini denied that he ever threatened to fire Mr. Dowdell because of his alleged derogatory comments about him over the mine phone (Tr. 266). He also confirmed that the incident concerning the phone occurred in 1980 (Tr. 267). He denied that he ever asked Mr. Dowdell to do anything which was unsafe or that he ever had any problems with Mr. Dowdell other than the phone incident (Tr. 272).

Jerry L. Truschel, section foreman, confirmed that Mr. Dowdell worked under his supervision as a shuttle car operator shortly before his discharge, but that he was not on his crew at the time he was discharged. He could not recall Mr. Dowdell ever complaining about the brakes on the shuttle car, or ever refusing to operate a car. Mr. Truschel confirmed that due to absenteeism on one day, Mr. Dowdell was re-assigned to operate a scoop and a cleanup man was assigned to operate the shuttle car (Tr. 277).

Mr. Truschel was at the mine on June 23, 1983, and Mr. Thompson walked into the foreman's office. His mouth was bloody, his shirt was torn, and his arms were scraped. He stated that Mr. Dowdell struck him when he got out of his car on the parking lot. Mr. Dowdell then came into the office and stated that he struck Mr. Thompson, but insisted that the incident occurred on the highway and not on mine property (Tr. 278). Mr. Truschel stated that he did not participate in the investigation of the incident (Tr. 279).

Mr. Truschel denied that Mr. Dowdell ever advised him that a reel cage was falling off his shuttle car and cutting eight or nine cables a day (Tr. 280). He also denied that he told Mr. Dowdell to operate his shuttle car with no brakes (Tr. 283).

Thomas A. Sikora, mine foreman, testified that Mr. Dowdell worked for him for a short while for 2 or 3 months when an old section of the mine was being readied for active production. He never had any problems with Mr. Dowdell, and Mr. Dowdell never made any safety complaints to him (Tr. 285).

Mr. Sikora did confirm that he spoke to Mr. Dowdell about his talking over the mine phone, but that he never disciplined him about the matter and simply had an informal talk with him (Tr. 286).

With regard to the matter concerning shovelling on the slope belt, Mr. Sikora stated that the matter came up 2 years ago, and that after meeting with the miner's who believed that shovelling in certain areas was unsafe, the matter was resolved by the implementation of safe working instructions for the belt areas in question (Tr. 288). Mr. Sikora denied that he ever assigned Mr. Dowdell to shovel under unsupported roof or in any areas marked unsafe (Tr. 289).

Mr. Sikora confirmed that he participated in the management inquiry concerning the fight between Mr. Dowdell and Mr. Thompson. At no time was the matter of Mr. Dowdell making safety complaints ever mentioned (Tr. 289). The decision was made to discharge Mr. Dowdell for striking Mr. Thompson on mine property (Tr. 290).

Mr. Sikora had no knowledge of any prior fighting at the mine, and he denied any knowledge of Mr. Dowdell shovelling by himself on the slope belt for 6 months (Tr. 291). He indicated that no one was ever assigned to that belt for 6 months (Tr. 292).

Mr. Sikora denied ever stating that he was going to fire Mr. Dowdell, and he indicated that he did not participate in the decision to discharge Mr. Dowdell for fighting (Tr. 295).

Findings and Conclusions

For the sake of clarity, and in order to insure that the Commission's task of review is not needlessly complicated in the event this case is appealed, and in keeping with the Commission's admonition as stated in a recent opinion in Roger E. Sammons v. Mine Services Co., SE 82-15-D, June 5, 1984, I feel it advisable to reiterate the basic analytical precedent guidelines established by the Commission in the area of discrimination law, and these guidelines follow below.

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 matter 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. Maga 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., Nos. 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).

The parties were afforded an opportunity to file post-hearing arguments in support of their respective positions. Mr. Dowdell filed a one-page letter in which he reiterates the assertion that Mr. Thompson was armed with a knife at the time of their encounter. He also alluded to the fact that miners had been known to drink on mine property. While I may sympathize with the fact that Mr. Dowdell brought this action pro se, and do not dispute the fact that he may not be totally literate, his arguments simply do not constitute a case of discrimination under the Act.

Respondent's arguments, filed by its legal counsel, conclude that Mr. Dowdell's conduct was not protected activity, that he was not the victim of disparate treatment, that great weight should be given to the arbitrator's determination that his discharge for fighting was appropriate, and that he simply has not made out a prima facie case of discrimination.

On the facts presented in this proceeding, there is no credible evidence to suggest or support any theory that Mr. Dowdell's discharge was in any way connected with any protected safety activities on his part. There is no evidence of any protected work refusals or retaliation for those asserted activities, nor is there any evidence that Mr. Dowdell made any safety complaints to mine management or to MSHA or to state mining officials concerning safety matters peculiar to his particular working environment, or that mine management retaliated against him by discharging him. The thrust of his complaint is that his discharge was

arbitrary in that Mr. Thompson was the aggressor and was armed with a knife during their fight. Mr. Dowdell obviously believes he was treated unfairly by the respondent when he was discharged, and the basis for this conclusion is his assertion that he was simply defending himself and that the fight took place off mine property.

After careful review of all of the evidence and testimony adduced in this case, the respondent has established by a preponderance of the evidence and testimony adduced at the hearing, including the testimony of witnesses called by Mr. Dowdell, that Mr. Dowdell's attack on Mr. Thompson was unprovoked, that Mr. Thompson was not armed with a knife, and that the fight did in fact take place on mine property. Given the fact that fighting was a dischargeable offense under the respondent's rules of conduct, I cannot conclude that the respondent acted arbitrarily when it discharged Mr. Dowdell. Although one may sympathize with Mr. Dowdell for losing his job after years of satisfactory service with the respondent, absent any showing of a connection with protected safety activities under the Act, I believe that employee discipline should be best left to the respondent. In this case, Mr. Dowdell availed himself of all of the rights afforded him under the applicable labor-management contract and grievance procedures, and the decision to discharge him was solely within the discretion of mine management.

With regard to the question of disparate treatment, after careful review of the record here, I cannot conclude that Mr. Dowdell has established that he was treated differently from other employees who may have been similarly situated. Although given a full opportunity to present and develop his case, even over the objections of respondent's counsel that I somehow was acting as his advocate, Mr. Dowdell was unable to substantiate his charges in this regard. All of the witnesses called on his behalf, while appearing to me to be honest and straightforward, still could not substantiate his charges. Their accounts of past fights between miners on mine property were lacking in credibility and specific facts, and were so far removed in time from the time of Mr. Dowdell's encounter with Mr. Thompson and his discharge as to render any sinister motive for the discharge as totally lacking in credibility.

With regard to Mr. Dowdell's charges of drinking on the job by miners, as well as the implication by the testimony of several witnesses that tempers were short and that miners at times armed themselves with various weapons to protect themselves from other miners, I can only conclude that these alleged incidents have not been shown to have any bearing on

Mr. Dowdell's complaint. Further, if such allegations are true, I believe they are best left to the managerial talents of those individuals charged with the responsibility of operating the mine. Since the mine has a safety committee, and since it is regulated by MSHA, I would expect that any such complaints which may affect the safety of the work force at the mine will and should be addressed by these entities rather than a Commission Judge assuming the role of a policeman.

Conclusion and Order

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that the complainant has failed to establish a prima facie case of discrimination on the part of the respondent. Accordingly, the complaint IS DISMISSED, and the Complainant's claims for relief ARE DENIED.


George A. Koutras
Administrative Law Judge

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Issues

The principal issue presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised are identified and disposed of where appropriate in the course of these decisions. Included among these issues is the question as to whether the cited violations were "significant and substantial."

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L.95-164, 30 U.S.C. §801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. §820(i).
3. Commission Rules, 29 C.F.R. §2700.1 et seq.

Stipulations

The parties stipulated that the respondent owns and operates the Maple Creek No. 1 and No. 2 Mines, and that the respondent and the mines are subject to the Act and to the jurisdiction of the Commission and the presiding judge.

The parties also stipulated that the respondent is a large mine operator and that the proposed civil penalty assessments will not adversely affect the respondent's ability to continue in business (Tr. 5).

Findings and Conclusions

Docket No. PENN 83-121

This case concerns two section 104(a) "S&S" citations issued by MSHA Inspector Francis E. Wehr on December 15, 1982, and January 12, 1983. The first citation, No. 2102682, asserts that 73 roof bolts were installed in the roof at two overcasts which had been shot down, but that no washers were provided between the 6x6 inch bearing plate and the 6-foot conventional roof bolt. The inspector believed that this was a violation of the roof control plan and mandatory safety standard 30 CFR 75.200.

The second citation, No. 2102696, asserts that a crosscut used as a shelter hole for the track haulage was obstructed with three 55-gallon oil drums and 22 stacked bags of rock dust. The inspector believed that a person would have trouble getting into the crosscut for shelter upon the approach of any haulage equipment, and he cited a violation of mandatory safety standard 30 CFR 75.1403.

During the course of the hearing, petitioner's counsel advised me that after further consultation with the inspector, citation No. 2102682 cannot be supported, and that the citation will be vacated (Tr. 6). Petitioner's counsel presented a full and complete argument in support of this action (Tr. 504-505).

With regard to citation No. 2102696, petitioner's counsel stated that upon further reflection, the inspector was now of the view that the violation was not "significant and substantial," and that he has agreed to delete that finding from the violation notice as originally issued. Petitioner's counsel presented a full argument in support of this proposed action by the inspector (Tr. 506-511).

Respondent's counsel asserted that the crosscut being used as a shelter hole was 17-feet wide and that there was room for persons to maneuver in and out. Counsel pointed out that the only person in that area is a switchman, and that the chances that he will have to use the shelter are very slim (Tr. 508). Petitioner's counsel agreed that there was room enough for persons to maneuver between the stated obstructions, and that is the reason why she believes the violation is not "significant and substantial" (Tr. 509).

After careful consideration of the argument presented, I affirm the inspector's vacation of citation No. 2102682, and that portion of the petitioner's civil penalty proposal seeking a penalty assessment for this citation IS DISMISSED, and the citation IS VACATED.

With regard to citation 2102696, I take note of the fact that the citation cites a violation of section 75.1403, which provides as follows:

Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

Inspector Wehr cited a previous safeguard notice, No. 391170, issued by Inspector Eugene W. Beck on March 1, 1979, to support the citation which he issued. The previous safeguard notice required that all shelter holes and crosscuts used as shelter holes be kept clean of loose coal, rock, supplies, and debris.

On the facts of this case, the respondent has not rebutted the fact that the crosscut in question was used as a shelter. Further, the respondent concedes that the obstructions as stated by the inspector on the face of his citation were in fact present. Accordingly, I conclude and find that the petitioner has established the fact of violation by a preponderance of the evidence. The previous safeguard notice served on the respondent required the respondent to maintain any shelter holes, or crosscuts used as shelter holes, free of debris and other materials so as to provide ready access into the shelter. Since this was not done here, petitioner has established a violation, and the citation IS AFFIRMED. The "S&S" finding IS VACATED.

Docket No. PENN 83-129

This docket concerns six section 104(a) "S&S" citations issued by MSHA Inspector Alvin L. Shade at the respondent's Maple Creek No. 2 Mine, and the conditions or practices cited are as follows:

Citation 2102605. The energized trolley wire at 2 Flat 6 Chute track switch was not adequately guarded where men are required to travel under regularly, as guard boards were broken off the width of track haulage. Mine was idle at time observed.

Citation 2106208. The continuous mining machine serial no. JM 3476 approval no. 2 G-3227 A-00 in 4 Flat right section was not maintained in permissible condition as the fluorescent light opposite the GM operator was not securely fastened to the machine as there were two bolts missing in mounting bracket.

Citation 2102609. The approved roof control plan was not being complied with in A entry 1 to 2, 4 Flat section, as temporary roof supports (jacks) were not installed according to the roof control plan as center jack was installed first and installed two jacks at same time.

Citation 2102611. The energized power wires serving power to the indicator lights for reck latch, and track haulage switch signal lights at mouth of 6 Flat A track switch were in contact with combustible material as reck latch lights were hung on wooden post and had wires taped to same. Also, switch signal lights were in contact with wooden cribs, wooden plank used to saddle beams, and roof coal.

Citation 2102618. The twin boom Fletcher roof bolter, serial no. 14242 approval no. 29-2607A-3 in 6 Flat 19 rm section was not maintained in permissible condition as there were two lights on the operator's side which were not secured to the machine as bolts were missing in the mounting.

Citation 2102619. There was a violation of the approved ventilation, methane and dust control plan in 20 rm 32 split 6 Flat 19 rm section as there was only 2400 c.f.m. of air reaching the end of the line curtain as measured with an anemometer while coal was being mined with a continuous mining machine and plan calls for 5,000 c.f.m.

Inspector Shade confirmed that he issued citation 2102605 after observing that an energized overhead trolley wire was not guarded at a point where it crossed over the main track where the locomotives, jeeps, and port-a-buses passed under (Tr. 14). The trolley wire at this point is approximately five to five and one-half feet above the ground, and it is usually guarded on both sides by boards to prevent anyone from coming in contact with the wire. The guard board had broken off at the point where the wire crossed the main track, thereby leaving the unguarded wire exposed and unprotected

for a distance of approximately six to eight feet (Tr. 16). The wire carries 550 DC volts, and at the time he observed the condition, the section was idle and coal was not being mined (Tr. 16). However, section foremen, mechanics, pumpers, and rock dust crews would be "in the area," and they would pass under the trolley wire since that was the normal way to get to the section (Tr. 17).

Inspector Shade testified that if anyone came into contact with the unguarded wire, they would likely suffer shock or burns. He also indicated that fatalities have occurred in cases where miners contacted such wires under "just the right conditions." He indicated that most of the trolley wires in the places he cited were lower than in other places, and that someone could contact a wire by walking under it or when getting out of equipment which has stopped in the area. He stated that he, as well as pre-shift examiners, walk under the wire at the location that he cited. He also indicated that during his inspection, the union walkaround representative advised him that someone at a neighboring mine had come in contact with an unguarded trolley wire and was taken out of the mine, but that the person was "all right." The inspector also alluded to two fatalities at another mine that he was aware of which were caused by persons coming into contact with unguarded trolley wires (Tr. 21). He identified the mine as the Mathies Mine, and confirmed that the accidents occurred about a year prior to his issuance of the citation here in question (Tr. 22).

On cross-examination, Mr. Shade conceded that 95% of the trolley wire in the mine is not required to be guarded, and while it may be true that miners are aware of the locations and hazards associated with trolley wires, they sometimes become complacent. Mr. Shade confirmed that an insulated hard hat would protect someone from shock if they came in contact with the wire with the hat (Tr. 29). He conceded that it is not necessary to stop a piece of machinery under the unguarded wire, and that there are other areas where the wire crosses the track where equipment can stop without any problems (Tr. 31). Someone sitting in a vehicle passing under the wire would be about two feet from it, but if he stands up for some reason, he may contact the wire (Tr. 32-33).

Respondent's Testimony

Respondent's counsel made a proffer that if called, Wayne Croushore would testify that the person performing the pre-shift examination in the area cited by Inspector Shade

would be riding in a vehicle rather than walking, and that Mr. Croushore would be of the opinion that during the time of the inspection it would be highly unlikely that anyone would ever be injured by a trolley wire (Tr. 374). He would also testify that he has no personal knowledge of anyone at the mine ever coming in contact with a trolley wire (Tr. 376).

Mr. Croushore testified in connection with a similar citation issued in Docket No. PENN 83-137, and his testimony there was that when he is in a piece of equipment traveling under a wire, he will duck his head to avoid contact with the overhead trolley wire. He indicated that he has heard of people "being hit" by such a wire, and when asked what injuries would result from one coming in contact with a 550 volt trolley wire, he responded "it would depend on how they hit it" (Tr. 381). He also admitted that he would not be surprised to learn that someone could be injured or killed after coming in contact with a 550 volt trolley wire, and he conceded that this was a lot of power and "you respect it" (Tr. 382).

Mandatory safety standard section 75.1003, requires in pertinent part that trolley wires be adequately guarded at any point where men are required to work or pass regularly under such wires. On the testimony and evidence adduced here, it seems clear to me that the portion of the overhead trolley wire which Mr. Shade cited was not adequately guarded. The guard boards usually in place had apparently fallen off and were not in place. It also seems clear to me that the location where the trolley wire passed over the track was in fact where men and equipment regularly traveled while going into the section, and that during this travel, men and equipment passed under the wire, either on foot or in a piece of equipment. I conclude and find that the petitioner has established a violation, and citation 2102605 IS AFFIRMED.

With regard to the two permissibility violations, citations 2102608 and 2102618, petitioner's counsel stated that Inspector Shade has agreed to delete his "significant and substantial" findings on the ground that he has now determined that the cited lights on the continuous mining machine and roof bolter in question were "intrinsicly safe" under MSHA's permissibility guidelines. Under the circumstances, MSHA's counsel was of the view that it was not reasonably likely that an accident or injury would occur as the result of the missing bolts on the mounting brackets for the lights in question (Tr. 73-80; 285).

The respondent does not dispute the fact that the conditions or practices stated in citations 2102608 and 2102618,

constituted violations of the permissibility requirements stated in mandatory safety standard section 75.503. Under the circumstances, the citations ARE AFFIRMED.

Inspector Shade confirmed that he issued citation 2102611 for a violation of section 75.516, after observing that certain signal lights which were hung up were in contact with wooden cribs, a wooden plank, and roof coal. He described the reck latch switch lights as a string of lights used to indicate where a derail device is located (Tr. 390). The lights were hung on a post and were strung down along side of the post, and the wire and lights were taped to the wooden post (Tr. 391). The wires were single insulated wires carrying 550 volts of DC power, and this was also true of the lights used for the track haulage signal (Tr. 393).

Mr. Shade stated that the reck latch lights in question are usually installed and hung on insulators, but that in this case he speculated that they had been torn down and someone simply put them back up by using plastic tape to tape them to the post (Tr. 393). As for the signal lights, they were hung where they usually are, but the wire was strung through the cribs used to support the roof, and the wire was strung over the crib plank and was in contact with the crib as well as the roof coal, and it too carried 550 volts DC power (Tr. 394).

Mr. Shade stated that the wires being in contact with the wooden cribs and roof coal presented a fire hazard, and that in the event of a broken wire, damaged insulation, or a short there would be such a hazard (Tr. 395). A trolley pole could jump off and damage the wires, although he conceded that it would not happen in the area where he found the wires in question (Tr. 395). He confirmed that the conditions were abated by hanging the reck lights on insulated hooks, and taking the other lights off the cribs and hanging those on insulated hooks also (Tr. 399).

On cross-examination, Mr. Shade stated that he believed the mine was idle when he issued the citation. However, there was power on the wires, and the wires were fully insulated. However, even so, he believed there is always a hazard because wires can be damaged by falling materials or the insulation could be damaged. However, he couldn't say whether there was any tension on the wires, and he did not observe that the wires were rubbing in any way (Tr. 401). He confirmed that the area was a haulageway on intake air, and that in the event of a fire it would have attracted someone's attention downstream of the air. He also confirmed that the area is

subject to a weekly electrical examination, and he had no reason to believe that the condition would not have been discovered at the next weekly examination (Tr. 404).

Mr. Shade admitted that he did not check the pre-shift books, and he had no idea how long the cited conditions existed (Tr. 421). He admitted that he is not an electrician, and he found no break in the wire insulation (Tr. 409).

Mandatory safety standard section 75.516, requires that all power wires be supported on well-insulated insulators and that they not contact combustible material, roof, or ribs. In this case, it seems clear from the un rebutted testimony of Inspector Shade that the wires on which the lights in question were strung were in fact touching wooden cribs, planks, and the roof coal, all of which is combustible material. Further, the reck lights were not hung on insulators, but were merely taped to a wooden post. Under the circumstances, I conclude and find that the petitioner has established a violation, and citation 2102611 IS AFFIRMED.

With regard to citation 2102619, Inspector Shade confirmed that he issued it after determining that only 2,400 cubic feet of air per minute was reaching the end of the line curtain where coal was being mined with a continuous mining machine. The ventilation plan, exhibit P-8, required that 5,000 cubic feet of air per minute be maintained (Tr. 443-445). The purpose of the air requirement is to sweep the face of any gases or dust (Tr. 446).

Mr. Shade stated that when he first arrived on the section, he and the foreman (Andy Peters) determined that there was 3,600 cubic feet of air at the end of the line curtain. However, since coal was not being mined at that time, this was not a violation. However, Mr. Shade reminded the foreman that he had to maintain 5,000 cubic feet of air when mining began, and the foreman knew this (Tr. 446). Mr. Shade then left the area. However, when he returned, coal mining had begun, and he noticed that dust was rolling back over the continuous miner operator. Mr. Peters informed him that he had 5,700 cubic feet of air, and Mr. Peters then left the area. Mr. Shade waited until the operator was finished loading, and after asking him to back the miner out, Mr. Shade took an air reading with an anemometer at the end of the line curtain and found 2,400 cubic feet per minute (Tr. 449).

Mr. Shade stated that after taking his reading, Mr. Peters repaired the line curtain, but he still got only 3,750 cubic feet of air. Mr. Peters then discovered that part of the line

curtain was against a rib, and after "framing it out," Mr. Shade took another reading and got 5,700 cubic feet of air (Tr. 451).

Mr. Shade testified that the mine liberates methane, and that it is on a section 103(i) inspection cycle. He had no knowledge as to how long the mine had been under such an inspection cycle, nor did he have any knowledge as to a purported previously issued order for methane accumulations (Tr. 457). He did confirm that he had previously issued a citation for methane accumulation, but could supply no details, and he had no knowledge whether it was on the same section or not (Tr. 460).

Mr. Shade confirmed that he made a methane check, and found one-tenth of one percent methane, and he conceded that it was not possible for a methane ignition to occur with this amount of methane present. He indicated that the explosive range of methane is five to ten percent (Tr. 463). He conceded that the time he issued the citation there was no hazard of a methane ignition, and that he had no knowledge as to how much of the dust that he observed was "respirable dust" (Tr. 463).

Respondent's Testimony

Andrew Peters, Assistant Section Mine Foreman, testified as to the events which occurred at the time the violation in question was issued. He testified that he examined the face area, took methane readings, and found 4,000 and 5,000 cubic feet per minute at the place where mining was to begin. After receiving a complaint from the continuous miner operator with respect to dust rolling back over his machine, he took an air reading behind the curtain, and found less than 5,000 cubic feet per minute. He found that the air was being short-circuited, and he instructed that repairs be made. After this was done, he measured the required 5,000 feet and left the area (Tr. 486). He later determined that some brattice curtain had been knocked down, and that the air was interrupted, and he believed that the miner operator and his helper should have been aware of this situation (Tr. 497-499). He had no opinion as to whether it was likely that an injury would occur as a result of the cited conditions (Tr. 491).

On cross-examination, Mr. Peters confirmed the air readings taken by the inspector to support the citation, and he even conceded that the inspector gave him the benefit of

the doubt by using a correction factor on his anemometer (Tr. 493-494). He also explained the circumstances surrounding the abatement efforts made to correct the cited condition (Tr. 496-500). Mr. Peters admitted to "a few methane ignitions" at the Maple Creek No. 2 Mine, but he indicated that they were face ignitions which did not result in any explosions (Tr. 500).

After consideration of all of the testimony and evidence here adduced, I conclude and find that the petitioner has established a violation by a preponderance of the evidence. Accordingly, citation no. 2102619 IS AFFIRMED.

Inspector Shade confirmed that he issued citation no. 2102609, because the respondent violated its approved roof control plan when it installed two roof support jacks simultaneously inby unsupported roof after a center jack had been installed in an entry. The roof control plan does not permit the simultaneous installation of two jacks because it places the men under unsupported roof (Tr. 99). Mr. Shade identified exhibit P-3, drawing No. 2 as the particular roof control provision which he claims was violated (Tr. 102). He explained that the roof jacks are installed after the particular cut has been mined out, and that when he arrived on the section, a "short cut" had been mined, and the jacks were installed in preparation for roof bolting (Tr. 103).

Mr. Shade explained the roof control drawing, and he confirmed that the jacks labeled A, B, and C were in place, and he explained the sequence for installing the remaining ones (Tr. 105-107). He explained that with the A, B, and C jacks in place, the men next installed jack No. 2, the center jack, and then walked inby unsupported roof and installed jacks Nos. 4 and 6. This violated the plan, since jacks Nos. 1 through 6 should have been installed in sequence (Tr. 108; 111). The proper procedure is to install one jack, and then go to the next one. Here, the men installed two at a time, and they were exposed to more unsupported roof than was necessary (Tr. 109). He confirmed that the distance between the No. 4 and No. 6 jacks was approximately 9-1/2 feet (Tr. 110).

Mr. Shade described the roof as "abnormal," and that it had "potted in different places," and this is the reason why a "short cut" of approximately 12 feet had been mined. He also indicated that the roof in the entire section had "clay veins," and "they had slips which passed through a loose roof that fall out at any time" (Tr. 112). He believed that the respondent knew the roof was bad and that is why 12-foot

cuts were being mined (Tr. 113). Mr. Shade was aware of a roof fatality which occurred at the Maple Creek No. 1 Mine last summer, but he is not aware of any at the No. 2 mine (Tr. 115).

Mr. Shade stated that abatement was achieved by installing the jacks according to the plan, but he could not recall if the section foreman was present when the jacks were installed (Tr. 118). Mr. Shade confirmed that he observed the men walk in with the number 4 and 6 jacks and he called them back out of the area with the jacks, and he reviewed the installation plan with them (Tr. 119).

On cross-examination, Mr. Shade conceded that the roof control plan does not specifically state that two men may not install roof jacks at the same time, but that it does provide for a particular sequence in which the jacks have to be installed. He also indicated that one can only go under unsupported roof for a distance of five feet and that the plan provides "that you can only use the people to install jacks that you need to install jacks" (Tr. 127).

Mr. Shade confirmed that at the time he issued the citation, three jacks (A, B, C), were in place. The men then installed jack no. 2, then walked into the entry with jacks 4 and 6, and that is when he called them back out and advised them that they were out of compliance (Tr. 133, 139). He confirmed that when jack No. 2 was installed, it was within 5-1/2 feet of the last row of roof bolts, and that since a 12-foot cut was being mined, jack No. 2 would have been 6-1/2 feet from the face (Tr. 134). He stated that had the men installed jacks 1, 2, and 3 before going inby to begin installing jacks 4, 5, and 6 there would not have been a violation (Tr. 135).

Mr. Shade conceded that he made no measurements at the time he issued the citation, and he conceded that the men being four feet beyond the center jack would have been within 2-1/2 feet of the face (Tr. 140). He confirmed that at the time the citation issued, the area had been mined, and the roof was being supported in preparation for roof bolting. He conceded that it was possible that the reason a 12-foot cut was taken was that time ran out on the last shift, and that it was possible that the 12-foot cut had nothing to do with the roof conditions (Tr. 150).

Mr. Shade agreed that the roof control plan permits someone to go under unsupported roof to install temporary supports, and after the first row of jacks are installed, the roof is no longer unsupported, and a person may then go 5-1/2 feet in by the last support to install the next one (Tr. 153). He further explained the violation, as follows (Tr. 154):

Q. So the man who set the center jack was in violation of the plan?

A. Yes, he was.

Q. Because he was beyond five and a half feet?

A. Because he set that in the center of the entry. If he would have started with five and three, it wouldn't have been in violation; but he started in the center, which didn't put him within five feet of a rib or another jack.

Q. If the two men setting No. 4 and No. 6 jack, what you call No. 4 and No. 6 jack, were within five and a half feet of the last row of bolts, there was no violation?

A. Well, then they set both of these jacks, you sent more people in that is necessary and you cannot do this.

In response to further questions, Mr. Shade testified as follows (Tr. 160-163):

Q. Mr. Shade, now, you testified that the first jack you actually observed being installed was jack No. 2 on Drawing No. 2 and then you next observed that two miners were going to install jacks No. 4 and 6.

Now, how do you know that? What specifically did you see them do that led you to conclude that they were going to install jacks 4 and 6?

A. I saw them going in there.

Q. With what did they have with them?

A. Two jacks. Each had a jack. They started to install them. They had them up in the roof and they pulled the jack and came back out.

Q. They actually started the installation process?

A. Yes.

Q. At the locations that you have already identified?

A. Well, they went in there with both jacks. What they do --

JUDGE KOUTRAS: Were the jacks set?

THE WITNESS: They weren't secured against the roof.

JUDGE KOUTRAS: Did they bring the jacks back out with them --

THE WITNESS: Yes.

JUDGE KOUTRAS: -- when you called them back out?

THE WITNESS: I asked them what they were doing. I said they're in violation.

JUDGE KOUTRAS: What if they would have had the jacks already set, would you have forced them to take them back out?

THE WITNESS: No, I wouldn't have forced anybody.

JUDGE KOUTRAS: They had not installed it?

THE WITNESS: No.

JUDGE KOUTRAS: When you called them back out, did they carry the jacks back out?

THE WITNESS: Yes, that's what I have on my drawing.

BY MS. GISMONDI:

Q. Now, Mr. Shade, what specifically, to the best of your recollection, what was done to terminate this violation?

A. Well, in the first place, they got to have three jacks and the first -- really three jacks, they installed those three jacks and then they went in and installed the other jacks.

Q. So they installed jacks 1 and 3?

A. Yes.

Q. Then they installed the row 4, 5, and 6; is that correct?

A. Yes.

Respondent's Testimony and Evidence

Joseph Skompski, assistant section foreman, testified as to his experience, and he confirmed that he was familiar with the mine roof control plan. He confirmed that he accompanied Inspector Shade during his inspection, and after referring to drawing No. 2 of the roof control plan, he stated that jack No. 2 was installed, and the men then "grabbed jacks 1 and 3 and they was going to set them and they went inby 2 a little bit" (Tr. 175). Mr. Shade then withdrew the men and discussed the roof control plan (Tr. 176).

Mr. Skompski stated that jack Nos. 2, 1, A, B, and C were in place at the time the citation issued, and it was his understanding that the violation was issued because two jacks were installed at the same time (Tr. 176). Mr. Skompski conceded that the roof plan requires that the roof supports be installed "in sequence, row by row" (Tr. 178). He stated that the men who were installing the jacks were experienced miners, and that it was his understanding that they intended to install jack Nos. 1 and 3, and he estimated that the center jack was 5 to 5-1/2 feet from the last row of roof bolts (Tr. 181).

On cross-examination, Mr. Skompski conceded that the roof conditions on the section "weren't the best conditions" (Tr. 182). He confirmed that under the approved roof control plan, temporary roof jacks are to be installed "rib-to-rib" (Tr. 183). He stated that he observed two men carrying jacks, and that they were going to install them at positions 1 and 3, as shown on the diagram, and that this would have placed them in line with jack No. 3 (Tr. 185). Referring to the diagram, Mr. Skompski confirmed that if two men started at jack No. 2 and installed jack Nos. 1 and 3 from either side of No. 2, they would be in compliance with the roof control plan as long as they stayed within 5-1/2 feet of jack No. 2 (Tr. 193).

Samuel L. Cortis, respondent's chief mine inspector, testified that part of his job is to prepare roof control plans for submission to MSHA. He identified drawing No. 2, and stated that it depicts two sets of roof control plans. He stated that during the mining phase, roof control is

accomplished by installing jacks A through D, 1, 4, and 7, as shown on the diagram (Tr. 214). Once mining is completed, and roof bolting begins, there is an eight-jack temporary roof support plan that is put into operation, and he explained this procedure (Tr. 214-217). He explained that drawing No. 1 depicts where temporary roof jacks are to be installed during certain sequences in the mining cycle, and he explained the procedures and confirmed that the ribs may be used as additional roof protection while installing the jacks (Tr. 220). He further explained how the jacks could be installed, and he indicated that they need not be installed in numerical sequence, as long as the distances between the jacks are maintained (Tr. 222).

On cross-examination, Mr. Cortis confirmed that as long as the next jack is kept within five feet of a person for protection, other jacks may be installed, regardless of the sequence (Tr. 223). He explained the procedures followed in the mine for the installation of jacks (Tr. 223-229), and he confirmed that the maximum allowable distance that anyone can go inby the last row of permanent roof supports to install temporary roof jacks is 5-1/2 feet (Tr. 237).

Petitioner's counsel acknowledges that under the roof control plan, a person may go out under unsupported roof to install temporary roof jacks as long as they are within 5-1/2 feet of the last temporary support. Counsel's understanding of the plan is that there are "two variables" that come into play with regard to how far a person may venture out under unsupported roof. Counsel asserted that one may go inby the last row of permanent supports (roof bolts), towards the face, for a distance of 5-1/2 feet. However, at all times, one must remain within five feet laterally of either rib or the next adjacent lateral jack (Tr. 230-231).

Referring to drawing no. 2, Mr. Cortis was asked certain questions regarding his interpretation of the jack installation sequence and he responded as follows (Tr. 241-246):

JUDGE KOUTRAS: She asked you, Counsel has asked you a question before, what the maximum distance someone can walk under an unsupported roof and you said five and a half feet. Now, does that mean under five and a half feet from permanent supports or from temporary supports or both he can walk out from?

THE WITNESS: From both. It would be either permanent or temporary.

JUDGE KOUTRAS: What I have a problem understanding here is if a fellow walks out starting at the last row of supports and walks out from nine and a half feet to set post No. 4, he would be in violation of the rule that says you cannot be more than five and a half feet inby permanent supports; correct?

THE WITNESS: He would be, in that case.

JUDGE KOUTRAS: But wouldn't he be within five and a half feet of C, which is a temporary roof support?

THE WITNESS: That's correct.

JUDGE KOUTRAS: Then how is he in violation?

THE WITNESS: Well, only in, I guess, in what our interpretation of the plan would be.

JUDGE KOUTRAS: Now, Ms. Gismondi, did you follow that? Is he in violation?

MS. GISMONDI: Yes, I believe he is.

JUDGE KOUTRAS: Why?

MS. GISMONDI: As I said, it is my understanding that there are maximum allowable distances both from, you know, working both laterally, that is, how far you are from either the rib or the next adjacent lateral support and how far inby are you.

I mean, as I said, I think there are two variables going on. You have got to have protection to either side of you, you have to have protection behind you.

JUDGE KOUTRAS: Well, now, that is the point. Look, this second drawing, I have got permanent roof bolts nine and a half between the arrows.

MS. GISMONDI: Correct.

JUDGE KOUTRAS: Depending on how this man -- let's assume he starts at point A and walks out here (indicating). Nine and a half feet with a jack over

his shoulder, he is going nine and a half feet out in unsupported roof in this direction and that violates the plan?

MS. GISMONDI: As far as the Secretary is concerned, yes.

JUDGE KOUTRAS: Because it is more than five and a half feet.

MS. GISMONDI: Regardless of how close to the rib he is.

JUDGE KOUTRAS: But if you've got temporary roof C set and the man walks under A and B and walks from this point, he is not under unsupported roof at any time, if you consider the permanent jack in place within five and a half feet?

MS. GISMONDI: I would say, yes, he is, Judge, because, again, he may have support to his left but he doesn't have any support behind him.

JUDGE KOUTRAS: My hypothetical says he got this far and that support and the rib is there (indicating).

MS. GISMONDI: He is still more than five and a half feet. As I said, I think there --

JUDGE KOUTRAS: From this reference point?

MS. GISMONDI: Right, which is the permanent bolt, right.

JUDGE KOUTRAS: That is what the parties understand Drawing No. 2 in this Roof Control is all about?

MS. GISMONDI: That is what I understand it to be.

JUDGE KOUTRAS: Is that your understanding, Mr. Cortis?

THE WITNESS: Yes.

JUDGE KOUTRAS: That is your understanding?

THE WITNESS: It is my understanding that we have to be within five and a half feet of support, permanent or temporary.

Inspector Shade was called in rebuttal, and he identified a copy of the notes he made at the time the citation issued (exhibit P-5; Tr. 254). He quoted from his notes, and he indicated that they reflect that the jacks identified as A, B, and C, were in place when he arrived, that jack 2 was then next installed while he observed the scene, and that the note "short cut installed both at once" confirmed that "they started installing" jacks 4 and 6 (Tr. 256). He believed that the miners who were going to install the 4 and 6 jacks were in beyond jack 2 further than four feet (Tr. 257).

Referring to roof plan drawing no. 2, Mr. Shade indicated that under the plan, miners may go 5-1/2 feet inby permanent roof supports to install temporary jacks, and that after that they may go four feet inby the temporary jacks to install the next row of temporary jacks (Tr. 258). He confirmed that the maximum allowable distance that a miner may go laterally from either the next adjacent rib or support is five feet (Tr. 258). On cross-examination, Mr. Shade further explained his notes, markings, and the observations which he made at the time the citation issued (Tr. 259-282).

Citation No. 2102609 charges the respondent with a violation of its approved roof control plan. Exhibit P-4 is a copy of the applicable complete roof control plan, and exhibit P-3 contains copies of pages from the plan, and in particular two pages labeled "Drawing No. 1" and Drawing No. 2." Although Inspector Shade failed to include in the citation a specific reference to the applicable roof control provision which he believed was violated, he testified that Drawing No. 2 was the particular plan provision which was violated. His contention is that the installation of two temporary roof jacks, simultaneously, is a violation of the plan because it exposes the miners installing those jacks to unsupported roof.

Apart from any roof control violation, mandatory section 75.200 prohibits anyone from proceeded beyond the last permanent roof supports unless adequate temporary support is provided. Thus, the question here presented is (1) whether the respondent has violated any specific portion of its approved roof control plan, and (2) absent a violation of the plan, was there a violation of section 75.200, when the two miners proceeded to install the two jacks in question.

The testimony in this case concerning the applicable roof control plan is most confusing. Drawings 1 and 2 are used

interchangeably, and respondent's witness Cortis, the man who drafted the plans for MSHA's approval, even went so far as to testify that Drawing No. 2 contains "two plans." By failing to state on the face of the citation the precise roof control plan provision allegedly violated, the inspector contributed to the confusion. Although the citation states that two jacks were installed simultaneously, the inspector conceded that there is nothing in the plan to prohibit this per se. Although the inspector characterized the roof condition as "abnormal," and indicated that this explained why a "short cut" was being taken, on cross-examination he conceded that it was possible that a "short cut" was taken because of a time factor rather than because of the roof conditions. Further, although the question of distances is critical here, the inspector conceded that he made no measurements, and his contemporaneous notes (exhibit P-5), shed no light on this. The notes simply reflect that one jack was installed first, and two others were installed at the same time.

Inspector Shade testified that three jacks were installed along the left rib of the entry in question, and these have been identified as jacks A, B, and C. He also testified that jack No. 2, which is the middle jack of three temporary jacks, was also installed at the time he viewed the area in question. Jack No. 2 was in by the row of permanent roof bolts which had been installed. Inspector Shade was concerned over the fact that two miners proceeded in by jack No. 2 to simultaneously install two additional jacks, which have been identified as Nos. 4 and 6. In the inspector's view, when this was done, the miners who were installing those jacks were under unsupported roof.

After careful review and consideration of all of the evidence and testimony adduced in this case, I cannot conclude that the petitioner has established by a preponderance of the evidence that the respondent violated its roof control plan. With respect to the question as to whether the two miners who started to install the two roof jacks in question were under unsupported roof, I can only conclude that the miner who intended to install roof jack No. 6 would have been under unsupported roof. Insofar as the other miner was concerned, I conclude that the rib jacks and permanent roof supports provided him ample protection when he ventured out into the entry to install roof jack No. 4. As for the miner who walked out with the intent to install roof jack No. 6, while he was protected on the diagonal by roof jack No. 2, he was not protected by any roof support out by and towards the permanent supports, nor was he protected by any roof support laterally. Accordingly, to that extent he was in fact under unsupported

roof, and it is on that basis that I affirm the citation. In short, I conclude and find that one of the two miners who simultaneously installed the two jacks in question within the view of the inspector, was under unsupported roof. Under the circumstances, this was a violation of section 75.200, and to that extent the citation IS AFFIRMED.

Docket No. PENN 83-128

Section 104(a) "S&S" Citation No. 2103081, charges that a Kersey battery-powered scoop was not maintained in a permissible condition in that an opening in excess of .005 inches (plane flange joint), was present in the lower right hand corner of the contactor compartment located in the operator's compartment. The inspector cited a violation of mandatory safety standard 30 CFR 75.503.

MSHA Inspector Okey H. Wolfe confirmed that he issued the violation in question, and explained why he did so (Tr. 511-516). He indicated that he found an opening between the cover and the contactor compartment of the scoop in question, and that the opening was .005, as measured by a feeler guage, and the allowable limit is .004 (Tr. 517). He described the batteries on the scoop as 240 volt DC, and he believed that the hazard presented by the violation was that the opening could be an ignition source for methane. He took methane readings, and detected none present (Tr. 520). He did confirm that the mine is on a "301(i) spot inspection status," which indicates that it liberates more than one million cubic feet of methane in a 24-hour period (Tr. 520). He explained the purpose of the permissibility requirements of the cited standard as follows (Tr. 520-522):

Q. Mr. Wolfe, what is the purpose of the permissibility regulations providing that there be an opening no greater than .004 inches?

A. Well, the idea of that is that these explosion-proof enclosures, none of them are air tight, and when a piece of equipment is in operation, it tends to warm up, which causes expansion of the air that's in the compartment, and therefore when it cools, it has a tendency to pull whatever atmosphere it happens to be in back into the compartment, and should that atmosphere contain an explosion mixture of methane, the idea of opening it is to provide a flame path, so that if methane were drawn back into the

compartment during the cooling stage and ignited by the arcing and sparking inside that compartment, that it would prevent it from getting to the outside atmosphere. It would be cooled sufficiently that it would not ignite methane once it exited the boss or enclosure.

Q. Now, is that purpose served where you have an opening in excess of .005 inches?

A. No, it is not.

Q. What would happen if methane were drawn into this piece of equipment as it exited when you issued the Citation?

A. In all likelihood, if once it was ignited within that compartment, it would escape to the outside atmosphere.

Q. Do you know whether or not there have ever been any excessive methane accumulations at Maple Creek No. 1?

A. There have been 107(a) orders issued for methane in excess of 1.5.

Q. What type of injury would result in the event of an explosion or a fire occurring as a result of this violation?

A. Well, the injuries that could result of a methane explosion would be concussion, burns, asphyxiation.

On cross-examination, Mr. Wolfe denied that at the time he issued the citation in question he was instructed that all permissibility violations should be considered as "significant and substantial" (Tr. 524). He explained his instructions in determining whether a violation was "S&S" or not, and he confirmed that at the time he issued the citation, he detected no methane in the area, there was adequate ventilation, and the scoop in question was three crosscuts outby the last open crosscut (Tr. 524-526). He conceded that there is a state law requiring a methane check at the face before any electrical equipment is taken there (Tr. 527).

Mr. Wolfe could not state whether anyone ever intended to use the scoop at the face on the day that he cited it,

but he did indicate that the scoops are normally used "to clean up and carry supplies around" (Tr. 529). He could not state how long a scoop would normally spend in the face area, and he has observed a scoop in operation during the entire cleanup cycle (Tr. 530).

Mr. Wolfe could not state how the opening in question was created, and he confirmed that abatement was achieved by merely tightening up the bolt. He confirmed that the equipment in question should be examined weekly, but he had no way of knowing how long the condition existed, and he had no reason to believe that the condition would not have been corrected during the next weekly examination (Tr. 531).

Mr. Wolfe stated that anytime there is mining in the Pittsburgh coal seam, there is a definite possibility that methane will be encountered, and he confirmed that the mine in question has only experienced face ignitions which did not result in any personal injuries or damage to property (Tr. 532). He further explained his concerns as follows (Tr. 533-534).

Q. Now, didn't you testify that the ventilation on this section was perfectly adequate?

A. Yes, ma'am.

Q. Did you have any reason to believe this scoop was going anywhere but this particular section?

A. No.

Q. So, what led you to believe that there was going to be an accumulation of methane to the 5 to 15 percent range on this section?

A. Well, methane can accumulate. There are a lot of reasons why methane can accumulate. I mean, at the time I was there, everything was fine as far as the ventilation was concerned and so on and so forth, but I don't know what is going to happen in the next hour or the next day or the next week.

Q. Did you have any opinion as to what period of time it would take for this occurrence to take place?

A. No, I did not.

Q. Did you have any opinion as to how likely it was to happen before the next weekly electrical examination?

A. No.

Q. If you considered the factors that were present when you examined the scoop and considered the history of the mine and assumed that the condition would be corrected at the next permissibility examination, would you consider this violation to be significant and substantial?

A. Those are not my instructions. I do not consider just that mine.

When asked why he believed the scoop would be used in the last open crosscut, Mr. Wolfe replied that it was standard procedure in the mine to use such scoops for cleaning up the face areas and the returns, and his "guess" was that it was last used on the idle shift or on the last production shift, possibly to carry supplies to the face (Tr. 542-543).

Respondent's Testimony

Joseph Ritz, ventilation foreman, testified as to his responsibilities, and they include the examination of air courses, bleeders, and methane examinations in the returns. He confirmed that he has 13 years of mining experience, holds a degree in mining from Penn State University, and has been an active member of the mine rescue team for several years (Tr. 546).

Mr. Ritz stated that he was familiar with the mine ventilation plan, and he described the amount of air induced into the mine ventilation system, and the amount of methane taken out (Tr. 547). Since 1974, he could recall only one methane face ignition at the Maple Creek No. 1 Mine, and he described it as a frictional ignition where a miner cutting coal ignited a pocket of methane, and he indicated "it flashed and was out probably about as quick as it happened" (Tr. 548). He was of the opinion that the chances of a scoop igniting any methane, with the opening described, was remote (Tr. 548). He could recall no section 107(a) orders ever being issued at the mine for excessive accumulations of methane (Tr. 549).

On cross-examination, Mr. Ritz agreed that mine ventilation can be interrupted and there was no "guarantee" that this will not happen (Tr. 551). However, he explained the

various safeguards and systems in effect at the mine to indicate when ventilation is interrupted. He stated that the mine in question liberated under a million cubic feet of methane per 24-hours, but that this will vary as conditions change (Tr. 553-556).

When asked whether he had any doubts as to whether or not the scoop in question would be used in by the last open crosscut, Mr. Ritz stated that the use of the scoop varies, and that he had no way to determine whether it would be used on the next shift, or whether it was used on the previous shift. He was only sure that it was used on the shift when it was observed by the inspector (Tr. 558). Although he denied that the scoop is used primarily in by the last open crosscut, he conceded that it is so used at times for cleanup, and that it is also used to haul supplies out by (Tr. 559). He did confirm that on the day of the inspection, the mine was active, and that the cited scoop was the only scoop available for cleaning up at the face area (Tr. 560). He also agreed that the scoop had not been "tagged out" (Tr. 561).

When asked his view on the opening found in the equipment by the inspector, Mr. Ritz agreed that it was not wise to leave the condition uncorrected, that he would insure that it was fixed if he found the condition, and he conceded that in any permissibility violation, "Murphy's Law" applies. He explained by stating that "if it can happen, it will happen" (Tr. 565).

After careful consideration of all of the testimony and evidence adduced here, I conclude and find that the petitioner has established a violation by a preponderance of the evidence. Mandatory safety standard section 75.503, requires that all electric face equipment taken or used in by the last open crosscut be maintained in a permissible condition. Here, the respondent does not dispute the fact that the cited piece of equipment was not maintained permissible. As for the question of whether or not it was "used or intended to be used in by the last open crosscut," I conclude and find that the petitioner has established that this was the case. Respondent's own witness (Ritz), admitted that the scoop was, in the normal course of business, used in by the last open crosscut, and that it was the only scoop available to perform cleanup of the face areas. Absent any evidence to the contrary, I conclude and find that the preponderance of the evidence establishes that the scoop in question "was used or intended to be used in by the last open crosscut." Under the circumstances, Citation No. 2103081 IS AFFIRMED.

In this case, MSHA Inspector Francis E. Wehr issued a section 104(a), "S&S" citation on December 14, 1982, citing a violation of mandatory safety standard 30 CFR 75.1003. The condition or practice cited is as follows:

Adequate guarding was not provided for the energized trolley wire and trolley feeder, at the 37 crossover switch off C track haulage road. The guards on the inside were knocked down and lying on the mine floor on B track haulage.

Inspector Wehr confirmed that he issued the citation in question after finding that the overhead energized trolley wire at the C track cross-over switch was inadequately guarded. He stated that the guarding had been knocked off, and that he found it lying on the mine floor. The guarding was missing along a six-foot area which he described as the "V" intersection, at the point where the C track haulage and a cross-over from the B track haulage intersected. He identified exhibit P-1 as a copy of the citation, and the second page is a copy of his notes, including a rough sketch of the cited location (Tr. 319-329).

Mr. Wehr stated that the trolley wire was approximately five and one-half to six feet off the floor, and that it was a 550-volt DC wire. He confirmed that abatement was timely achieved by re-installing the section of guarding which was not in place. He also confirmed that the trolley wire guarding has been a problem in the mine in that it is often knocked off by the trolley "harps," particularly at the track switch-over locations. He also indicated that mine management is aware of the problem and makes an effort to constantly keep after the work force to be alert to the problem.

Mr. Wehr indicated that his principal concern was that the locomotive or mantrip operators who regularly passed under the wire would come in contact with the unguarded wire. If they did, it was his opinion that it was reasonably likely that a serious injury would occur. He confirmed that he was aware of the fact that past accidents or fatalities have occurred in the mining industry when miners came in contact with unguarded trolley wires similar to those which he cited in this case. Although he could not document any recent accidents at the mine, he did indicate that he had

heard that someone had recently come in contact with a trolley wire at the mine, but he had no specific details about the incident.

Mr. Wehr described the different types of vehicle conveyances which used the track haulage, and he believed that it was possible for a miner operating this equipment to come in contact with the overhead wire while in the equipment. Although he conceded that he did indicate on the face of his citation that only one person would be affected by the conditions he cited, he emphasized that under certain circumstances other persons would be in the area where he found the unguarded trolley wire, and he identified them as foremen, company inspectors, and pumpers (Tr. 333-334).

Mr. Wehr did not know how long the guarding had been down, and he stated that he checked the pre-shift books but found no notations that the guard was down. He also indicated that guards do get knocked down when a power pole jumps off the wire (Tr. 337).

On cross-examination, Mr. Wehr conceded that trolley guarding is a mine maintenance item and that it is not physically possible to keep up with it all the time (Tr. 342). He confirmed that at the Maple Creek No. 2 Mine, two men are regularly assigned to replace trolley guarding that has been knocked down (Tr. 346). He also conceded that persons riding a locomotive wear protective hats, and that these hats provide electrical protection (Tr. 351).

Respondent's Testimony

Paul Gaydos, construction foreman, testified that in his opinion, while it was possible that someone could be injured because the trolley guard board was down, it was not probable. He indicated that a small area of wire was unguarded, and that through training, safety meetings, and inspections, everyone is made aware of these situations (Tr. 354-356). Mr. Gaydos identified the types of equipment which would pass under the wire, and he indicated that he was six-foot-three and had often passed under the wire, but has not come very close to it (Tr. 357). He conceded that if one were in the largest piece of equipment, a 54-ton locomotive, his head may be 5-1/2 feet off the ground level (Tr. 358).

Mr. Gaydos stated that it is very unlikely that a power pole would come off the trolley wire at the crossing chute

location in question, and this is because one is not moving fast. If the pole does come off, one could stop the vehicle and retrieve the pole (Tr. 359). He indicated that the mine must be pre-shifted three hours preceding the next operating shift, and that this includes the trolley wire guards (Tr. 359-360). He could not remember how long the guard in question was down (Tr. 361). Mr. Gaydos could not state how serious an injury would result if one were to simply brush the wire, but conceded that he "respects it," and would not like to back into it (Tr. 364).

On cross-examination, Mr. Gaydos confirmed that short of someone committing suicide by intentionally grabbing the wire, he could not imagine anyone suffering fatal injuries while riding in a piece of equipment under the wire. He stated that it was his practice to duck his head while approaching an overhead wire, and he would expect that an experienced motorman would do the same (Tr. 365-366). He conceded that it was possible that the guards were knocked off by a pole coming off the wire, and he confirmed that under State law the trolley guard boards extend two inches below the wire (Tr. 370).

After carefully consideration of all of the testimony and evidence adduced here, I conclude and find that the petitioner has established by a preponderance of the evidence that the guarding for the cited energized trolley wire at the location in question was inadequate, and that this constitutes a violation of section 75.1003. Accordingly, Citation No. 2102681 IS AFFIRMED.

PENN 83-136

MSHA Inspector Okey H. Wolfe confirmed that he issued Citation No. 2103084, on February 8, 1983, for a permissibility violation on a Fletcher roof bolter after finding that one of the bolts which secured the lid to the main contactor compartment was missing (Tr. 579). The function of the compartment is to distribute power to various parts of the machine after it comes in from the power source. He believed the mine was active the day the citation issued, and the bolter was required to be maintained in permissible condition. All bolts must be in place so as to preclude methane from entering the compartment or to confine any methane ignition inside the compartment (Tr. 581).

The parties agreed to incorporate by reference Mr. Wolfe's prior testimony concerning the methane liberation history of

the mine, as well as his rationale for finding that the violation was significant and substantial (Tr. 582). Mr. Wolfe was sure that the roof bolter was used in by the last open crosscut and that it was the only one available on the section (Tr. 583).

The parties agreed to proffer the testimony of Mr. Joseph Ritz on behalf of the respondent, and that if called he would testify that the cited roof bolter was parked two blocks out by the last open crosscut, there was no opening in the contactor compartment, the section was wet and well rock dusted, the ventilation was good, and there was no methane detected anywhere in the section (Tr. 592-593). Petitioner's counsel added that she would ask the witness to confirm that interruptions to the ventilation are always possible (Tr. 593).

While it may be true that the roof bolter was parked at the time it was cited by Inspector Wolfe, I find his testimony that it was used on the section for roof bolting to be credible. Respondent has offered no testimony or evidence to the contrary, nor has the respondent rebutted the fact that the missing bolt on the contactor panel was a permissibility violation. I conclude and find that the petitioner has established the fact of violation, and Citation No. 2103084 IS AFFIRMED.

Inspector Wolfe confirmed that he issued Citation No. 2103085 on February 8, 1983, citing a violation of section 75.606 after observing a shuttle car run over its own trailing cable (Tr. 594-595). The car was in operation and was coming off the loading point, and it ran over the cable one time. The cable is a 440-volt AC cable, and Mr. Wolfe issued the citation to Mr. Ritz as soon as he observed the car run over the cable.

Mr. Wolfe stated that the power was reduced, and the cable was inspected for damage. However, no visible damage to the cable or to the outer insulation was found (Tr. 596). Mr. Wolfe stated that the danger presented was a possible fire hazard due to cable damage not readily observable, and a possible shock hazard. He indicated that the cable is handled from time to time, and while he could not recall whether the area was wet, but he believed that the area was "normally pretty wet" (Tr. 597). His concern for a fire hazard stemmed from the fact that if there were internal cable damage, two leads could come together which would cause the cable to "blow," and that while AC cables are protected, "you would still have a momentary flash that would be pretty hot" (Tr. 598).

Mr. Wolfe believed that cable damage will result from a heavy machine running over it, and that "if it would continue, it is definitely going to cause damage to it eventually" (Tr. 598). He admitted that when he operated a shuttle car, there were times when he ran over his own cable, and normally, an operator can observe when this happens (Tr. 600). In the instant case, he had no way of knowing whether the operator had run over the cable prior to his observing it, nor did he know that the machine operator was even aware that he had run over his cable (Tr. 601).

Mr. Wolfe conceded that he was more concerned with a fire hazard rather than a shock hazard, and if a fire occurred, miners underground would be exposed to smoke inhalation and burn hazards. Also, toxic fumes could be given off from the burning insulation or neoprene cable jackets. He was aware of a previous fire in another mine caused by cable damage. A short circuit occurred in the cable, and when it was reeled up, it caught the car on fire. However, he did not know whether the short circuit was caused by the car running over the cable, and it was possible that the cable was damaged by fallen rock. The resulting fire filled the section with smoke (Tr. 603-605).

On cross-examination, Mr. Wolfe conceded that it "could well be possible" that the incident in question was a "freak accident" in that the cable got caught between the cable compartment lid and the side of the shuttle car, and that "perhaps" the operator did not realize what had occurred (Tr. 605). He also conceded that he permitted the car to continue in operation after the cable was inspected, and that it was not taken out of service (Tr. 606).

Respondent's Testimony

Joseph Ritz testified as to the circumstances surrounding the shuttle car operator's cutting of his own trailing cable. He stated that it happened when the car operator slowly drifted off the loading ramp while backing up and he and the inspector were standing nearby observing him (Tr. 633). Mr. Ritz indicated that the operator "drifted back" and the cable did not "pick up" on the reel because the hydraulic motor did not engage, and as a result "he just ran onto the cable" (Tr. 633). Mr. Ritz believed that the operator was aware of the presence of the inspector, and simply did not pay close attention to what he was doing (Tr. 634). Mr. Ritz immediately de-energized the machine, and he, the inspector, and the section mechanic, visually inspected the cable and found no visible damage. The power was put on again, and the shuttle car was put back in service (Tr. 635).

Mr. Ritz was of the opinion that there was no problem with the cable, and he personally has never observed a fire on an AC cable such as the one in question. Once the cable is put in service, he does not believe that anyone would handle it, and he did not understand why the inspector issued the citation (Tr. 688). The operator was admonished to watch out for his cable, and he continued operating the car after the cable was inspected (Tr. 639). Mr. Ritz stated that the section was wet (Tr. 631). He also indicated that had there been any critical damage to the interior of the cable the ground fault system would likely "kick out the power" and de-energized the cable (Tr. 643).

Respondent does not dispute the fact that the cited shuttle car ran over its own trailing cable. Petitioner affirmed that the theory of its case lies in the fact that the cited standard requires that trailing cables be adequately protected to prevent damage by mobile equipment (Tr. 646). Further, petitioner's counsel was of the view that the manner in which the car operator was operating the shuttle car at the time the inspector observed him run over the cable constituted the gist of the violation (Tr. 647, 651). As concisely stated by counsel, "the cable is supposed to be protected from damage. When you run over it, it is not protected from damage" (Tr. 651).

Mandatory safety standard section 75.607 requires that trailing cables be adequately protected to prevent damage by mobile equipment. In the instant case, it seems clear to me that the trailing cable in question was in fact run over by the shuttle car operator as he drifted back off the loading station in question. Since this happened in the full view of the MSHA inspector who was standing nearby with a company foreman, the inspector immediately informed the foreman that he was issuing a citation, the machine was de-energized, and the cable was visually inspected for damage. Since no damage to the exterior of the cable was detected, the inspector permitted the shuttle car to continue operating and "abatement" was achieved by merely instructing the machine operator to be more careful and to observe his cable.

The inspector here conceded that "it was possible" that the incident was a "freak" occurrence. As a matter of fact, during his testimony, he had no recollection as to how the incident occurred. Further, there is no evidence to suggest that the cable reel was defective, and although the inspector testified that it was not an unusual occurrence for a trailing

cable to "catch" between the cable compartment lid and the side of the shuttle car, he took no action to insure that this would not occur again. It seems to me that if this type of "cable hang-up" occurs frequently, the inspector should have required the respondent to take some preventive measures to insure that the cable was protected against any such future "hang-ups." In short, he required no physical alterations to the machine or to the cable-reeling device to insure against other cable "hang-ups." As a matter of fact, when asked this precise question, the inspector responded -that "I honestly don't remember" (Tr. 611).

After careful consideration of the record in this case, I cannot conclude that the running over of the cable in question was other than an isolated one-time occurrence. Further, based on the testimony and evidence of record, I cannot conclude that the incident resulted from a failure by the respondent to insure that the cable was adequately protected against damage. Aside from the fact that the petitioner has not established that the cable was damaged, there is no credible evidence to establish that apart from the operator's inattention or failure to prevent the machine from drifting, there is no evidence that the respondent here failed to provide adequate protection to prevent damage to the cable. Further, there is absolutely no evidence that this respondent has a history of running over trailing cables, and there is no evidence to support any conclusion that the machine operator has done this in the past.

Inspector Wolfe was asked to explain what could have caused the cable to catch on the machine compartment. His initial response was that he had no notes on the incident (Tr. 623). Although he speculated that the incident may have occurred due to the lack of proper tension on the cable, he could not support this "theory," even though it happened right before his very eyes. As a matter of fact, he candidly admitted that he couldn't state precisely what caused the "hang-up," other than the machine "drifting" (Tr. 624). When asked whether he spoke with the machine operator, the inspector stated that "I don't remember" (Tr. 626). The machine operator was not called to testify by either side.

After careful review and consideration of all of the evidence and testimony adduced here, I conclude and find that the cable incident in question was a one-time inadvertent incident, and that the petitioner has failed to establish that the respondent failed to provide adequate protection to insure against cable damage. Accordingly, Citation No. 2103085 IS VACATED.

Negligence and Gravity Findings and Conclusions

PENN 83-121

Negligence

I find that the respondent should have been aware of the fact that the cited shelter hole was obstructed with oil drums and rock dust bags as noted by the inspector. A preshift examination should have detected these conditions, and the failure by the respondent to take the corrective action in advance of the inspector's arrival on the scene was due to a lack of reasonable care. Accordingly, I find that violation No. 2102696 resulted from ordinary negligence.

Gravity

The inspector testified that the shelter hole was 17 feet wide and there was room for a person to manuever in and out. MSHA's counsel pointed out that there was only one person in the area and that the chances of his having to use the shelter were slim. Under all of these circumstances, I find that this violation was nonserious.

PENN 83-129

Negligence

Inspector Shade was of the opinion that Citation No. 2102605 resulted from moderate negligence, and he stated that mine management usually guarded the overhead wires as soon as possible after that particular condition is brought to its attention. However, he did not know whether the guards were down at the time of the preshift examination (Tr. 24).

I find that Citation No. 2102605 resulted from the respondent's failure to take reasonable care to insure that the overhead trolley guards which were down were promptly discovered and the condition corrected before the inspector arrived on the scene. I conclude that the violation resulted from ordinary negligence.

With regard to Citation No. 2102619, the testimony and evidence presented by MSHA and the respondent is not in dispute. While it is true that the required amount of air was not reaching the end of the line curtain at the time the citation was issued, the facts show that the foreman in charge of mining was aware of the problem and was in the process of taking corrective action while the inspector was on the section. In

the circumstances, I believe that the foreman was taking reasonable steps to correct the problem and that the violation did not result from any negligence on the part of the respondent.

With regard to Citation No. 2102609, I conclude and find that the violation resulted from the respondent's lack of reasonable care to insure that the miner who was under unsupported roof was aware of that fact, and was aware of the provisions of the roof control plan. While I have commented that the roof control plan is rather confusing, it is the respondent's responsibility to insure that miners are aware of the plan provisions, particularly that portion which prohibits anyone from walking out under unsupported roof. I find that the violation resulted from ordinary negligence.

With regard to Citation No. 2102611 concerning the energized light power wires which the inspector found were not properly hung, the respondent should have been aware of the cited standard prohibiting the wires from coming into contact with combustibles. I find that the violation resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

I conclude and find that all of the violations which have been affirmed in this docket were serious. In each instance, except possibly for the two permissibility citations (2102608 and 2102618), where the inspector found that the lighting circuits on the cited machines were "intrinsically safe," the inspector found a hazard associated with each of the cited conditions (Tr. 38-41; 120). While it may be true that the permissibility standards in question are specifically intended to guard against loss of illumination, as I observed during the hearing, the missing bolt brackets in question could have caused the light fixtures to fall on the operators of the equipment in question while it was tramming, and in this event they would probably sustain injuries (Tr. 286-309). Under these circumstances, I conclude that these two citations were also serious.

PENN 83-128

Negligence

I find that Citation No. 2103081 resulted from the respondent's failure to take reasonable care to insure that the opening in the battery powered scoop was discovered and corrected. Accordingly, I conclude that this permissibility violation resulted from ordinary negligence by the respondent.

Gravity

Respondent's ventilation foreman conceded that mine ventilation could be interrupted, that methane is liberated in the mine, and that the opening found in the scoop contactor compartment is a condition which should have been attended to. He also conceded that in any permissibility violation of this kind, "Murphy's Law" would apply. Accordingly, I find that this violation was serious.

PENN 83-136

Negligence

I find that Citation No. 2103084 resulted from the respondent's failure to take reasonable care to insure that the missing bolt from the contactor compartment of the cited roof bolter was discovered and corrected. A pre-operational check should have discovered the missing bolt. I find that the violation resulted from ordinary negligence.

Gravity

For the same reasons that I found Citation No. 2103081 to be serious in PENN 83-128, I find the violation here is also serious. While it is true here that the section may have been wet and well rock dusted, and no methane was detected, the missing bolt which caused the permissibility violation presented a hazard of possible arcing and sparking in the contactor compartment when the machine was in operation.

PENN 83-137

Negligence

Inspector Wehr stated that the violation resulted from a moderate degree of negligence, and he indicated that he has spoken with mine management about the trolley wire guards so that they may institute a program of prompt reporting of the situation. I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Gravity

The missing trolley wire guards in question presented a possible shock hazard in an area where miners and equipment would have been present during the ordinary course of business. Accordingly, I conclude and find that this violation was serious.

Size of Business and Effect of Civil Penalties on the
Respondent's Ability to Continue in Business

The parties stipulated that the respondent is a large mine operator and that the proposed civil penalties will not adversely affect its ability to remain in business. I adopt these stipulations as my findings on these issues, and I further conclude that the penalties which I have assessed will not adversely affect the respondent's business.

History of Prior Violations

Exhibit P-9 is a computer print-out summarizing the number of violations assessed and paid by the respondent for violations issued at the Maple Creek No. 2 Mine for the period December 1, 1980 to November 30, 1982. The print-out also reflects the number of assessed and paid violations before December 1, 1980. The information on the printout is summarized by reference to the specific mandatory health and safety standard violated, rather than by any specific violation number. The printout reflects that for the two-year period noted, the respondent paid \$81,036 in civil penalties for 485 violations. Fifty-two of the violations were for violations of mandatory standard section 75.200 (roof control), 48 were for violations of section 75.400 (accumulations of combustibles), and 81 were for violations of section 75.503 (permissible electric fact equipment).

Exhibit P-10 is a computer printout summarizing the number of assessed and paid violations at the respondent's Maple Creek No. 1 Mine for the same time periods noted above for the No. 2 Mine. The information reflects that for the period December 1, 1980 to November 30, 1982, the respondent paid \$82,571 for 435 violations. Forty-three citations were for violations of section 75.200, 41 for violations of section 75.400, and 52 were for violations of section 75.503.

While I take note of the fact that the computer printout information for the violations issued at the No. 1 and No. 2 Mines prior to December 1, 1980, reflect that most of them were for violations of section 75.200, 75.400, and 75.503, absent any specific time frames or details concerning the listed violations, I am unable to conclude that this prior history reflects a good or poor compliance record by the respondent. Given the size of the respondent's business, its compliance record for the periods December 1, 1980 to November 30, 1982, insofar as the bulk of the standards noted are concerned does not appear to indicate a significantly poor record. However, I do take note of the number of permissibility and roof control violations and have taken this

into account in the civil penalties assessed by me for the violations which I have affirmed in these proceedings.

Good Faith Compliance

The testimony and evidence adduced in all of these proceedings reflects that all of the cited violations were timely abated by the respondent in good faith. Accordingly, I have taken this into consideration in the assessment of the civil penalties for the violations which have been affirmed (Tr. 340; 497-499; 522-523).

"Single Penalty" Assessment Arguments

During the course of the hearing, respondent's counsel argued that in those instances where a "significant and substantial" finding is rejected by the judge, a \$20 civil penalty must be assessed by the judge. As an example, respondent's counsel argued that had MSHA's district manager not been following a policy that all permissibility violations are "significant and substantial," Citation No. 2102608 would have been assessed as a "single penalty" of \$20 (Tr. 82). Counsel argued that since the "S&S" finding has been withdrawn, the civil penalty should "automatically" be assessed at \$20, and that I must give deference to the Labor Department's regulations for assessing such penalties (Tr. 87-89).

Section 110(i) of the Act specifically authorizes the Commission to assess all civil monetary penalties provided in the Act. Section 110(i) mandates that in assessing these penalties, the Commission shall consider the six statutory criteria set forth in that section. While the last sentence of section 110(i) vests discretion in the Secretary of Labor to propose civil penalties based upon "a summary review of the information available to him," and does not require him to make findings of fact concerning the six statutory criteria, this discretion does not apply to the Commission, nor is it controlling in cases docketed before the Commission and adjudicated by its judges.

In any contested civil penalty case, including "single penalty" assessments, the Commission and its judges apply the six statutory criteria, and in exercising their respective independent adjudicatory authority, may do so without consideration of the Secretary's Part 100 regulations.

MSHA's revised Part 100 procedures for proposing civil penalties under the Act became effective on May 21, 1982,

47 Fed. Reg. 22286-22297. In the explanatory discussions concerning the Secretary's creation of the "\$20 single penalty" concept as promulgated under 30 C.F.R. 100.4, the following statements appear at 57 Fed. Reg. 22291:

This is a new section. It provides for the assessment of a \$20 single penalty for violations which are not reasonably likely to result in reasonably serious injury or illness. Single penalty violations which are paid in a timely manner will not be included in the operator's history (emphasis added). * * * Under this proposal, this section was designated as the "minimum penalty" assessment procedure. In the final rule, MSHA has substituted the term "single penalty assessment" to clarify that \$20 is the only penalty an operator could receive under this section (emphasis added).

As proposed, this section provided for the assessment of a fixed single penalty of \$20 for violations involving low level gravity and no negligence (emphasis added). In the notice of public hearing, MSHA included a refinement of the proposed single penalty provision which would apply the single penalty to those violations which are not reasonably likely to result in a reasonably serious injury or illness.

In promulgating and adopting the "single penalty" final rule now found in section 100.4, an assessment of \$20 may be imposed by MSHA as a civil penalty where the violation is not reasonably likely to result in a reasonably serious injury or illness, and is abated within the time fixed by the inspector. If the violation is not abated within the time fixed by the inspector, the violation is not eligible for the \$20 single penalty assessment. Thus, it appears that the only requirements for the "automatic" assessment of a \$20 penalty is that the violation be one which is not reasonably likely to result in a reasonably serious injury or illness, and that the violation is timely abated within the time fixed by the inspector. It would further appear that the prior proposed additional finding of no negligence as a condition precedent for such a \$20 assessment has been deleted from section 100.4. Thus, even if an inspector were to find that there was negligence, regardless of the degree, the violation would still be assessed an automatic \$20, as long as the two elements noted above were present (non S & S and timely abatement).

The Secretary's rationale for apparently deleting any consideration of negligence by the operator is found at the following discussion which appears at 47 Fed. Reg. 22292:

* * * when the gravity factor is low and good faith is established through abatement, MSHA does not believe that an individualized analysis of the negligence, size and history criteria is appropriate or necessary.

Thus, in any given case where a violation qualifies for a \$20 single penalty assessment, even if the inspector finds that the violation resulted from gross negligence, which is defined as "conduct which exhibits the absence of the slightest degree of care," the penalty will still result in an automatic \$20 assessment by MSHA, even though the standard of care established under the Act imposes on an operator a responsibility for a high degree of care.

MSHA's promulgation and application of the single-penalty provision found in section 100.4, totally negates and ignores the statutory criteria of negligence and history of prior violations. Theoretically, a mine operator who has paid any number of "non-S & S" violations which resulted from gross negligence, could continue doing so with impunity, as long as they are timely abated.

Respondent's arguments that I am bound by MSHA's "single penalty" assessment regulations are rejected. See: Secretary of Labor v. United States Steel Mining Co., PENN 82-328, decided May 31, 1984.

"Significant and Substantial" Arguments

In Secretary of Labor v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), the Commission held that a violation of a mandatory safety or health standard significantly and substantially contributes to the cause and effect of a mine safety or health hazard when "there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature," 3 FMSHRC at 825.

In National Gypsum, the Commission noted that the Act does not define the term "hazard," and it construed the term to "denote a measure of danger to safety or health," 3 FMSHRC at 827. The Commission also stated that a violation "'significantly and substantially' contributes to the cause and effect

of a hazard if the violation could be a major cause of a danger to safety or health. In other words, the contribution to cause and effect must be significant and substantial."

In Mathies Coal Co., 6 FMSHRC, PENN 82-3-R, etc. (January 6, 1984), the Commission noted that in order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove:

- (1) the underlying violation of a mandatory safety standard;
- (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation;
- (3) a reasonable likelihood that the hazard contributed to will result in injury;
- (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

During its rulemaking on the revised regulatory criteria used by MSHA for proposed assessments of civil penalties, the rulemakers made the following statements with respect to the application of the term "significant and substantial":

MSHA does not believe that further specific language governing the inspector's evaluation of hazardous conditions should be incorporated into the final rule.

* * * MSHA will carefully review its policy for uniform application and consistency with this rulemaking (47 Fed. Reg. 22292, May 21, 1982).

Respondent's counsel asserted that MSHA's District Office has acted arbitrary in applying an interpretation of the term "significant and substantial" which goes far beyond the Commission's definition of that term as it was articulated in Secretary of Labor v. Cement Division, National Gypsum Co., supra. Counsel asserted that the inspectors who issued the violations and found that they were "significant and substantial," followed certain policy directives and instructions from their MSHA district manager. Respondent's counsel indicated that this policy is included in the comments made

the Secretary's rulemakers during the considerations which preceded the promulgation of the revised Part 100 criteria and procedures for proposed civil penalty assessments.

Respondent's counsel pointed out that MSHA's policy concerning "S & S" findings is articulated at 47 Fed. Reg. 22292, May 21, 1982, as follows:

MSHA inspectors already make a determination as to which violations of the Act are of a serious nature. In making this determination, inspectors first evaluate whether an injury or illness is reasonably likely to occur if the violation is not corrected. Next, the inspector must evaluate whether the injury or illness, were it to occur, would be reasonably serious. In these areas, inspectors use their experience, background and training together with an evaluation of the actual circumstances surrounding the violation to arrive at an independent judgment. Where a violation is not reasonably likely to result in a reasonably serious injury or illness, a summary review and analysis of the condition or practice is conducted. However, when the gravity factor is low and good faith is established through abatement, MSHA does not believe that an individualized analysis of the negligence, size and history criteria is appropriate or necessary.

Inspector Shade explained his interpretation of an "S&S" violation as follows (Tr. 64-71):

ADMINISTRATIVE LAW JUDGE KOUTRAS: Let me ask the inspectors up front. What instructions, if any, do you receive from your district office as to how you interpret S&S?

THE WITNESS: When we find a violation and we see it is reasonably likely that an accident would occur, that an accident would occur and it is reasonably likely that the accident would be serious before it could be terminated.

* * * * *

Q. Mr. Shade, isn't it true that your instructions are that you are to assume every violation will never be corrected?

A. Before it can be terminated, before it can be corrected, if we find a violation and we see that this violation will not be corrected in one night, we issue a citation.

Q. Isn't it true you are supposed to base your determination as to what is a significant and substantial violation on an assumption that the condition will never be corrected?

A. This was one of the criteria of S&S, but -

ADMINISTRATIVE LAW JUDGE KOUTRAS: I do not understand how anybody can come to the conclusion of an assumption that a violation found by the inspector will never be corrected.

MS. SYMONS: I don't, either, but that is what they have been instructed to do.

THE WITNESS: They said before it can be corrected, if we wouldn't find this violation, they assumed that this violation would not be corrected, so it would stay in the same position as if it wasn't found.

When asked to explain the procedures he follows in making a determination as to whether a violation is "S&S," Inspector Shade testified in pertinent part as follows (Tr. 423-433):

THE WITNESS: Well, we see a violation, and we usually have an escort with us, and we discuss the violation with the escort, but as far as information on it, whenever we have a violation that we think could cause an accident before this could be corrected or if it weren't corrected, then we have to mark S&S. These are our instructions.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Ms. Gismondi, I just don't understand that. Their instructions are, when they find a violation, they act under the assumption that had the inspector not found it, the mine operator would find it and likely not do anything about it, and therefore, since the inspector caught it and forced them to correct it through the citation process, that it is S&S.

The citation process itself requires the operator to abate. He is subject to withdrawal order, and if he doesn't abate it, then he is given a \$1,000 a day penalty. I just don't understand this theory.

* * * * *

MS. GISMONDI: I don't think it's so much a question, Your Honor, that the inspector assumes that the violation is not going to be corrected.

ADMINISTRATIVE LAW JUDGE KOUTRAS: That's what he just said.

MS. GISMONDI: Well, what I'm trying to say it, I think that the significant and substantial determination is intended to be and is, in fact, keyed into the facts of the violation and the facts that are in existence at the time that it is cited and that can reasonably be expected.

* * * * *

ADMINISTRATIVE LAW JUDGE KOUTRAS: Mr. Shade, what are your instructions as you understand them on S&S? What is your understanding of how you are to approach marking a violation S&S?

THE WITNESS: If this violation is reasonably likely to cause an accident.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Now, what instructions do you have to determine whether or not it is reasonably likely?

THE WITNESS: Let me finish. It is reasonably likely that it could cause an accident and that it is reasonably likely that it would be a serious accident if it were not corrected.

ADMINISTRATIVE LAW JUDGE KOUTRAS: If it were not corrected?

THE WITNESS: That's right.

ADMINISTRATIVE LAW JUDGE KOUTRAS: What does that mean? What is your understanding of "if it is not corrected"?

THE WITNESS: If the violation wasn't corrected.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Well, how can it not be corrected if you are there citing it? How is it not going to be corrected? How can the operator refuse to correct a violation that you have cited?

THE WITNESS: Well, they don't refuse to correct it as far as that goes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: How does that language play.

THE WITNESS: Well, to me it means that if it weren't corrected at any time.

ADMINISTRATIVE LAW JUDGE KOUTRAS: That presupposes that it existed for some period of time; isn't that true?

THE WITNESS: Yes, or that it would exist for some period of time. To me, that is what it means.

ADMINISTRATIVE LAW JUDGE KOUTRAS: So, in this case, had you not been there on January 13th to issue this citation, you are telling me that that violation probably existed that day and the next day, and then when you went in there and, let's assume you went in there on the 15th and found it, that you would find it S&S, because it hadn't been corrected?

THE WITNESS: Yes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Do you understand, Miss Gismondi, what that means?

MS. GISMONDI: I'm not sure I understood just that little bit of dialogue.

ADMINISTRATIVE LAW JUDGE KOUTRAS: He said that his instructions are he marks S&S on the theory that the violation would not be corrected. That's part of the formula. What does that mean?

MS. GISMONDI: Well, I think that is the general terminology that is used in MSHA policies, but probably unfortunate, I think, that what it means --

ADMINISTRATIVE LAW JUDGE KOUTRAS: Tell me what it means. There is enough bureaucratic policies around that you and I don't understand. Is it written someplace? I want to know what it means.

MS. GISMONDI: I'm sure there is some kind of letter or statement of what the policy is written somewhere.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Tell me what it means in your mind.

MS. GISMONSI: What it means in my mind is that you make an S&S determination on the basis of the condition that you observe and that you cite.

ADMINISTRATIVE LAW JUDGE KOUTRAS: All right.

MS. GISMONDI: Now, obviously when you observe it and when you cite it, it is not corrected. I think that the inspector is, you know, this stuff about whether or not it's going to remain uncorrected forever, I think is misleading.

I think that the question is, you know, what is the likely effect of this violation as I'm looking at it, you know, as I cite it. As I said, obviously as you are citing it, it is not corrected. It is what it is.

ADMINISTRATIVE LAW JUDGE KOUTRAS: And is it S&S at that point?

MS. GISMONDI: I think it depends on the factors that we are talking about.

ADMINISTRATIVE LAW JUDGE KOUTRAS: What could happen if the inspector didn't appear and cause him to correct it?

MS. GISMONDI: Exactly.

THE WITNESS: As far as S&S is concerned, it is not necessarily permissibility. We have to look at it, first of all, is it a violation? If it's a violation, either the condition at the time or in our own knowledge through training and experience and using the entire country, you know, things that have happened throughout the entire country, let's put it that way, if the event should occur that we are citing, could it cause an injury or an illness?

Now, if it passes that test that we feel that it could create an illness or an injury, which we have also been instructed that that means that should a person lose one day's work or have to be reassigned for one day from his normal duties, then it would be considered a significant or substantial type injury, then it becomes S&S.

BY MS. SYMONS:

Q. So that any violation which could result in an injury over any period of time is significant and substantial?

A. Well, I left that out, I'm sorry. When we look at the violation, we also must in our own mind say, if the condition were left uncorrected--

Q. Okay, are you supposed to give any effect to the surrounding circumstances?

A. Well, there is some consideration given to the condition that we find, yes.

Additional Findings and Conclusions
Significant and Substantial Violations

PENN 83-129

Citation No. 2102605

Inspector Shade made his "S&S" determination because of the lack of overhead guarding on the trolley wire at the

"A Flat 6 Chute track switch." He determined that the violation was "S&S" because the wire was energized, it was five and one-half feet off the ground, and was located where the locomotives, jeeps, and other personnel carriers passed under the unprotected overhead wire. His concern was that someone standing up in the carriers, or alighting from the carriers, could contact the unguarded wires. Respondent does not dispute the fact that the guarding normally in place for the overhead wires had fallen or been knocked down, and that the trolley wire in question was not guarded or protected.

On the basis of all of the evidence adduced here, I conclude and find that the inspector's "S&S" finding is clearly supportable. The overhead trolley wire was not guarded, men and equipment regularly ran under it, and it would not be too difficult for a miner to reach up and contact the wire or inadvertently come into contact with it while riding in a conveyance or alighting from it when it stopped under the unguarded wire. Here, the inspector's "S&S" finding is rational and supportable, and IT IS AFFIRMED.

Citation No. 2102611

In this instance Inspector Shade found that the violation was "significant and substantial" because he believed that the light wires which were in contact with the wooden cribs and roof coal presented a fire hazard. In his view, in the event of a roof fall, the wire could be broken or damaged, and a short would result, thereby posing a fire hazard.

Inspector Shade believed that the mine was idle at the time the citation was issued. While he is not an electrician, he confirmed that the wires were fully insulated, he observed no breaks, and the wires were not rubbing in any way. He could not state whether there was any tension on the wires, and he conceded that he had no reason to believe that the cited conditions would not have been discovered during the regular weekly electrical inspection. He admitted that he did not check the preshift examination books, and had no idea how long the cited conditions had existed.

I conclude and find that Inspector Shade's belief that the roof would fall at some unspecified time in the future, thereby possibly damaging the wire and causing a fire is

speculative and unsupported. Given the aforementioned conditions which the inspector observed, I cannot conclude that it was reasonably likely that the wire resting on the crib or in contact with the roof presented the likelihood of an injury or hazard. While I have affirmed a violation of the cited safety standard, and have concluded that it was serious, I cannot conclude that it was significant and substantial. Accordingly, the inspector's finding IS REJECTED, and IT IS VACATED.

Citation No. 2102609

On the facts surrounding this particular violation, I cannot conclude that the inspector's "S&S" findings are supportable. Here, the area was roof bolted and additional support was provided along the left rib by means of roof jacks. The period of time which the miner spent under unsupported roof was at most a few seconds. When he walked out to install a jack, he was in full view of the inspector and a foreman, and he was immediately called back out. Given the fact that MSHA itself concedes that miners must go under unsupported roof to install roof supports, critical factors which must be considered include the amount of time a miner is under unsupported roof, the overall roof conditions, and whether or not the immediate area is supported. Here, I am convinced that the inspector made an "automatic" "S&S" finding simply because it involved roof support. Given the facts here, I find that the inspector's finding of "S&S" is unsupported, and IT IS REJECTED and VACATED.

Citation No. 2102619

In this case, prior to the start of mining, the inspector and the foreman on the scene were both aware of the fact that the amount of air at the end of the line curtain was less than the required amount. The foreman took immediate remedial steps to insure compliance, and based on his air readings, more than the required amount of air was achieved and the inspector left. However, when he returned, an interruption to the air flow, caused by a collapsing curtain, and which had not been detected by the miners in the work area, caused the air flow to diminish. When informed of this fact, the foreman immediately discovered the problem and corrected it. Given these circumstances, I cannot conclude that the violation was "S&S." Given all of the prevailing circumstances, I fail to understand how the inspector could conclude that an injury or

accident was likely to occur. Here, both the inspector and the foreman were both aware of the problem from the outset, and steps were quickly taken to correct the problem.

I am convinced that the inspector here found an "S&S" violation on the basis of his belief that all such violations are "S&S." This theory of "S&S" is rejected. I conclude and find that the inspector must consider the prevailing conditions as well as the fact that the operator is on top of the problem and is attempting to make corrections. Accordingly, on the facts here presented, the inspector's "S&S" finding IS REJECTED, and IT IS VACATED.

PENN 83-128

Citation No. 2103081

In this case, Inspector Wolfe found that the citation was "significant and substantial" because he believed that the opening in the contactor compartment of the scoop which was cited posed a potential hazard of a methane ignition. Mr. Wolfe "believed" that no methane was detected in the area, that the ventilation was good, and that "it could well be" that the scoop was three crosscuts outby the last open crosscut. However, the scoop was often used for cleanup details and the hauling of supplies, and was used at the face. Given these variety of uses, as well as the fact that the scoop was required to be examined weekly, I believe it was reasonably likely that the loosened bolt which rendered the machine non-permissible would have gone undetected. Coupled with the fact that the mine had previously experienced methane face ignitions, and the fact that the mine is on a section 301(i) "spot inspection status" because of the amount of methane liberated, I cannot conclude that the inspector's "S&S" finding is unsupportable. As a matter of fact, in this instance, respondent's ventilation foreman Ritz expressed concern about an uncorrected permissibility violation of this kind, and he confirmed that ventilation can be interrupted at any time, and that the presence of methane is unpredictable. The "S&S" finding by Inspector Wolfe IS AFFIRMED.

PENN 83-137

Citation No. 2102681

Inspector Wehr made an "S&S" determination on the basis of his belief that an unguarded trolley wire could be contacted by a miner during the course of his regular travel in

the mine, whether it be by motorized conveyance or on foot. The guarding which was normally in place had been knocked down, and the inspector was concerned that a miner riding in one of the conveyances which normally passed under the wire could come in contact with the wire.

Inspector Wehr testified that he was concerned that a person running a locomotive could come in contact with the overhead unguarded wire while passing under it, and that shock or fatal injuries could result (Tr. 338). He also indicated that with the amount of traffic passing under the wire, it was reasonably likely that someone could come in contact with the unprotected wire (Tr. 339).

While it may be true that trolley poles do become dislodged from track haulage equipment from time-to time and that overhead guarding for trolley wires is a constant problem in the mine, the fact is that the respondent here does not dispute the fact that the cited trolley wire was not guarded. Further, based on the credible testimony by the inspector, which has not been rebutted by the respondent, it seems clear to me that men do pass regularly under the wire which was not guarded at the time the inspector observed and cited it. Given the fact that someone could readily contact or reach the unguarded energized wire, I conclude and find that the inspector's finding of "S&S" is supported. Accordingly, his finding in this regard IS AFFIRMED.

PENN 83-136

Citation No. 2103984

In this case, Inspector Wolfe issued the citation after finding that one of the bolts which secured the lid to the main contactor compartment of a roof bolter was missing. With regard to his "S&S" finding, the parties agreed to incorporate Mr. Wolfe's prior testimony regarding the permissibility violation concerning a scoop (Citation No. 213081), in support of his "S&S" finding concerning the roof bolter.

In defense of the citation, the parties agreed to accept a proffer by respondent's witness Ritz that the roof bolter in question was parked two blocks outby the last open crosscut when the inspector cited it, and that at the time the inspector observed the cited condition the section was wet and well rock dusted, that the ventilation was good, and that no methane was detected on the section.

In the previous scoop violation, the facts established that there was an opening in the contactor compartment which could have admitted methane, thereby sparking an ignition. In the instant case concerning the roof bolter, Mr. Wolfe confirmed that there was no opening present (Tr. 583). However, he believed that with the use of the machine, the heating and cooling process would allow methane to be drawn into the compartment. When asked how this was possible if there were no opening, Mr. Wolfe alluded to a possible warping process caused by "an ignition inside the compartment" (Tr. 585).

In response to further questions, Mr. Wolfe could not state how many bolts were required to be on the compartment. He "guessed" at a number between 18 and 24. While explaining his "flame path" theory, he "guessed" that the flame path for the particular compartment size in question was an inch and one-half, but he was "not sure," and simply stated that "it was close enough" (Tr. 586).

Further examination of the record with regard to this citation leads me to conclude that Inspector Wolfe made his "S&S" finding on the basis of his general belief that methane ignitions have resulted from permissibility violations. He conceded that in making his "S&S" determinations, he does not necessarily consider the particular prevailing mine conditions, and in fact conceded that he had no idea as to those conditions which may have prevailed when he issued the citation (Tr. 587-589).

On the facts in this case, I am convinced that Inspector Wolfe made his "S&S" determination on the assumption that this particular permissibility violation was per se "S&S," and that he did so on the speculative assumption that all permissibility violations cause methane ignitions. Given these circumstances, and the facts surrounding this particular citation, his "S&S" conclusions are simply not supportable. Accordingly, his finding in this regard IS REJECTED, and his "S&S" finding IS VACATED.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

PENN 83-121'

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2102696	1/12/83	75.1403	\$115

PENN 83-129

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2102605	1/7/83	75.1003	\$205
2102608	1/12/83	75.503	125
2102618	1/24/83	75.503	150
2102611	1/13/83	75.516	120
2102619	1/24/83	75.316	75
2102609	1/12/83	75.503	125

PENN 83-128

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2103081	1/19/83	75.503	\$300

PENN 83-137

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2102681	12/14/82	75.1003	\$225

PENN 83-136

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2103084	2/8/83	75.503	\$125

ORDER

Respondent IS ORDERED to pay civil penalties assessed by me for the violations in question, in the amounts shown above, and payment is to be made to MSHA within thirty (30) days of the date of these decisions and Order. Upon receipt of payment, these proceedings are dismissed.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 11 1984

WESTMORELAND COAL COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEVA 83-260-R
Order No. 2147582; 8/10/83
SECRETARY OF LABOR, : Hampton No. 3 Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 84-75
Petitioner : A.C. No. 46-01283-03530
v. : Hampton No. 3 Mine
WESTMORELAND COAL COMPANY, :
Respondent :

DECISIONS

Appearances: Kevin McCormick, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for Petitioner/Respondent;
F. Thomas Rubenstein, Esq., Westmoreland Coal Company, Big Stone Gap, Virginia, for Contestant/Respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a proposal for assessment of a civil penalty filed by MSHA against Westmoreland Coal Company pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment for an alleged violation of mandatory safety standard 30 CFR 75.523. The alleged violation was stated in a section 104(d) (2) Order served on Westmoreland by MSHA Inspector Vaughan Garten on August 10, 1983.

Westmoreland Coal Company contested the civil penalty proposal, and also filed a separate notice of contest pursuant to section 105(d) of the Act challenging the validity of the order. The cases were consolidated for trial in Madison, West Virginia. The parties were afforded an opportunity to file post hearing arguments, and they have been considered by me in the course of these decisions. */

Issues

The issues presented in these proceedings include the validity of the order, whether the alleged violation resulted from an unwarrantable failure by Westmoreland Coal Company to comply with the cited mandatory standard, and whether or not the violation was significant and substantial.

Assuming the alleged fact of violation is established by a preponderance of the evidence, the question next presented is an appropriate civil penalty to be assessed for the violation taking into account the criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301, et seq.
2. Sections 110(a), 110(i), 104(d), and 105(d), of the Act.
3. Commission Rules, 29 CFR 2700.1, et seq.

Stipulations

The parties stipulated to the following:

1. Westmoreland Coal Company is subject to the jurisdiction of the Commission and the Act, and the presiding judge has jurisdiction to hear and decide these cases.
2. MSHA Inspector Vaughan Garten is a duly authorized representative of the Secretary of Labor, MSHA, and acted in this capacity when he served the contested order on a representative of the contestant/respondent.
3. The subject contested order was properly served, and a copy may be admitted as a part of the record in these proceedings.

*/ MSHA filed a brief, but Westmoreland opted not to.

4. Westmoreland Coal Company is a large mine operator. It's overall coal production for the year 1982 was approximately 12,642,000 tons. The 1982 coal production for Westmoreland's Hampton No. 3 Mine was approximately 490,000 tons.
5. The proposed civil penalty for the contested violation will not adversely affect Westmoreland's ability to continue in business.
6. The conditions cited as a violation were timely abated in good faith by the respondent/contestant.
7. The history of prior violations for the Hampton No. 3 Mine is reflected in a computer print-out, exhibit G-2, and it may be admitted as part of the record in these proceedings.

Counsel for Westmoreland stated that he does not now challenge the fact that the required precedent underlying section 104(d) citations or orders to support the order issued in these proceedings were issued by MSHA inspectors. Accordingly, counsel stipulated that the contested order was procedurally valid. However, he indicated that he was not waiving or otherwise admitting his contention that the violation did not constitute an unwarrantable failure and a significant and substantial violation.

Discussion

Section 104(d)(2) Order No. 2147582, 10:20 a.m., August 10, 1983, citing a violation of 30 CFR 75.523, states the following condition or practice:

The panic bar provided for the No. 19 Joy Standard drive shuttle car operating in the 018-1 7 Left Section was not being maintained in an operative condition in that when tested said device would not deenergize said shuttle car in the event of an emergency.

The inspector found that the violation was "significant and substantial," and ordered the withdrawal of the shuttle car from service.

The inspector cited a previous order, No. 2140708, issued on February 18, 1983, as the "initial action," underlying the order which he issued on August 19, 1983.

Order No. 2147582 was abated at 11:25 a.m., August 10, 1983, and the abatement action states:

Panic bar was repaired and now will deenergize said equipment.

MSHA's Testimony and Evidence

MSHA Inspector Vaughan Garten testified as to his duties, experience, and training, and he confirmed that he has worked as a mine foreman and holds mine foreman's and fire boss certificates issued by the West Virginia Department of Mines. He confirmed that he is familiar with the subject mine, that he was assigned to inspect it for approximately a year beginning in October 1982, and he described the mine as a slope and deep mine. Coal is mined with continuous miners and a beltline, and the mine has five active sections. The roof averages six-feet high, and spot inspections for methane are conducted at the mine (Tr. 9-13).

Mr. Garten confirmed that he conducted an inspection at the mine on August 10, 1983, and the inspection was a continuation of a general inspection which began on August 1, 1983. After arriving at the mine on August 10, he met with the mine superintendent, mine foreman, and chairman of the union safety committee, checked the pre-shift, on-shift, and weekly equipment books for the 7 left section, and he then proceeded to that area. Upon arrival, the section foreman asked him if he was going to inspect any equipment, and when Mr. Garten answered in the affirmative, the foreman requested him to check the Nos. 17 and 19 shuttle cars which were on the section (Tr. 13-15).

Mr. Garten stated that upon inspection of the No. 19 shuttle car he found that the panic bar was inoperative in that it could not be pressed down to deenergize the machine. The panic bar was located alongside the operator's shoulder or lower part of his arm, and Mr. Garten explained that the bar should be able to deenergize the machine by the operator leaning over against it or hitting it with his hand. Fifteen pounds of pressure are required to deenergize the machine, and the bar should only travel about two inches for this to occur. He found that the bar was "fouled" by a piece of metal at one end, and this would not allow the bar to go in the downward motion when it was hit. In order to activate the bar one had to reach and pull the bar forward, then "mash it down" (Tr. 15-17).

Mr. Garten stated that the section foreman and the union safety committeeman were with him when he tested the panic bar,

and when they both tried it and observed that it would not work and could not operate it the way it was designed to operate, Mr. Garten then issued the order, and served it on Ted Forbes (Tr. 17-18).

Mr. Garten stated that the No. 19 shuttle car was energized and in by the section dumping point at the time the violation was issued, and that the section was not active and coal was not being mined (Tr. 18, 23). However, he stated that the section was preparing to mine coal, and that from speaking to other miners, he determined that coal was mined on the previous shift. He also confirmed that the section was an active pillar section, and although the prior shift was not a production shift, and he could not state why coal would have been mined on this prior shift, Mr. Garten stated that "due to it being a pillar section, you cannot let a pillar section set idle for a period of time" (Tr. 20-21).

Mr. Garten stated that the shuttle car is a self-propelled electric car which is in the active workings of the mine, and that it is not equipped with a substantially constructed cab. He also indicated that the respondent has not applied to MSHA for approval of a device in lieu of the panic bar to deenergize the shuttle car. In his opinion, the car which he cited did not have a panic bar which allowed for a quick deenergization of the machine (Tr. 21).

Mr. Garten stated that the problem was corrected by cutting the metal from the area which fouled the panic bar, and after this was done it performed the way it was designed to (Tr. 22).

Mr. Garten confirmed that the shuttle car was used on a regular basis in a heavily worked or frequently traveled area, and he believed that the condition should have been discovered by the required weekly electric hazards examination. He also believed that the electrician or section foreman should have been aware of the condition because the electrician should have checked all of the working components of the car. However, Mr. Garten confirmed that he found no notation of the condition in the electrical examination book (Tr. 23).

Mr. Garten believed that the violation was unwarrantable because the condition should have been known to mine management. He confirmed that the machine operator should have checked the car and reported the condition to management (Tr. 23).

Mr. Garten noted that the respondent's negligence was "moderate" because "management should have been aware of this condition, but there could be mitigating circumstances behind it" (Tr. 24). He believed that it was reasonably likely that the cited condition would lead to an accident, and that any

resulting injuries "could be permanently disabling or maybe fatal" (Tr. 24). He confirmed that the purpose of the panic bar is to stop the shuttle car in the event of an emergency, and he believed that the operator or a miner working in the section would be affected if an accident were to occur. The operator could be crushed against a rib, and miners could be run over if the machine "got away" and could not be stopped (Tr. 26).

On cross-examination, Mr. Garten stated that on prior inspections he would have examined the shuttle car in question, but that the panic bar was operating properly. The only difference he found on August 10, 1983, was the piece of metal which had been welded on and which prevented the bar from working (Tr. 27). He did not observe the metal piece during prior inspections, and he believed that it had been added since the time he last inspected the car.

Mr. Garten confirmed that he tested for methane on August 10, 1983, and found none present. He stated that he did not test the panic bar, but asked the machine operator to test it while he observed him and he confirmed that the operator did deenergize the machine at that time, and he clarified his previous direct testimony as follows (Tr. 29-30):

Q Did you not earlier testify that the panic bar was totally inoperative, the piece of metal would prevent it from actuating?

A The piece of metal did prevent it from working properly. The way he designed it, or would test it -- he'd pull the bar forward, then mash it down. I talked to that man and told him that wasn't the way it was designed to work.

Q Your testimony is the panic bar would somehow slide?

A Yes.

Q How did the piece of metal cause it to not work if the bar was sliding? Was there only one particular spot it would get in and not work?

A The piece of metal, the way it was situated, it would prevent the bar from going in a downward motion. Now, you could slide the panic bar forward and it would free itself from the piece of metal. Then you could mash it down.

Q What would cause the bar to slide back and forth? Aren't those things fairly rigid?

A The majority of them, right.

Q What position would the bar normally be in?

A What are you referring to?

Q Would it not oftentimes be operative if it was slid away from where the piece of metal would catch?

A There would be circumstantial factors that plays in that, because a lot of times a panic bar designed on a piece of equipment will slide forward and slide back, but they have a piece of metal welded on so when it comes down, it comes in contact with the switch --

Q How big is that switch? How big's the piece of metal in width that we're talking about?

A I'd say two to three inches.

Q So we're talking about a two to three inch area? In that particular area, the panic bar would work? The piece of metal would not prevent it from operating. It would have to be within the range of that two to three inch area?

A Right.

Mr. Garten stated that the piece of metal behind the bar was approximately 2 to 3 inches and that the bar would have to be in this area for it not to operate properly (Tr. 30). He stated that maintenance foreman Harold Vanhorn came to the machine after it was cited, and the panic bar would not operate. Mr. Garten stated that he advised Mr. Vanhorn that the bar would have to be repaired so that it deenergized the machine by someone's body simply coming into contact with it and without the necessity of someone making any other kind of motion to activate the bar. Although Mr. Garten did not point out the piece of metal to Mr. Vanhorn, Mr. Garten stated that Mr. Vanhorn observed the problem and that he cut the metal off with a torch (Tr. 31).

Mr. Garten stated that the piece of metal which impeded the bar served no other purpose than to prevent the bar from working. He has never observed a Joy standard drive shuttle car which could also be deenergized by means of a rear lever which could activate the emergency car braking system (Tr. 32).

Mr. Garten indicated that if the car operator knew of the condition of the panic bar this would constitute mitigating circumstances, but that he had no reason to believe that this was the case (Tr. 32). He also indicated that the shuttle car's movement is limited to an area within its 500 foot cable (Tr. 32).

In response to further questions, Mr. Garten stated that he also inspected the No. 17 car but found no piece of metal impeding the panic bar, and that it worked properly (Tr. 33).

And, at (Tr. 36-37):

Q Did you actually climb into the equipment yourself to test the panic bar?

A Right. I showed him -- the operator himself -- I showed him how the panic bar was supposed to work by just leaning into it.

Q So once it became disengaged or pulled away from the metal piece that was there, then you could lean into it and it would go down and do what it was supposed to do?

A That is if you held it up, slid it forward, Your Honor.

Q I'm saying once it was away from the metal, once someone pulled it away from there, then you could lean into it and it would deenergize it?

A No. You had to keep holding it forward. Once you let go of it, it would slide back.

Q Did you ever determine what that was all about? I mean, did someone deliberately weld a piece of metal on there to allow someone to manipulate the panic bar in the way you described it?

A I hope not. I don't think.

Q Well, how did the metal mysteriously appear on that particular machine when it wasn't on the other one?

A I don't know, Your Honor.

Q You don't know what it did, what its function was?

A No, sir.

Q Did anyone from management offer any explanation as to what that piece of metal was doing there?

A One of them -- I think it was Harold Vanhorn stated maybe they used that as some kind of a stop. Now, so far as what he was referring to, I could not --

Q Is that panic bar -- I mean it's right in the cab, right, right next to the operator?

A Yes, sir.

Respondent/Contestant's Testimony

William Roberts testified that he is employed at the mine as a union electrician, and that his duties include performing electrical and mechanical maintenance on mine equipment. He confirmed that he was familiar with the No. 19 Joy standard drive shuttle car which is the subject of these proceedings, including the panic bar. He stated that he personally checked the panic bar in question the day before the violation was issued, and when he checked it with the car energized, the panic bar worked (Tr. 51).

Mr. Roberts explained the operation of the panic bar, and he confirmed that the car also contained a valve in the car deck which automatically locked when the machine lost power. The valve was activated by a metal flap welded on the panic bar itself, and it was always on the cars used at the mine. Mr. Roberts confirms that he never received any complaints from car operators concerning inoperative panic bars (Tr. 53).

On cross-examination, Mr. Roberts confirmed that he checked the panic bar in question while seated in the cab, and after starting the pump motor he pushed down on the bar and it operated. He stated that he checked the car during the day shift. He could not recall testing the bar by simply leaning into it, and he remembered simply pushing the bar down by simply hitting it down (Tr. 55). He did not check the No. 17 car because he is assigned only to the No. 19 car. However, he stated that he has observed the No. 17 car and that it has a metal lip on the bar (Tr. 56). The purpose of this piece of metal or "lip" is to serve as an alternative method of activating the emergency braking system, and that this was also the reason why it was on the No. 19 car (Tr. 56).

Mr. Roberts stated that he has observed car operators activate panic bars by leaning against them with their arms and he has never seen anyone pulling it in any direction and then depressing it (Tr. 57).

Mr. Roberts identified Exhibit C-1 as pages from the electrical equipment examination book of August 5, 1983, but he could not confirm his signature, nor could he recall whether he reported anything that day (Tr. 59). He also identified his signature on the report for August 12, 1983, and he again confirmed that he inspected the No. 19 car on that day (Tr. 60).

In response to further questions, Mr. Roberts stated as follows (Tr. 65-69):

BY JUDGE KOUTRAS:

Q Mr. Roberts, let me ask you a hypothetical question now. Okay? You climb into a particular shuttle car to examine it one day, you're sitting there and you decide to check the panic bar. Okay?

A Yes, sir.

Q You reach over and slide it and lift it and then hold it down and it deenergizes the equipment, okay?

A Got it.

Q In your mind, is that panic bar functioning properly?

A No, sir.

Q Why?

A Because you've got to go straight down position with it before it will deenergize the switch and the braking system.

Q What does that mean to you now, straight down?

A It means it's working.

Q Didn't it go straight down in my hypothetical?

A No, not if you have to pull on it and push to get it in position.

Q All right. Were you there when the inspector in this case issued this particular order on August 10?

A I was on the section, not at the buggy.

Q Do you have any idea why he issued this order?

A No, sir.

Q Has anyone ever told you why he issued this order?

A That it wouldn't work.

Q Did they tell you why it wouldn't work?

A I don't think so.

Q But you're the man that's responsible for checking it?

A Yes, sir.

Q On this, the same shift he issued the citation on?

A Yes, sir.

Q And your curiosity wasn't aroused?

A No, sir.

* * *

Q Were you involved in the abatement of this particular citation?

A No, sir, I don't think so.

* * *

Q The lip wouldn't keep the bar from going down to touch the actual deactivation device?

A Well, it's a possibility it could have got -- something happened to it in twenty-four hours; but like I say, the day before, the panic bar was checked because I personally checked it.

Q You leaned into it and there was no problem?

A I don't remember if I leaned into it or how I shut it off, but anyhow, I just shoved it or leaned into it, or whatever, and it went off.

Q But you don't remember specifically how you did it?

A No, sir, but I remember that it worked like it's required to work.

Q What is your idea about how it's required to work?

A Just push down on it and it deenergizes the motor.

Harold Vanhorn, assistant maintenance foreman at the subject mine, testified that he was responsible for the supervision of maintenance on the 7 Left Section on August 10, 1983, and he confirmed that he was summoned to come to the area after the violation was issued. He stated that he got into the shuttle car after energizing it, and that the panic bar operated properly and deenergized the car when he used it (Tr. 72). He indicated that Mr. Garten got into the car and tried the panic bar, but because of his height when he leaned against it, it did not work. Mr. Vanhorn then adjusted the spring so that the panic bar "would be down a little bit for him." When the bar hit the piece of metal, which was a lever for a park brake, Mr. Vanhorn removed it (Tr. 72-73).

Mr. Vanhorn testified that the lever in question was an alternate method of setting the parking brake, and that it was always attached to the panic bar (Tr. 74). He confirmed that the No. 17 car had a similar lever, and that both cars came equipped that way (Tr. 75). Mr. Vanhorn stated that after he adjusted the spring on the bar to lower it to suit Mr. Garten's height, and he indicated that individual car operators always wanted to adjust the bars to suit their own height and that this was a "big controversy" (Tr. 75). However, as long as the bar was not altered so that it could not deenergize the car, operators were allowed to adjust them to suit their individual height (Tr. 76).

Mr. Vanhorn was not aware of any previous problems with the panic bars on shuttle cars, and he indicated that the piece of metal has to remain in alignment so that when it is depressed it will activate the hydraulic valve (Tr. 78).

On cross-examination, Mr. Vanhorn described what he did to check the shuttle car after the violation was issued. He confirmed that when Inspector Garten tried it, it did not operate but that when Mr. Vanhorn lengthened the spring, it did. However, Mr. Vanhorn indicated that the panic bar would deenergize the car when one reached out or up and hit it (Tr. 79). He indicated that the car operators are instructed to test their equipment before operating it, and that the operators are more or less the same height (Tr. 80).

In response to further questions, Mr. Vanhorn stated as follows (Tr. 83-89):

Q And did you speak with the inspector?

A Yes, sir. I asked him, I said, "Just what is wrong with the machine?"

Q And what did he tell you?

A And he showed me, he got in it and showed me what was wrong with it.

Q What did he show you? Do you remember?

A When he got in it, he pushed against it, and it went up.

Q What do you mean it went up?

A It pivots down on, say, a forty-five degree angle over a set of switches; and the boy had a spring up here and it raised it up a little more than center. You know what I mean? And when he come against it, you know what I mean, it went up. It fouled again. It went up.

* * *

Q It went up?

A It come up, instead of going down. But the motion of it is to go down.

Q How did he finally get it to work, the inspector?

A I lengthened the spring on it to lower it more.

Q And then he got it working?

A As far as I know, it worked for him. It suited him, and they run the buggy.

* * *

Q I'm told that lip is what caused the problem in that it would cause the panic bar to hang up somehow and the operator would have to get in, slide the panic bar, then push it down before it would deactivate.

A I did not have no indication of that with it.

Q Now, this panic bar is designed so that anyone, by depressing it, could deactivate the machine, right?

A Yes, sir.

Q Is that panic bar supposed to be at one particular position?

A No, sir.

Q And it can be raised or lowered, depending upon what, the size of the operator?

A Well, it's a matter of figures, you know. They might come up with a certain travel space on the panic bar, or weightwise, or something; but do energize it. Do you follow me?

Q Right. But I'm talking about accessibility.

A As long as you're supposed to be inside the cab of it, you're supposed to be able to hit it.

Q The next question is how are you supposed to hit it? What would you do to hit it?

A I approximately would use my shoulder or my hand. It would depend if I was in a hurry. In a quick reflex, you don't know what you'd do.

Q In a shuttlecar, you're steering the machine with your left hand, are you not?

A Yes, sir.

Q And the panic bar is on that side, isn't it?

A Yes, sir.

Q So if you use your hand to do it, you wouldn't let go. You'd reach over with your right hand?

A Well, you could.

Q If you were going to use your hand?

A It would be a matter of quickness. I'd probably do it with my shoulder.

Q With your left shoulder?

A Yes. I'd just go against it. Left or right, whichever way you'd be traveling. There's a left and right machine.

* * *

Q Did that piece of metal in any way impede or keep the panic bar from doing its job?

A When I tried it, no.

Q How about if somebody else tried it?

A Well, now --

Q If the inspector tried it, did it?

A It might have, but it did not when I tried it.

Inspector Garten was called in rebuttal, and he could not explain the presence of the metal lip on the panic bar, nor could he dispute the testimony of the respondent's witnesses regarding that device (Tr. 101). In response to further questions, Mr. Garten testified that when he tested the panic bar he had to push it approximately one-half inch forward and then down, and he explained his citation further as follows (Tr. 107-108):

Q If there's an operator sitting there and he pushes it a half an inch and down, is it altogether possible that he believed it was operating all right?

A He could have.

Q And yet when you did it, you didn't think it was, because --

A The panic bar is designed two-inch play downward pressure, not sideways. It was designed for two-inch play when you hit it for it to come down into contact.

Q So it's altogether possible then the reason you issued this citation is that you were strictly applying Subparagraph (c), which says, Any part of the body leaning into it has to de-energize it?

A Yes, sir.

Q Whereas, the operator you saw was having a little difficulty because he had to move it a half an inch and then put a little more pressure down. And in your view, that wasn't in compliance with the standard?

A No, sir, because the standard calls for the fifteen pound pressure on your body in a downward direction.

And, at Tr. 109:

JUDGE KOUTRAS: Half an inch, gentlemen -- how big is this panic bar?

MR. RUBENSTEIN: Three-and-a-half feet long?

THE WITNESS: Three-and-a-half or four feet. It depends on the length of the deck.

JUDGE KOUTRAS: So the question of whether the fellow leans into it or moves it half an inch, really --

MR. McCORMICK: I take issue with that, Judge. It's not that. He said when you leaned into it, it didn't work. So half an inch might be a small amount of distance, but you have to move it half an inch and then it would work; but if you leaned into it without moving it forward with your hand, it wouldn't work. So the half inch, I think, is significant. Not so much the distance. It's the fact you had to do something before the panic bar would automatically work the way it's supposed to.

Findings and Conclusions

In this case the respondent is charged with a violation of the provisions of mandatory safety standard section 30 CFR 75.523, which provides as follows:

[Statutory Provision]

An authorized representative of the Secretary may require in any mine that electric face equipment be provided with devices that will permit the equipment to be deenergized quickly in the event of an emergency.

The citation issued by Inspector Garten asserts that the panic bar on the cited shuttle car was not maintained in an operative condition in that when it was tested it would not deenergize the machine in the event of an emergency.

Regulatory standard section 75.523-1 requires that electric face equipment must be provided with a device that will quickly deenergize the equipment in the event of an emergency. The parties stipulated that the exception found in subsection (b) of this standard, which does not require such a device when a machine is equipped with a substantially constructed cab, does not apply in this case.

Regulatory standard section 75.523-2 states the performance requirements for the deenergization device in question, and subsection (b) and (c) state as follows:

(b) The existing emergency stopswitch or additional switch assembly shall be actuated by a bar or lever which shall extend a sufficient distance in each direction to permit quick deenergization of the tramming motors of self-propelled electric face equipment from all locations from which the equipment can be operated.

(c) Movement of not more than 2 inches of the actuating bar or lever resulting from the application of not more than 15 pounds of force upon contact with any portion of the equipment operator's body at any point along the length of the actuating bar or lever shall cause deenergization of the tramming motors of the self-propelled electric face equipment.

The inspector here did not include a reference to sections 75.523-1 and 75.523-2 as part of his citation. While it would have made the citation more specific and detailed as to precisely what was being charged, I do not believe that his failure to include these sections renders the citation procedurally defective. I conclude that all of these sections must be read together in order to make any sense as to what is required under section 75.523. Subsections (b) and (c) of section 75.523-2 state the performance requirements necessary to maintain compliance with section 75.523, to insure that the deenergization device "will permit the equipment to be deenergized quickly in the event of an emergency".

In its post-hearing brief, MSHA takes the position that the uncontradicted testimony of Inspector Garten clearly establishes that the panic bar in question did not operate in conformity with the requirements of the applicable standards noted above. MSHA asserts that when Mr. Garten examined the shuttle car, the operator had difficulty activating the panic bar, and that before the bar would deenergize the machine, the operator had to slide the bar up and then press it down. Given these circumstances, MSHA concludes that the car operator was unable to activate the panic

bar by using any portion of his body, and that it was only after he went through a special manuever was he able to work the bar properly.

In further support of the violation, MSHA points out that when Inspector Garten attempted to activate the panic bar himself he was unable to deenergize the shuttle car because the bar could not be smoothly pressed down. MSHA concludes that Mr. Garten correctly determined that this additional step of pulling the panic bar before it could be pressed down to deenergize the car did not satisfy the requirements of the standard for a quick deenergization in the event of an emergency because a metal lip on the panic bar prevented the bar from moving smoothly in a downward direction. Finally, MSHA points to the fact that neither the mine foreman (Forbes) nor the Chairman of the Safety Committee (Gunoe), both of whom were present with the inspector when the machine was examined, were able to deenergize the car by simply pressing down on the bar, and that the testimony by Mr. Garten in this regard was not refuted.

In defense of the citation, the contestant/respondent presented the testimony of electrician William Roberts and assistant maintenance foreman Harold Vanhorn. Although Mr. Roberts indicated that he had checked the panic bar the day before the inspection and that it worked properly, he confirmed that he was not present at the shuttle car when the inspector issued his citation on August 10, 1983. He also stated that he had no idea why the order was issued, and that no one told him why the panic bar would not work.

Mr. Roberts was not involved in the abatement of the citation, and when asked how he had tested the bar the day before the citation issued, he stated that he had "hit it" or "pushed down" on it, but he could not recall whether he activated the bar by simply leaning into it. In response to a hypothetical question as to whether a panic bar which had to be activated by someone sliding it, lifting it, and then pushing it down would be functioning properly, Mr. Roberts answered that it would not.

Mr. Vanhorn was summoned to the shuttle car area after the citation issued, and he stated that when he tested the panic bar it operated properly and deenergized the car. However, he conceded that when the inspector tested it in his presence by simply leaning into it, the device would not operate properly and did not deenergize the machine. Mr. Vanhorn also conceded that the device is designed to function by someone simply depressing it, and in order to quickly deenergize the machine, he would probably use his shoulder.

After careful review and consideration of all of the testimony and evidence adduced in this case, I conclude and find that MSHA has established the fact of violation. I find the inspector's

testimony in support of the violation to be credible, and the contestant/respondent's testimony, while possibly mitigating the offense, has not rebutted the credible testimony presented by MSHA in support of the violation. Accordingly, the violation IS AFFIRMED.

Unwarrantable Failure

The violation in this case was set out in a section 104(d) (2) "unwarrantable failure" order issued by Inspector Garten. Although I have affirmed a finding of a violation of the cited safety standard in question, there still remains the issue as to whether or not the violation constitutes an "unwarrantable failure" by the contestant/respondent to comply with the requirements of section 75.523. Contestant/respondent has stipulated that it does not challenge the procedural underpinning for the order, and it concedes that the precedent underlying section 104(d) citation and order "chain" was validly issued (Tr. 48). However, contestant/respondent preserved its challenge to the "unwarrantable failure" finding by the inspector.

As correctly stated by MSHA in its brief, the test for "unwarrantable failure" is whether "the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence", Zeigler Coal Company, 7 IBMA 280, 295-296 (1977).

MSHA did not produce copies of the underlying section 104(d) citation and order, and I have no way of knowing why they were issued. In support of its argument that the violation here was an unwarrantable failure, MSHA relies on the testimony of Inspector Garten. He believed that the violation was unwarrantable because he "felt this condition should have been known by mine management" (Tr. 23). In support of this conclusion, Mr. Garten was of the opinion that since the machine is on the section all of the time, and since there is a qualified electrician present who is required to inspect the equipment during his weekly examination, the condition should have been discovered. Further, Mr. Garten was of the view that the machine operator is required to check the machine daily before he operates it, and if he finds any condition that is out of compliance, he is required to report it (Tr. 22-23).

Neither party called the shuttle car operator as a witness, nor did they take his deposition. As a matter of fact, no testimony was elicited from the inspector as to whether he even interviewed the machine operator or obtained any statement from him as to whether or not he had examined the car in question prior to operating it, or whether he believed the condition "was obvious or easily discernible", as claimed by the inspector. Further,

when asked his opinion as to the negligence of the operator, Inspector Garten was of the view that it was "moderate". In reply to a question as to whether or not mine management should have been aware of the condition, Mr. Garten replied "there could be mitigating circumstances behind it" (Tr. 24).

Inspector Garten asserted that he had no reason to believe that the shuttle car operator was aware of the condition of the panic bar (Tr. 32). This leads me to conclude that prior to the inspector's arrival on the scene, the car operator either did not check it out or thought nothing of it. As a matter of fact, when called in rebuttal, Mr. Garten admitted that when he tested the panic bar he had to push it approximately one-half inch forward and then down before the machine would deenergize. When asked whether the car operator, given these same circumstances, could have concluded that the device was operating properly, Mr. Garten replied "he could have" (Tr. 108).

As for Mr. Garten's testimony that he examined the very same car "a month, maybe longer" prior to August 10, 1983, and found that the panic bar operated properly, and that he observed no metal lip impediment, contestant/respondent's post-hearing information suggests that it may have been added in May 1979 when the car was rebuilt. Thus, any inference that the metal lip may have been added after Mr. Garten's prior inspection is simply not supportable. As a matter of fact, Mr. Garten appeared to be totally ignorant as to the function of the impediment described as a "metal lip". Further, there is no evidence of any past complaints by machine operators concerning any problems with the panic bar, and Mr. Vanhorn's testimony that no prior complaints were ever brought to his attention remains unrebutted. Although the computer print-out of prior violations for the mine shows that four prior citations for violations of section 75.523 were issued in 1982, and in March and June of 1983, MSHA presented no evidence or testimony as to what those were about.

After careful scrutiny of the record in this case, I cannot conclude that MSHA has established that this violation was caused by an unwarrantable failure by the contestant/respondent to comply with the requirements of section 75.523. MSHA has produced no credible evidence to support any conclusion that the weekly examination had not been conducted, and I take official notice of the fact that August 10, 1983, the day the citation issued, was a Wednesday. Further, respondent's electrician Roberts' testimony that he examined the panic bar the day before the citation issued and found it operating properly has not been rebutted by MSHA.

Maintenance foreman Vanhorn's testimony concerning the adjustments that are required to be made in the panic bar to take into account the height of the car operator has merit, and leads

me to conclude that it is altogether reasonable that what may appear to one individual as an "obvious or easily discernible" condition could very well depend on the subjective judgments and observations of someone else. As a matter of fact, Mr. Garten conceded during his rebuttal testimony that he strictly applied the standard requirement that the panic bar be capable of deenergizing the machine by the operator simply leaning his body against it (Tr. 107-108).

In view of the foregoing findings and conclusions, I conclude and find that MSHA has failed to establish by a preponderance of any credible evidence or testimony that the violation constituted an unwarrantable failure by the contestant/respondent to comply with the requirements of the cited safety standard. Accordingly, Inspector Garten's finding in this regard IS VACATED, and the section 104(dd)(2) order IS MODIFIED to a section 104(a) citation.

Significant and Substantial

In support of its contention that the violation is "significant and substantial" (S&S), MSHA asserts that the unrefuted testimony of Inspector Garten established not only that there was a reasonable likelihood that the failure of the panic bar to deenergize the shuttle car would lead to an accident, but that if an accident did occur, it would reasonably be expected to result in at least one and possibly two employees being permanently disabled or fatally injured (Tr. 25). This was true, argues MSHA, because a shuttle car like No. 19, which could freely roam in the mine for up to 500 feet, could easily crash against a rib in the mine seriously injuring the operator or crush anyone in its path if the panic bar was inoperative (Tr. 25-26, 33). MSHA points to the fact that neither Mr. Roberts nor Mr. Vanhorn questioned Inspector Garten's statements as to the potential harm that can be caused by an inoperative or malfunctioning panic bar.

Although Inspector Garten confirmed that coal was not being produced at the time the violation was cited, and while he did not specifically know when the car was last used, he did confirm that the section was an active pillar section which does not remain idle for very long, and that the shuttle car was used during a coal production cycle. He also confirmed that the car would be used on a regular basis in the pillar section in areas which are heavily worked or frequently traveled (Tr. 21-22). While the testimony of the shuttle car operator himself would have been the best and most direct evidence of any hazard concerned with the cited panic bar, I still find the inspector's testimony to be credible, and Westmoreland has not rebutted it.

I believe it is reasonable to conclude that given the violation in this case, in the event of a collision caused by the inability of the shuttle car operator to quickly deenergize the

machine by simply leaning his shoulder into the panic bar, personal injuries or equipment damage would likely result. Accordingly, I conclude and find that the violation is significant and substantial, and the inspector's finding in this regard IS AFFIRMED.

Size of Business and the Effect of the Civil Penalty on the Respondent's Ability to Continue in Business.

The parties stipulated that Westmoreland Coal Company is a large mine operator and the civil penalty assessed in this case will not adversely affect its ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues.

Good Faith Abatement

The parties stipulated that the cited conditions were timely corrected and abated in good faith, and I adopt these as my conclusion on this issue.

Negligence

The inspector here believed that the violation resulted from a moderate degree of negligence. I conclude and find that the violation resulted from Westmoreland's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Gravity

I conclude and find that the violation here was serious. Failure of the car operator to be able to quickly deenergize the shuttle car by leaning against the panic bar during an emergency, unexpected traffic, or other obstacles in its path while the machine is in operation presents a real potential for accidents and injuries.

History of Prior Violations

Westmoreland's history of prior violations for the mine in question is contained in a computer print-out submitted by MSHA (exhibit G-2). For the period August 10, 1981, through August 9, 1983, the mine was assessed for a total of 290 violations, four of which were previous citations of section 75.523. The information also reflects that since October 20, 1978, the mine has received 126 "S&S" violations, and I assume that these are among those listed in the print-out.

Although Westmoreland is a large mine operator with a 1982 annual production of over 12 million tons of coal, for that same year the Hampton No. 3 Mine produced 490,000 tons. Assuming that

same production for 1983, the number of violations at the mine, in comparison to its production, appears to be high. However, absent any further analysis or supportive arguments from MSHA, I cannot conclude that the prior history warrants any additional civil penalty increase, and I am persuaded by the fact that the mine has had only four prior citations for violations of section 75.523.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$175 is appropriate for the violation in question.

ORDER

Respondent Westmoreland Coal Company IS ORDERED to pay a civil penalty assessment of \$175 within thirty (30) days of the date of this decision, and upon receipt of payment by MSHA, these proceedings are dismissed.



George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 16 1984

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 82-105-D
ON BEHALF OF :
PAUL S. SEDGMER, JR., : MSHA Case No. VINC CD 82-16
EDWARD J. BIEGA, AND :
DENNIS R. GORLOCK, : Reclamation Services No. 60
Complainants : Mine
v. :
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor,
U. S. Department of Labor, Cleveland, Ohio, for
Complainants;
Robert M. Vukas, Esq., Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Moore

On the first day of the hearing Mr. Gorlock and Mr. Sedgmer completed their testimony. Since their memories differ in some respects from the other witnesses, I will summarize their testimony first. Considering that the events took place in April 1982, that the depositions were taken in November of 1983 (the reporter apparently lost the notes because the depositions were not transcribed until March 1984) and that the trial took place in March of 1984, it is not surprising that memories differ as to details.

Both witnesses testified essentially as follows. They were reinstated as pan (a pan and scraper are the same thing) drivers after a lay-off on April 12, 1982. On April 15, 1982, they were both in a crew operating in a loop or a circle where they would pick up dirt from one area and deposit it in another. Mr. Taylor, the superintendent, stopped them and asked them if they could go a little faster. Both replied that they could not under the conditions and Mr. Gorlock mentioned that he had injured his back earlier and did not intend to do it again. Mr. Sedgmer was told by Mr. Taylor something like "I know you had trouble in the preparation plant and came out here thinking it would be easy..well, I'm going to tame you." Mr. Sedgmer considered this a threat. Both witnesses thought it was unusual

that Mr. Taylor was out on the job so often. Usually a superintendent was somewhere else, not out with the pan crew. Both thought that a tramping or deadheading operation, and they had both engaged in many such operations, was not a valid indication of the pan operator's ability to produce. Pan operators dead-headed only 1% or 2% of the time and such operations were not similar to their normal productive activity.

On April 23, 1982, a deadhead was scheduled to an area known as the 46-C Pit. The deadhead would begin at a place where the various pans or scrapers had been parked, and on the way to the 46-C Pit they would first pass, in either a mile or a half-mile, the Gem Haulroad Bridge, then the Spade Haulroad Bridge, and thereafter the 46-C Pit. On the bus from the 46-C Pit to the place the scrapers were located it was very dusty in the back of the bus. There were times when the witnesses could not see Foreman Busby in his pickup truck ahead of the bus. When the bus stopped, Mr. Busby got on and said that because of the dusty conditions and the traffic of the darts on the road, which was expected to be heavy, a different than normal deadhead system would be used. This time the men would start off individually with 5-minute intervals between them. The men had been assigned various scrapers that had been lined up in a row and Mr. Biega, Mr. Sedgmer, Mr. Hornyak and Mr. Gorlock were at the tailend of the procession. The first nine were waved on over the hill and both witnesses assumed that they would go over the hill and then line up and leave at 5-minute intervals. About twenty minutes later, however, Mr. Busby signaled the last four to start moving and when they got to the brow of the hill they could not see the others lined up for a 5-minute interval start like they expected. Everybody had left. At some point after they had left the Spade Haulroad Bridge, but before they got to the 46-C Pit, a Mr. Lane stopped them all and then pulled Mr. Hornyak off to the side for an alleged brake problem. In getting going again, Mr. Gorlock, who originally started out last, went ahead of Mr. Sedgmer. Both witnesses testified that from the Quonset hut on, about 25% of the total move, the area had been watered. When these two, and Mr. Biega were almost finished with the deadhead, Mr. Davis pulled them off to the side of the road. Mr. Taylor and Mr. Lane were there. They were asked if they had any safety or mechanical problems and they said No. They then were directed to return to their cabs and stay there. They stayed there for about 6 hours. During that time Mr. Davis was asked what was going on and he said he did not know what Mr. Taylor had up his sleeve this time. During the whole time Mr. Davis sat across the haul road from the three pans operated by Mr. Gorlock, Mr. Sedgmer, and Mr. Biega. The three pan operators were not allowed to talk to each other. For most of the deadhead they had operated in second or third gears and both had the new pans which had six gears instead of four and thus operated slower in the middle gears than the older pans. They both testified that they knew of no one who had been

fired for going too slow in the pans but knew of some who had been disciplined and warned about going too fast.

Both had made many deadheads and said that the normal way was to leave in a convoy with a supervisor and his radio in front and a supervisor and his radio behind the convoy. Normally, the way was clear to them so that there was no problem with the darts (haulage trucks). The foreman had always said that there was plenty of work for them so even though they had recently been laid off they were not concerned about running out of work at this time.

Other witnesses who had participated in the deadhead testified, and while there was some discrepancy as to the manner in which they departed and while one witness testified that the Quonset hut was in a different location from that testified to by the others there was no essential difference. The company stipulated that in all past moves a convoy had been used and that the move on April 23 was the first time they had ever attempted to set the pans off in 5-minute intervals. Mr. Barron, a pan operator who had been involved in at least a hundred deadheads, testified that on a deadhead the pans were not allowed to pass each other.

In addition to the three complainants, five of the other participants in the April 23 deadhead testified. Mr. Bintz, classified as a first-class mechanic, Mr. Carpenter, classified as a 'dozer operator, Mr. McKeen, classified as a 'dozer operator, and Mr. Bonfini, a pan operator, and Mr. Hornyak, a first-class mechanic all gave similar testimony. Pan operators that were not involved with the April 23 deadhead: Scott, Barron, and Boggs also testified. All were of the opinion that only the operator of the equipment can judge the proper speed for that piece of equipment. Only the operator knows the conditions of the road when he is traveling on it, the extent of dust suspended in the air, and the condition of his machine. The government, prosecuting for the three complainants, contends that the operator of the equipment has absolute discretion as to how fast he operates.

All of the participants in the April 23 deadhead heard Mr. Busby describe the new procedure of leaving at 5-minute intervals. Some of them, including complainant Biega, heard him say that plans had been changed and they were no longer intending to use the 5-minute interval system. Some of them, however, went to their scrapers still thinking that they would be leaving at 5-minute intervals.

Unbeknownst to the scraper operators and to most of the foremen, a time and motion study had been secretly set up for the April 23 deadhead. Superintendent Taylor made the decision as to the order in which he wanted the pans to depart the Gem Pit, and he told Mr. Cyrus to set up the study. Mr. Cyrus and

two assistants stationed themselves at points along the haulroad known as the Gem Haulroad Bridge, the Spade Haulroad Bridge, and the 46-C Pit. As each scraper passed one of these three points, its number and the time of passage to the nearest minute was noted. The results of that time and motion study are set forth in complainants' exhibit 3. From the starting point of the study, the Gem Haulroad Bridge, it was 6.4 miles to the Spade Haulroad Bridge and 3.3 miles thereafter to the 46-C Pit (the actual study ended at the 'dozer pit, which is near the 46-C Pit), a total of 9.7 miles.

The first four scrapers to leave the Gem Haulroad Bridge and the ones that finished the entire trip with an average time of 29.25 minutes were operated by the miners who were not classified as pan operators. Two were first-class mechanics and two were 'dozer operators. There was convincing testimony that non-pan operators generally run faster than regular pan operators. One possible explanation is that since they do not operate pans on a regular basis they enjoy the change of pace and like to run fast. Another possible explanation is that since they do not have to put up with the jarring motion of the pan all day like the pan operators do, they run faster and take more punishment. The pan operator on the other hand, knowing that he is going to be driving that pan for a full shift, tends to take it easy on himself. Regardless of what the reason may be, the time and motion study bears out this evidence. The first four regular pan operators to finish the deadhead did so in an average time of 38.6 minutes. The complainants covered the same distance at an average time of 68.3 minutes.

The secret time and motion study was obviously a set-up or "sting" operation. The suspected malingerers along with the mechanic, Hornyak, who may or may not have been a target, were put at the tailend of the procession and the drivers who could be expected to be the fastest, were put in front. Mr. Taylor also testified that he likes to get his mechanics and 'dozer operators to the scene of a new operation first; but if he had expected the entire group to travel as a convoy, the time difference between the first arrivals and the last arrivals should have been insignificant. There was also the suggestion that the front-runners were driving the older pre-1977 scrapers and that these old scrapers are faster than the newer ones. Inasmuch as nobody ran at full speed, 32 m.p.h., it hardly matters which pans were faster.

There is considerable controversy about how dusty it was on the day in question. Some of the witnesses said that dust was a problem and others said it was not. Mr. Sedgmer, father of one of the complainants, was driving a water wagon that day and he put the first water on the haul road in the vicinity of the Quonset hut and it had not been previously watered. The Quonset

hut is fairly near the Spade Haulroad Bridge which, from respondent's exhibit 7 would appear to be about 6 miles after the start of the time and motion study. According to the study, the watering of the Quonset hut area would have taken place before any of the thirteen pans involved in the deadhead got to that area and at about the time that the last four pan operators passed the Gem Haulroad Bridge where the study began. Mr. Sedgmer's watering of the Quonset hut area took place at 7:50 A.M.

If, on April 23, the unwatered portions of the haul road had been extremely dusty with no cross wind to carry the dust away, it would be obvious that the last pans in line would have had more dust to contend with than the scrapers near the front of the line. And if the dust was hanging in the air the cumulative effect of the dust being thrown off by the coal haulage trucks would be worse for the last pan operators in line. I can not find, however, that the road was as dusty as the conditions I have just described. The complainants testified that at the speed they were driving dust was not a problem. The front-runners all testified that they were not having a problem with dust but that the road conditions would be worse for those trailing behind. It was speculated that the ones behind would have not only more dust but more truck traffic to contend with.

Some of the witnesses thought that there was dew on the ground and while it is fairly clear that the dust settling effect of the dew would be dissipated as more and more scrapers rolled by, there is no evidence of a traumatic change in the road conditions between 7:38 A.M. when the first scraper passed the Gem Haulroad Bridge and 9:09 A.M. when the last scraper passed the finish line. The superintendent, Mr. Taylor, and the other foreman traversed the deadhead route several times during the move and observed both the leading pans and the last four. They testified that the dust and traffic conditions as well as the road surface conditions were not significantly different for the different operators.

After listening to the testimony of the complainants, Mr. Biega, Mr. Gorlock and Mr. Sedgmer, I can not believe that they were involved in a deliberate slowdown designed to hamper the company's operation and avoid a layoff. Avoiding a layoff by engaging in a slowdown, thus prolonging the available work, has been suggested as the motive for complainant's actions. I do not find that the complainants engaged in such a slowdown.

I believe that Mr. Hornyak and the three complainants took a leisurely trip relying upon the belief that all equipment operators seem to hold to the effect that they are the only ones who can determine the speed at which the equipment will operate. To the extent that the pan operator or any other equipment operator, has his feet on the brake and accelerator and is in charge

of the gear shifting mechanism the operator is obviously the one who determines the speed at which the equipment is operated. I can not find, however, that he has unlimited discretion in this respect as the government contends. Mr. Biega himself was the cause of a citation being issued against the company because he was following another scraper too close. Drivers have been disciplined for going too fast and a Mr. Scott, who testified for the complainants, was disciplined (a letter of reprimand) for going too slowly. I heard a case in Texas, Secretary of Labor vs. Garrett Construction Company, 4 FMSHRC 2202 (December 13, 1982) in which two scrapers were going in opposite directions at 30 m.p.h. each and collided. One operator was killed and the other was seriously injured. Those drivers undoubtedly thought they had discretion to operate at approximately full speed. I hold that the speed at which a scraper is supposed to be operated is not in the sole discretion of the operator himself.

Both parties devote a portion of their briefs to the question of good faith belief, on the part of complainants, that they were operating at a safe reasonable speed. I do not consider the driver's belief a controlling factor. The question is whether respondent had a good faith belief that the three drivers were engaged in a slowdown. It is the determination of the motivation of the employers that is crucial.

While I have held that I do not believe the complainants were engaged in a slowdown, I also hold that from the results of the time and motion study, respondent had every right to think that they were so engaged and, in fact, did think that. Taking the first 6.4 mile leg of the test, only a small portion of which had been watered at the time of the deadhead, complainants' average speed was 8.2 m.p.h. Disregarding the faster speed of the mechanics and 'dozer operators, the five regular pan operators had a speed over that first leg of 14.6 miles per hour. That is 6.4 miles per hour faster than the complainants. It took an average of 26.2 minutes for the five regular pan operators to cover that leg, and it took the complainants an average of 47 minutes to cover that same distance. The last of the regular pan operators passed the Spade Haulage Bridge at 8:12 A.M. It was 19 minutes later before the first of the complainants got to that check point. The time and motion study justifies a belief by respondent that complainants were engaged in a slowdown.

The complainants did make safety complaints from time to time and there is evidence that they were outspoken in regard to safety matters, but there was no evidence that their safety complaints had any connection with the disciplinary action taken. 1/

1/ Complainants were all given notices of suspension with intent to discharge. The matter went to arbitration and the decision of the arbitrator was that complainants should be suspended for 30 days, but not discharged. The complainants were thus suspended for 30 days and then put back to work.

Complainants were suspected of being malingerers and a trap was set up to provide evidence of that fact. The trap did provide Mr. Taylor with the evidence he wanted and the result was exactly as he expected it to be. If extremely dusty conditions had existed on April 23, 1982, on the haul road, I would have found this time and motion study to be unfair because of the way the scrapers were lined up. I do not find that such extremely dusty conditions existed, and I can not find that the time and motion study was unfair. Considering the fact that Mr. Biega finished the entire run approximately 25 minutes before Messrs. Sedgmer and Gorlock, together with the fact that Mr. Gorlock passed Mr. Sedgmer, I can not find that any of the complainants were being held up by one of the other complainants. Pan operators are allowed to pass each other although some of them (Mr. Barron for example) do not think they are supposed to pass. There was evidence to the effect that a rubber-tired front end loader overtook and went around one or more of the complainants.

I find for the company and the case is DISMISSED.

Charles C. Moore, Jr.

Charles C. Moore, 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

July 17, 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 84-43-M
Petitioner : A.C. No. 16-00335-05501
v. :
: Perryville Sand & Gravel
LOUISIANA INDUSTRIES, INC., : Plant
Respondent :

DISAPPROVAL OF SETTLEMENT
ORDER OF ASSIGNMENT

The Solicitor has filed a motion to approve settlements in the amount of \$20 apiece for the three violations involved in this matter. The Solicitor's motion contains no discussion regarding the circumstances of any of these violations. At least two of the violations indicate on their face that some degree of gravity might be involved. Citation No. 2236638 was issued for an unsecured oxygen cylinder and acetylene cylinder. Citation No. 2236640 was issued because the catloader was not provided with a fire extinguisher.

It is now well established that the Commission and its administrative law judges have de novo authority to assess penalties under the Act. United States Mining Co., Inc., FMSHRC Docket No. PENN 82-328, Slip. Op. (May 31, 1984). See also, Sellersburg Stone Co., v. Federal Mine Safety and Health Review Commission, F. 2d (7th Cir. 1984), aff'g, 5 FMSHRC 287, 291 (March 1983); Knox County Stone Co., Inc., 3 FMSHRC 2478, 2480-81 (November 1981); Tazco, Inc., 3 FMSHRC 1895, 1896-98 (August 1981); Shamrock Coal Co., 1 FMSHRC 469 (June 1979), aff'd, 652 F. 2d 59 (6th Cir. 1981).

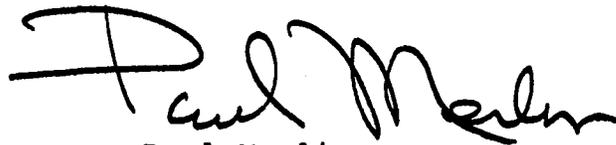
The Solicitor must therefore explain why \$20 penalties are justified for these three citations.

In order to expedite the handling of this matter, including the setting of this case for hearing, if appropriate, this case is hereby assigned to Administrative Law

Judge Michael A. Lasher. All future communications regarding this case should be addressed to him at the following address:

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Two Skyline Place, Suite 1000
5203 Leesburg Pike
Falls Church, VA 22041

Telephone: 703-756-6220

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

Paul Merlin
Chief Administrative Law Judge

Distribution:

Jack F. Ostrander, Esq., Office of the Solicitor, U.S.
Department of Labor, 555 Griffin Square, Suite 501, Dallas,
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Mr. James E. Mercer, Regional Personnel Safety Manager,
Louisiana Industries, 4600 Lee Street, P.O. Box 5472, Alex-
andria, LA 71301 (Certified Mail)

/nw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 17, 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-54
Petitioner	:	A.C. No. 15-12628-03501
v.	:	
	:	Cobra Tipple
COBRA RESOURCES, INC.,	:	
Respondent	:	

DECISION DISAPPROVING SETTLEMENT ORDER OF ASSIGNMENT

On March 27, 1984, the Solicitor filed his response to the Order to Submit Information issued in the above-captioned case. At issue is one violation, the proposed settlement of which is for \$20, the originally assessed amount.

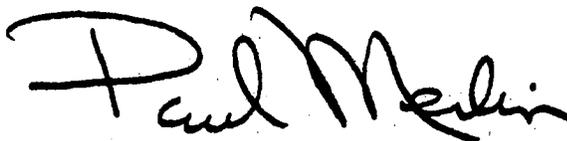
Citation No. 2054981 was issued for violation of 30 C.F.R. § 77.1605(b) because adequate brakes were not provided on a 125 Michigan Front End Loader being used for moving cars to be loaded on track. The Solicitor represents in his motion that the brakes on the front end loader were worn but not completely out. It was equipped with an operative emergency brake and in addition it could use its front blade in the event that it needed to stop suddenly. The Solicitor also states that this front end loader was being used to move railroad cars on level ground and was not being used to load the coal into the hopper. For the above enumerated reasons, the Solicitor asserts that gravity was low and negligence was moderate. I cannot approve a \$20 settlement in this case. \$20 denotes a lack of gravity. Thus, although the degree of seriousness of this violation may be somewhat mitigated by the facts described by the Solicitor, it did constitute a definite safety hazard. One can only wonder at the process which produced a \$20 penalty in this instance.

This case is hereby assigned to Assistant Chief Administrative Law Judge Gary Melick.

All future communications regarding this case should be addressed to Judge Melick at the following address:

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Two Skyline Place, Suite 1000
5203 Leesburg Pike
Falls Church, VA 22041

Telephone: 703-756-6261

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive, flowing style.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. John T. Mongoven, Vice President, Cobra Resources, Inc., P.O. Box 1166, Madisonville, KY 42431 (Certified Mail)

/nw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 18, 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 84-2
Petitioner : A.C. No. 33-01357-03502
v. :
: West Point Strip Mine
BUCKEYE COAL MINING COMPANY, :
Respondent :

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

The Solicitor has filed a motion for approval of settlement for the two violations in the above captioned action. The original assessments were for \$20 apiece and the Solicitor seeks approval in the amount of \$15 each.

One violation was for the absence of a fire extinguisher on a bulldozer and the other was for the absence of a fire extinguisher on the drag line. The Solicitor advises that "The probability of occurrences of the event against which the violated standard is directed is improbable. The gravity of protected injury was slight. The number of affected persons was one. * * * This violation only concerns the failure to install portable fire extinguishers on a bulldozer and a dragline pursuant to 30 C.F.R. § 77.1109 (c)(1) and § 77.1109-2. Therefore, there was little likelihood of danger to any of Respondent's miners."

The Solicitor does not explain why the failure to install fire extinguishers means that there was little likelihood of danger. The absence of fire extinguishers would appear to pose some risk of injury and if this was not so, then the Solicitor should specifically tell why. Even more importantly, the original assessed penalties of \$20 apiece were very low. In absence of some compelling circumstance, further reduction would make a mockery of the Act.

In light of the foregoing, the proposed settlements are disapproved.

This case is hereby assigned to Assistant Chief Administrative Law Judge Gary Melick. All future communications regarding this case should be addressed to him at the following address:

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Two Skyline Place, Suite 1000
5203 Leesburg Pike
Falls Church, VA 22041

Telephone: 703-756-6261



Paul Merlin
Chief Administrative Law Judge

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Ninth Street, Cleveland, OH 44199 (Certified Mail)

Mr. Ed Browne, Buckeye Coal Mining Company, Inc., P.O. Box
1, Lisbon, OH 44432 (Certified Mail)

/nw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 29 1984

EMILIANO ROSA CRUZ, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. SE 83-62-DM
: :
PUERTO RICAN CEMENT COMPANY, : MSHA Case No. MD 83-44
INC., :
Respondent :

DECISION

Appearances: Julio Alvarado Ginorio, Esq., Ponce, Puerto Rico, for Complainant;
Daniel R. Dominguez, Esq., Dominguez and Totti, Hato Rey, Puerto Rico, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged from his job as a hydrator because he complained to the Mine Safety and Health Administration about safety conditions in the plant. Respondent contends that Complainant was discharged for chronic absenteeism.

Pursuant to notice, the case was heard on the merits in Hato Rey, Puerto Rico on March 30, 1984. Emiliano Rosa Cruz, Roberto Padua Vasquez and Jorge Marcucci Cruz testified on behalf of Complainant. Rene Vargas Lizardi and Pedro Rodriguez Morales testified on behalf of Respondent. Counsel for both parties have filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Complainant worked for Respondent for more than 18 years before he was discharged on April 25, 1983. He began working as a laborer, was later classified as a lab technician assistant, then as a mill worker. In approximately 1975, he was promoted to the position of hydrator. At the time of his discharge he was earning \$5.03 per hour, and worked 40 hours per week.

On December 13, 1979, Complainant was suspended for 7 days "for reason of absences from work without notifying

same and because you were found by your supervisors reading a newspaper without attending to your work." (Respondent's Exh. 1). On March 30, 1981, Complainant was sent a notice from the personnel office that he had been absent from work 121 days in the year 1980. This did not include vacation time but did include authorized sick leave. Similar notices were sent for 1981 (Complainant was absent 78 days) and 1982 (Complainant was absent 49 days).

On January 25, 1982, Complainant was suspended from January 25 to February 8, 1982, "for having been absent from * * * work on Saturday, January 23 * * *, despite the fact that you were denied permission to be absent and thus acting insubordinately." (Respondent's Exh. 2). On April 26, 1982, Complainant was notified that he was discharged because of frequent absences from work. After discussions between union and company officials, the discharge was changed to a 2-week suspension from April 27, 1982 through May 10, 1982. The reason for the suspension was "frequent absences from work and * * * unsatisfactory record of attendance." (Respondent's Exh. 3). The notice of suspension contained a warning that "[the] next time you are absent from work without a valid and satisfactory justification for the company, you shall be dismissed from your employment." (Id.)

An inspection of Respondent's facility was conducted by Federal Mine Inspector Perez on April 5 and 6, 1983. During the course of this inspection, Complainant told the inspector that the hydrator floor was broken and presented a stumbling or tripping hazard to employees; a leak in the ceiling or roof caused hot water to come through, and on one occasion this caused burns to an employee; a chair in the control room had a broken leg. A close out conference, attended by Inspector Perez; the company safety director, Mr. Calish; the plant manager, Mr. Pedro Rodriguez; and the Union President, Mr. Marcucci, was held following the inspection. Apparently no citations or orders were issued as a result of the inspection.

On or about April 6, 1983, Mr. Tim Perez, an administrative assistant to the plant manager Pedro Rodriguez, told Complainant that he (Complainant) "was hot * * * [and] was going to be fired * * * because * * * he had commented or made comments to the MSHA people about * * * the condition of the equipment and some safety conditions." (Tr. 39-40). Perez told Complainant that "the next time Rodriguez catches you he is going to suspend you." (Tr. 8). This warning was overheard by Roberto Padua, a lab technician for Respondent. Several days later, Perez repeated this threat to Complainant.

On April 22, 1983, Complainant was scheduled to work from 6:00 a.m. to 2:00 p.m. He testified that he did not report for work that morning because he was ill. Complainant did not have a telephone and "had to wait for my neighbor to get up" (Tr. 11) before calling the company at 9:05 a.m., to notify it of his inability to work. The collective bargaining agreement requires that an employee who cannot attend his work shall notify the employer no later than 8:00 p.m. on the previous day "except in the case of unforeseen circumstances" (Respondent's Exh. 6, Art XVII). A letter to Complainant was prepared by Rene Vargas of the personnel office and delivered by a guard to Complainant at his home, directing him to report to the personnel office before returning to work (Respondent's Exh. 9). A company nurse was also sent to Complainant's home at 3:25 p.m. the same day. She reported that Complainant advised that he was ill with the flu and was taking Contac. She took his temperature which was 37³°C. (Respondent's Exh. 8). Later the same day, Complainant went out in a car driven by a friend and stopped to collect some money owed him and then went to the drug store to buy some medicine. He was seen by the plant manager at a machine shop where his debtor was.

On April 27, 1983, Complainant was notified that he was discharged effective April 25, 1983, because of excessive absences. (Respondent's Exh. 14). The decision to discharge Complainant was made by the company assistant personnel manager Rene Vargas, plant manager Pedro Rodriguez, personnel director Guillermo Rios, and benefits supervisor J. E. Rosich.

Complainant filed a claim for unemployment benefits which was denied because of a finding that he was dismissed due to excessive absences. Prior to the hearing on his unemployment claim, Vargas stated that Complainant threatened to kill him because his benefits had been withheld.

After leaving Respondent, Complainant worked from January 1, 1984 to February 18, 1984, as a watchman on a farm. He earned \$3.35 per hour. He was not working at the time of the hearing.

STATUTORY PROVISION

Section 105(c) of the Act provides in part 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 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.

* * * * *

(3) Within 90 days of the receipt of a complaint filed under paragraph (3), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has 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).

ISSUES

1. Whether Complainant was discharged for activity protected under the Mine Act?
2. If he was, to what relief is he entitled?

CONCLUSIONS OF LAW

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., 2 FMSHRC 2786, (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 (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 (1982). The ultimate burden of persuasion does not shift from the Complainant. Robinette, supra. 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). See also NLRB v. Transportation Management Corp., ___ U.S. ___, 76 L.Ed. 2d 667 (1983).

PROTECTED ACTIVITY

There is no dispute that Complainant reported certain deficiencies in the workplace to an MSHA inspector on April 5, 1983. Although Mr. Rodriguez, the plant manager, denied that these reports had anything to do with safety, I credit the testimony of Complainant, of Mr. Padua who is a disinterested witness, and of Mr. Marcucci, the union representative, each of whom stated that the conditions reported to the inspector did indeed involve safety matters. The fact that citations were not issued does not establish otherwise. Rodriguez was very defensive in his testimony and his credibility is suspect. Reporting safety problems in the workplace to a federal inspector is the first and most obvious kind of activity protected under the Mine Act.

ADVERSE ACTION

On the day of the close out conference following the inspection, Complainant was told by the plant manager's administrative assistant that the plant manager was going to fire Complainant because of his safety complaints to MSHA. Less than 3 weeks later Complainant was fired.

MOTIVATION FOR ADVERSE ACTION

The stated reason for Complainant's discharge was excessive absenteeism. The record shows that Complainant was off work a considerable number of days back at least as far as 1979. An inordinate number of his absences occurred on the day before and after weekends and holidays. Complainant testified that his absences were caused by illness and injury. However, he was terminated in 1982 because of absenteeism (the penalty was reduced to a suspension in the grievance proceeding), and was warned on a number of occasions

that he would be disciplined for being absent. On April 22, 1983, he was absent and failed to call in before his shift began. This record persuades me that one motive for discharging Complainant was his absenteeism. However, the statement of Tim Perez concerning Pedro Rodriguez's reaction to the complaints made to MSHA persuades me that part of the motive for the discharge was Complainant's report to the MSHA inspector. Tim Perez's statement was overheard by an apparently disinterested witness, Roberto Padua. There is no doubt in my mind that Perez made the statement. Perez is still employed in a supervisory position by Respondent, but, and I consider this fact significant, he was not called as a witness. I conclude that Perez was repeating to Complainant what Rodriguez in fact said. I do not credit Rodriguez's denial that he made such a statement. This also damages Rodriguez's credibility generally. I conclude that Complainant was discharged in part because of activity protected under the Act. Therefore, he had made out a prima facie case of discrimination under section 105(c) of the Act.

AFFIRMATIVE DEFENSE

Respondent does not overcome a prima facie case of discriminatory discharge by showing that it had adequate nondiscriminatory reasons under its contract or otherwise to terminate Complainant. Were that enough, it would clearly have met its burden here. But the burden is a more difficult, more subtle one: it must show that in fact it would have discharged Complainant solely for unprotected activities, this is, in this case for absenteeism. I conclude that it did not carry that burden. The incident which ostensibly precipitated the discharge was failure to call the personnel office prior to being off work for illness. The collective bargaining agreement apparently requires reporting 10 hours in advance (no later than 8 p.m. the day before for an employee beginning to work at 6:00 a.m.), which is an odd requirement for sick leave notification. Complainant was apparently ill: he was in bed when the nurse arrived and his temperature was slightly elevated (37.3°C = 99.14°F.) He was taking medication. I conclude that Respondent (in the person of Rodriguez) was awaiting an excuse to fire Complainant because he reported safety problems to MSHA, and that it seized upon his absence on April 22, 1983, as a plausible reason to let him go. Respondent has not established that it would have discharged Complainant for his absence on April 22, 1983, or for excessive absenteeism.

COMPLAINANT'S THREAT OF VIOLENCE

Respondent argues that Complainant loses the protection of the Act because he threatened the life of Respondent's assistant personnel manager, Mr. Vargas. The alleged threats were made at an unemployment compensation hearing some months after Complainant was discharged. I conclude that any threats made subsequent to Complainant's discharge are not relevant to this proceeding. I do not hereby determine whether the alleged threats were in fact made.

CONCLUSION

I conclude that Respondent discharged Complainant, a miner, because he made complaints related to the Mine Safety Act. Respondent therefore, violated section 105(c)(1) of the Act.

RELIEF

Based on the above findings of fact and conclusions of law, Respondent is ORDERED

1. To reinstate Complainant to the position from which he was discharged on April 25, 1983, or to a comparable position at the same rate of pay and with the same non wage benefits;

2. To remove from Complainant's records all references to his discharge on April 25, 1983;

3. To pay Complainant his regular wages from April 25, 1983, to the date of his reinstatement with interest thereon using the formula set out in the case of Secretary/Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (1983). (A copy of the Arkansas-Carbona decision is appended hereto.)

4. To pay reasonable attorney's fees and costs of litigation incurred by Complainant in the prosecution of this case.

ORDER

1. Complainant shall file a statement on or before August 17, 1984, showing the amount he claims as back pay and interest to the date of this decision.

2. Complainant shall file a statement on or before August 17, 1984, showing the amount he claims as attorney's fees and necessary legal expenses. The attorney's hours and rates shall be set out in detail.

3. Respondent shall file a reply on or before September 12, 1984, and if it objects to the amounts claimed as back pay or attorney's fees, shall state its objections with particularity.

4. Until the issues of the amount due as back pay and interest, and the amount due as attorney's fees are determined, the decision is not final.

James A. Broderick
James A. Broderick
Administrative Law Judge

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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 12, 1983

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
On behalf of MILTON BAILEY : Docket No. CENT 81-13-D
 :
v. :
 :
ARKANSAS-CARBONA COMPANY :
 :
and :
 :
MICHAEL WALKER :

DECISION

This discrimination case presents four issues: whether the Commission's administrative law judge abused his discretion in severing the Secretary of Labor's request for a civil penalty from the complaint of discrimination; whether the judge erred in awarding 6% interest on the back pay award; whether he erred in tolling the back pay award on the date the Secretary filed a complaint on Bailey's behalf; and whether he erred in refusing to award Bailey tuition and certain miscellaneous expenses.

For the reasons that follow, we hold that the judge did not abuse his discretion in this case when he severed the request for a civil penalty from the discrimination complaint, but we also announce our intention to amend Commission Procedural Rule 42, 29 C.F.R. § 2700.42, to end the need for such severance in future cases. We adopt as the Commission's interest rate formula for back pay awards the interest formula used by the National Labor Relations Board--that is, interest set at the "adjusted prime rate" announced semi-annually by the Internal Revenue Service for the underpayment and overpayment of taxes. We hold that the judge erred in assessing 6% interest on the back pay award and remand for recalculation of the award pursuant to the computation rules announced in this decision. We reverse the judge's order tolling back pay on the date of the Secretary's complaint on behalf of Bailey. We continue the award until the date Bailey informed the Secretary he did not wish reinstatement, and additionally remand for determination of the date when that notification occurred. Finally, we affirm the judge's holding that Bailey was not entitled to payment of college tuition and related expenses.

I. Factual and procedural background

We briefly summarize the facts, which are undisputed, as background for our discussion of this case. Arkansas-Carbona Company, a joint venture, operated a small surface anthracite coal mine in Dardanelle, Arkansas at the relevant time. Milton Bailey was employed by Arkansas-Carbona from May 13, 1980, until his discharge on June 27, 1980. Bailey was the company's safety director and he earned \$1,000 per month. Michael Walker was the president of one of the firms comprising the Arkansas-Carbona joint venture, and after June 13, 1980, took over control of mine operations at the mine site. On June 27, 1980, Bailey complained to Walker that the mine's first aid kit, which had been moved from the main office to a screened porch, should remain in the office to prevent its exposure to dust. Walker contended the kit was in a dustproof container. An argument ensued which resulted in Bailey's discharge.

On October 20, 1980, the Secretary of Labor filed a discrimination complaint before this independent Commission on behalf of Bailey against Arkansas-Carbona and Michael Walker. ^{1/} His complaint alleged that Bailey was unlawfully discharged for exercising rights protected by section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). The relief sought included back pay with 9% interest, and reinstatement on the same shift with the same or equivalent duties at a rate of pay "presently proper" for the position. The Secretary's complaint also requested "an order assessing a civil penalty of not more than \$10,000 against [the operator] for [the] violation of section 105(c) of the Act." 30 U.S.C. § 815(c)(Supp. V 1981). On January 22, 1981, the Secretary filed a motion to amend his discrimination complaint. The motion stated in part: "Subsequent to his filing of the complaint the Secretary was informed by complainant Bailey that he did not wish to be reinstated by respondents and that in lieu of reinstatement he would accept tuition for one year of college plus an allowance for expenses."

The Commission's administrative law judge first held that Bailey's complaint concerning the first aid kit on the day of his discharge was protected activity and that Bailey's discharge was motivated in part by that protected activity. Thus, the judge held that a prima facie case of discrimination, that is, adverse action motivated in part by protected activity, was proved. 3 FMSHRC 2313, 2318-19 (October 1981)(ALJ). The judge then examined each non-discriminatory ground the operator presented as the cause of Bailey's termination and concluded, "Neither singularly nor in combination do Respondents' contentions establish that Respondents would have discharged Complainant for the reasons given." 3 FMSHRC at 2319. Therefore, the judge determined that Arkansas-Carbona's discharge of Bailey violated section 105(c)(1) of the Mine Act. 30 U.S.C. § 815(c)(1).

The judge awarded Bailey back pay with 6% interest from the date of discharge until October 19, 1980, one day before the Secretary's complaint was filed. 3 FMSHRC at 2323. Because the complaint on behalf of Bailey was amended January 22, 1981, to request one year's college tuition and related expenses in lieu of reinstatement, the judge applied

^{1/} We refer to the respondents collectively as "the operator."

Rule 15(c), Federal Rules of Civil Procedure, and concluded that the amendment related back to October 20, 1980, the date of the Secretary's complaint. 2/ Therefore, the judge concluded that Bailey did not request reinstatement from that date and that, accordingly, the obligation for back pay ceased on that date. ³ FMSHRC at 2321. The judge also declined to order the payment of one year's college tuition and expenses because Bailey "failed to establish any entitlement to an award of 1 year of college tuition." ³ FMSHRC at 2322. The judge also ordered expunging of all references to "this matter" from Bailey's employment record.

In addition, the judge severed MSHA's proposed assessment of a civil penalty from this proceeding, and he ordered MSHA to proceed under Commission Procedural Rule 25, 29 C.F.R. § 2700.25. 3/ At the outset of the administrative hearing, the judge explained the reason for the severance: "I will sever the civil penalty proceeding because there has not been the required administrative processing of the proposal through the notification to the respondents of the amount of the proposed penalty or the opportunity to discuss this matter with the District Manager's office." Tr. 4.

II. Severance of the civil penalty from the proceedings involving the complaint of discrimination

We first consider the question of how civil penalties for violations of section 105(c) should be proposed and assessed in cases where the Secretary files a complaint on behalf of a miner, and then whether the judge erred in severing the penalty proceeding.

Civil penalties are assessed under the Mine Act to induce compliance with the Act and its standards. See, for example, S. Rep. No. 181, 95th Cong., 1st Sess. 40-41 (1977) ("S. Rep."), reprinted in Subcommittee on Labor, Senate Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 628-29 (1978) ("Legis. Hist."). Penalties are mandatory for violations of

2/ Rule 15(c), Fed. R. Civ. P., provides in part:

Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

3/ Commission Procedural Rule 25 provides:

The Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of: (a) the violation alleged; (b) the amount of the penalty proposed; and (c) that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty. If within 30 days from the receipt of the Secretary's notification or proposed assessment of penalty, the operator or other person fails to notify the Secretary that he intends to contest the proposed penalty, the Secretary's proposed penalty shall be deemed to be a final order of the Commission and shall not be subject to review by the Commission or a court.

the Act and its standards. The Act separates the procedures for civil penalty assessment between the Secretary and the Commission. The Secretary proposes the penalty he wishes assessed for a violation and the Commission assesses a penalty of an appropriate amount. See Sellersburg Stone Co., 5 FMSHRC 287, 290-92 (March 1983), pet. for review filed, No. 83-1630, 7th Cir., April 8, 1983; Tazco, Inc., 3 FMSHRC 1895, 1896-98 (August 1981). 4/

This bifurcation of functions is set forth in sections 105 and 110 of the Act. 30 U.S.C. §§ 815 & 820 (Supp. V 1981). Section 105(a) requires the Secretary to take certain steps to notify an operator of the civil penalty "proposed to be assessed under section 110(a) for the violation cited." 30 U.S.C. § 815(a). Section 110(a) provides, in turn, for penalty assessments of not more than \$10,000 per violation. 30 U.S.C. § 820(a). Section 110(i) provides, "The Commission shall have authority to assess all civil penalties provided in this Act." 30 U.S.C. § 820(i). After listing the six statutory penalty criteria, section 110(i) concludes, "In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above [six] factors." 5/

Section 105(a) states that the civil penalty proposal procedures set forth for the Secretary therein are only invoked "[i]f, after an inspection or investigation, the Secretary issues a citation or order under section 104 [30 U.S.C. § 814]." 30 U.S.C. § 815(a). 6/ The Secretary must notify an operator "within a reasonable time" of the penalty he proposes. If the operator chooses to contest a proposed penalty, the Secretary must "immediately advise" the Commission so that a hearing can be scheduled. 30 U.S.C. § 815(d). The statutory procedures for prompt notification

4/ When penalties proposed by the Secretary are not contested, however, a proposed civil penalty is not actually assessed but is deemed to be a final order of the Commission, as if the Commission had assessed it. 30 U.S.C. § 815(a). See also Commission Procedural Rule 25 (n. 3 supra).

5/ The words "shall be assessed a civil penalty by the Secretary" in section 110(a) must be read in pari materia with sections 105(a) and 110(i). Although section 110(a) uses the language "shall be assessed a civil penalty by the Secretary," the express language of sections 105(a) and 110(i) makes clear that this Secretarial function is one of proposal, not disposition. The legislative history bears out this reading of section 110(a). Conf. Rep. No. 461, 95th Cong., 1st Sess. 58 (1977) reprinted in Legis. Hist. 1336; S. Rep. 43, 45-46; reprinted in Legis. Hist. 631, 633-34. Thus, the reference to "shall be assessed" in section 110(a) means "shall be subject to a proposed assessment of a civil penalty by the Secretary." See Sellersburg Stone Co., supra.

6/ Section 104, 30 U.S.C. § 814 (Supp. V 1981), contains the procedures through which an operator's violations of the Act or its standards are enforced. Section 104(a) makes clear that citations shall be issued for violations of "this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act." 30 U.S.C. § 814(a).

and contest of a proposed civil penalty assessment reflect Congress' belief that penalty assessment had lagged under the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976)(amended 1977), and its consequent desire to speed the process. Thus, the thrust of the penalty procedures under the Mine Act is to reach a final order of the Commission assessing a civil penalty for violations without delay.

Cases involving violations of the discrimination provisions, however, are not initiated with the issuance of a citation or order under section 104 but, rather, with filing of special complaints before the Commission under sections 105(c)(2) or 105(c)(3). 30 U.S.C. §§ 815(c)(2) & (3). These two statutory subsections provide for complaint by the Secretary if he believes discrimination has occurred, or complaint by the miner if the Secretary declines to prosecute.

It is clear that a penalty is to be assessed for discrimination in violation of section 105(c)(1). The last sentence of section 105(c)(3) states, "Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 [30 U.S.C. § 818] and section 110(a)." 30 U.S.C. § 815(c)(3). 7/ Section 110(a) requires the Secretary to propose penalties to be assessed for violations of the Act. Neither section 105(c) nor section 110(a), however, states how and when the Secretary is to propose a penalty for a violation of section 105(c)(1).

The Secretary's regulations in 30 C.F.R. Part 100 set forth "criteria and procedures for the proposed assessment of civil penalties under section 105 and 110 of the [Mine Act]." 30 C.F.R. § 100.1. 8/ Section 100.5 lists a number of "categories [of violations which] will be individually reviewed to determine whether a special assessment is appropriate" including "discrimination violations under section 105(c) of the Act." 9/

In spite of this reference to discrimination cases, none of the Part 100 regulations specifies how the Secretary shall propose a civil penalty when he files the complaint of discrimination, and it does not appear that the Secretary contemplated that his administrative review procedures for proposed penalties should apply to a determination that an operator had violated

7/ Section 108 permits injunctive relief and is not relevant to the issues presented in this case.

8/ In this analysis, for convenience, we will refer to the current Part 100 regulations, which became effective May 21, 1982. They are substantially similar to those in effect when the judge's decision issued. The changes made do not affect our analysis, and we would reach the same conclusions under either version.

9/ A review of the discrimination cases adjudicated by this Commission indicates that the Secretary has used the section 100.5 special assessment procedure in discrimination cases only when the miner has proceeded on his own behalf pursuant to section 105(c)(3) of the Act and prevailed, or when, as here, the judge has severed the penalty proceedings from the discrimination case. In other discrimination cases, the Secretary has requested a penalty in his complaint of discrimination.

section 105(c)(1). Similarly, the Commission's procedural rules do not specifically address penalty procedures for alleged violations of section 105(c)(1). Our rules more generally require the Secretary to notify the operator of "the violation alleged" and the penalty proposed and to afford the operator 30 days in which to notify the Secretary if it wishes to contest the proposal. Commission Procedural Rule 25 (n. 3 supra). See also Commission Procedural Rules 26 through 28, 29 C.F.R. §§ 2700.26 through 28. 10/

The Secretary argues that the penalty proposal procedures in section 105(a) of the Mine Act and Commission Procedural Rule 25 apply only to citations and orders issued under section 104. Violations of the discrimination section, the Secretary urges, are subject only to the provisions expressly mentioned in section 105(c) itself. The Secretary relies on the last sentence in section 105(c)(3), which states that violations of section 105(c)(1) "shall be subject to the provisions of sections 108 [injunctions] and 110(a)." 30 U.S.C. § 815(c)(3). He argues that because section 110(a) contains no reference to section 104 or to section 105(a), the assessment proposal procedures required therein need not be applied in penalty proposals under section 105(c)(3).

Thus, from the language of sections 105(c)(3) and 110(a), the Secretary argues that it is not necessary to have separate penalty proceedings in discrimination cases. Rather, he contends that penalties should be assessed by Commission judges when liability is determined--that is, when an operator is found in a discrimination proceeding to have violated section 105. The Secretary asserts he is "always" prepared to provide the information on the penalty criteria in section 110(i), and that an administrative law judge will never be more competent to decide the penalty question than at the close of a discrimination case in which the judge has determined the existence of a violation.

10/ Commission Procedural Rules 40 through 44 (29 C.F.R. §§ 2700.40 through 44) deal with discrimination complaints, but do not resolve the issue of how a penalty is to be proposed. Rule 42 requires that a discrimination complaint include, among other things, "a statement of the relief requested." The rule tracks section 105(c)(2) of the Act, which requires the Secretary in his complaint to "propose an order granting appropriate relief." 30 U.S.C. § 815(c)(2). The Secretary contends that a civil penalty is part of the "relief" he may request in the complaint, and that inclusion of such a request in a complaint conforms to Rule 42 and section 105(c)(2). We conclude, however, that "relief" as used in section 105(c) and Rule 42 indicates only those remedies available to make the discriminatee whole. Section 105(c)(3) states in part, "The Commission shall ... issue an order ... granting ... relief ... including ... rehiring or reinstatement ... with backpay and interest or such remedy as may be appropriate." 30 U.S.C. § 815(c)(3). The legislative history also supports this reading of "relief." See Secretary on behalf of Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126, 142 (February 1982), citing to S. Rep. 37, reprinted in Legis. Hist. 625. A civil penalty, on the other hand, is not intended to compensate the victim but rather to deter the operator's future violations.

We agree with the Secretary that it is desirable to adjudicate in one proceeding both the merits of the discrimination claim and the civil penalty. The Mine Act emphasizes, "Proceedings under [section 105(c)] shall be expedited by the Secretary and by the Commission." 30 U.S.C. § 815(c)(3). Because the last sentence of section 105(c)(3) references penalty proposals under section 110(a), we conclude that penalty proposals for section 105(c) violations are to be expedited as well. The express statutory intent to expedite these proceedings is furthered by having the Secretary avoid dual proceedings and incorporate his penalty proposal in his discrimination complaint.

We also conclude, however, that it is incumbent upon the Secretary in a combined proceeding to set forth in the discrimination complaint the precise amount of the proposed penalty with appropriate allegations concerning the statutory criteria supporting the proposed amount. Experience makes us somewhat skeptical about the Secretary's assertion that he has "always" been prepared to present evidence on penalty criteria. Formal penalty allegations in the complaint better afford operators adequate notice of penalty issues in discrimination cases. Because the Secretary may "rely on a summary review of the information available to him" in proposing penalties (30 U.S.C. § 820(i)), the penalty allegations in the discrimination complaint may be stated in summary fashion.

In this case, the Secretary's naked request in his complaint for a penalty of "up to \$10,000" is scarcely a penalty proposal at all. Henceforth, we shall require in these cases that the Secretary propose in his complaint a penalty in a specific dollar amount supported by information on the section 110(i) criteria for assessing a penalty. This new rule shall apply to cases pending with our judges as of the date of this decision or filed with the Commission as of, or after, the date of this decision. Leave to amend complaints to add the penalty allegations shall be freely granted. Thus, the operator will be informed not only of the dollar amount proposed, but also the basis therefor. The parties will then be better prepared to litigate at the hearing any disputes concerning the penalty sought.

Because the Secretary did not provide in his complaint sufficient notice to the operator of the amount of the penalty sought and the basis therefor, we cannot say that the judge erred in severing the penalty proposal in order to provide such notice to the operator. Nor do we see the utility of a remand to allow the Secretary to amend his complaint. The judge's approach to the Secretary's inadequate proposal is consistent with the Act's notice requirements and with the position we now enunciate. Accordingly, we affirm the judge's severance of the penalty proposal from the underlying discrimination complaint. 11/

11/ We are presently in the process of adopting an interim amended Rule 42, which will reflect our resolution of the penalty issue. We also note that this case does not raise, and we do not reach, the question of how penalties should be proposed when the Secretary does not file a discrimination complaint on the miner's behalf and the miner files his own complaint under section 105(c)(3).

III. The rate and computation of interest on back pay awards

The next question in this case is whether the judge erred in assessing 6% interest on the back pay award. The remedial goal of section 105(c) is to "restore the [victim of illegal discrimination] to the situation he would have occupied but for the discrimination." Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC at 142. As we have previously observed, "Unless compelling reasons point to the contrary, the full measure of relief should be granted to [an improperly] discharged employee." Secretary on behalf of Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1, 2 (January 1982), quoting Goldberg v. Bama Mfg. Corp., 302 F.2d 152, 156 (5th Cir. 1962).

Included in that "full measure of relief" is interest on an award of back pay. Section 105(c)(3) of the Mine Act expressly includes interest in the relief that can be awarded to discriminatees, while leaving it up to the discretion of the Commission to determine the exact contours of such an award. ^{12/} The Senate Committee that drafted the section which became section 105(c) stated in its report:

It is the Committee's intention that the Secretary propose, and the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination.

S. Rep. 37, reprinted in Legis. Hist. 625 (emphasis added).

Our judges have awarded interest at rates varying from 6% per annum to 12.5% per annum and have used a variety of methods to compute interest awards. At least two of our judges have adopted the NLRB's rate of interest on back pay awards. See, e.g., Bradley v. Belva Coal Co., 3 FMSHRC 921, 925 (April 1981)(ALJ) aff'd in part, remanded in part on other grounds, 4 FMSHRC 982 (June 1982); Secretary on behalf of Smith et al. v. Stafford Construction Co., 3 FMSHRC 2177, 2199 (September 1981)(ALJ) aff'd in part, rev'd in part on other grounds, 5 FMSHRC 618 (April 1983), pet. for review filed, No. 83-1566, D.C. Cir., May 27, 1983. The experience of our

^{12/} Section 105(c)(3) provides in part:

The Commission ... shall issue an order, ... if the charges [of discrimination] 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.

30 U.S.C. § 815(c)(3).

judges in this area has greatly aided our evaluation of different methods of assessing interest. It has also led us to the conclusion that it is time to adopt a uniform method of computing interest so that all discriminatees will be treated uniformly when they are awarded back pay under the Mine Act.

The miner has not only lost money when he or she has not been paid in violation of section 105(c), but has also lost the use of the money. As the NLRB has stated with regard to interest on back pay awards under the National Labor Relations Act, "The purpose of interest is to compensate the discriminatee for the loss of the use of his or her money." Florida Steel Corp., 231 NLRB 651, 651 (1977). Thus, in selecting an interest rate, we have considered the potential cost to the miner both as a "creditor" of the operator, and as a potential borrower from a lending institution under real economic conditions. We have therefore sought a rate of interest that compensates the discriminatee fully for the loss of the use of money. In addition, we have attempted to select a rate of interest flexible enough to reflect economic and market realities, but not so complex in application as to place an undue burden on the parties and our judges when attempting to implement it.

For all of these reasons we adopt the interest rate formula used by the NLRB: interest set at the "adjusted prime rate" announced semi-annually by the Internal Revenue Service under 26 U.S.C.A. § 6621 (West Supp. 1983) as the interest it applies on underpayments or overpayments of tax. The "adjusted prime rate" of the IRS is the average predominant prime rate quoted by commercial banks to larger businesses as determined by the Federal Reserve Board and rounded to the nearest full percent. 26 U.S.C.A. § 6621 (West Supp. 1983). Under the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, § 345, 96 Stat. 636 (to be codified at 26 U.S.C. § 6621), the adjusted prime rate must be established semi-annually: by October 15 based on the prime rates from April 1 to September 30, and by April 15 based on the prime rates from October 1 to March 31. The rate announced in October becomes effective the following January 1, and the rate announced in April becomes effective the following July 1.

We agree with the NLRB that the IRS adjusted prime rate comes closest to compensating the miner fully for loss of the use of money. On the one hand, if the miner had the money, he or she could invest it or save it and probably earn less than the prime rate. On the other hand, if the miner has to borrow money because he or she is deprived of a paycheck, the rate of interest most likely would be higher than the prime rate. In these circumstances, we concur with the NLRB that the IRS formula "achieves a rough balance between that aspect of remedial interest which attempts to compensate the discriminatee or charging party as a creditor and that which attempts to compensate for his loss as a borrower." Olympic Medical Corp., 250 NLRB 146, 147 (1980). This "rough balance" in our view achieves the goal of making the miner whole for the loss of the use of money.

The IRS adjusted prime rate is also attractive for pragmatic reasons. It is a per annum rate adjusted semi-annually, based on the prime rates for the six months preceding its calculation. In this way, the rate reflects economic conditions with reasonable accuracy. Its announcement well in advance of the effective date offers notice to all parties and our judges. Cf. Olympic Medical Corp., supra.

The relevant adjusted prime rates, which we adopt as the Commission's remedial interest rates, are:

January 1, 1978 to December 31, 1979...6% per year (.0001666% per day)
January 1, 1980 to December 31, 1981...12% per year (.0003333% per day)
January 1, 1982 to December 31, 1982...20% per year (.0005555% per day)
January 1, 1983 to June 30, 1983.....16% per year (.0004444% per day)
July 1, 1983 to December 31, 1983.....11% per year (.0003055% per day)
January 1, 1984 to June 30, 1984.....11% per year (.0003055% per day)

Because the IRS rates of interest are announced as annual rates, it is necessary, as explained below, to convert them to daily rates to calculate interest on periods of less than one year. 13/

There must also be a uniform method of computing the interest on back pay awards under the Mine Act. We have considered a number of possible computational approaches. We are mindful of the NLRB's extensive administrative and legal experience in this area. The NLRB's general back pay methodology is sound and has met with judicial approval. The labor bar is familiar with this system. We conclude that rather than expending administrative resources in attempting to devise a new system, we will best, and most efficiently, effectuate the remedial goals of section 105(c) of the Mine Act by adopting the major features of the NLRB computational system. We are satisfied that this system will do justice to the miner, avoid unnecessary penalization of the operator, and not prove unduly burdensome for our judges and bar to apply.

We therefore announce the following general rules for the computation of interest on back pay.

Back pay and interest shall be computed by the "quarterly" method. See Florida Steel Corp., 231 NLRB at 652; F.W. Woolworth Co., 90 NLRB 289 (1950), approved NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953). 14/

13/ Prior to the passage of the Tax Equity and Fiscal Responsibility Act of 1982, the IRS announced the adjusted prime rate in the October of the appropriate year to take effect the following February. For ease of administration under the Mine Act, however, we have bounded certain interest periods at December 31 and January 1 rather than at January 31 and February 1. (The NLRB's General Counsel has followed the same simplifying approach. NLRB Memorandum GC 83-17, August 8, 1983.)

14/ Back pay is the amount equal to the gross pay the miner would have earned from the operator but for the discrimination, less his actual interim earnings. Bradley v. Belva Coal Co., 4 FMSHRC 982, 994-95 (June 1982). The first figure, the gross pay the miner would have earned, is termed "gross back pay." The third figure, the difference resulting from subtraction of actual interim earning from gross back pay, is "net back pay"--the amount actually owing the discriminatee. Interest is awarded on net back pay only.

In a discrimination case where, as here, there has been an illegal discharge, the back pay period normally extends from the date of the discrimination to the date a bona fide offer of reinstatement is made. (As we conclude below, the period may also be tolled when the discriminatee waives the right to reinstatement.)

Under this method (referred to as the "Woolworth formula," after the NLRB's decision in the case of the same name, supra), computations are made on a quarterly basis corresponding to the four quarters of the calendar year. Separate computations of back pay are made for each of the calendar quarters involved in the back pay period. Thus, in each quarter, the gross back pay, the actual interim earnings, if any, and the net back pay are determined. See n. 14.

Interest on the net back pay of each quarter is assessed at the adjusted prime interest rate or rates in effect, as explained below. Like the NLRB, we will assess only simple interest in order to avoid the additional complexity of compounding interest. Interest on the amount of net back pay due and owing for each quarter involved in the back pay period accrues beginning with the last day of that quarter and continuing until the date of payment. See Florida Steel Corp., 231 NLRB at 652. In calculating the amount of interest on any given quarter's net back pay, the adjusted prime interest rates may vary between the last day of the quarter and the date of payment. If so, the respective rates in effect for any quarter or combination of quarters must be applied for the period in which they were operative. The interest amounts thus accrued for each quarter's net back pay are then summed to yield the total interest award.

For administrative convenience, we will compute interest on the basis of a 360-day year, 90-day quarter, and 30-day month. Using these simplified values, the amount of interest to be assessed on each quarter's net back pay is calculated according to the following formula:

$$\frac{\text{Amount of interest}}{\text{number of accrued days of interest (from the last day of that quarter to the date of payment)}} = \frac{\text{The quarter's net back pay}}{\text{daily adjusted prime rate interest factor}}$$

The "daily adjusted prime rate interest factor" is derived by dividing the annual adjusted prime rate in effect by 360 days. For example, the daily interest factor for the present adjusted prime rate of 11% is

.0003055% (.11/360). The daily interest factors are shown in the list of adjusted prime rates above. A computational example is provided in the accompanying note. 15/

15/ The mechanics of the quarterly computation system may be illustrated by the following hypothetical example, in which a miner is discriminatorily discharged on January 1, 1983, and offered reinstatement on September 30, 1983. Payment of back pay and interest is tendered on October 15, 1983. After subtraction of the relevant interim earnings, the net back pay of each quarter involved in the back pay period is as follows:

First quarter (beginning January 1, 1983)	\$1,000
Second quarter (beginning April 1, 1983)	\$1,000
Third quarter (beginning July 1, 1983)	\$1,000
Total net back pay	<u>\$3,000</u>

The adjusted prime interest rates in effect in 1983 are:

16% per year (.0004444% per day) from January 1, 1983, to June 30, 1983;
11% per year (.0003055% per day) from July 1, 1983, to December 31, 1983.

The interest award on the net back pay of each of these quarters is as follows:

(1) First Quarter:

(a) At 16% interest until end of second quarter of 1983:

$\$1,000 \text{ net back pay} \times 91 \text{ accrued days of interest}$
(last day of first quarter plus the entire second quarter) $\times .0004444 = \underline{\$40.44}$

Plus,

(b) At 11% interest for entire third quarter through the date of payment:

$\$1,000 \text{ net back pay} \times 105 \text{ accrued days of interest (the third quarter plus 15 days)} \times .0003055 = \underline{\$32.07}$

(c) Total interest award on first quarter:

$\$40.44 + \$32.07 = \underline{\$72.51}$

(2) Second Quarter

(a) At 16% interest for the last day of the second quarter

$\$1,000 \times 1 \text{ accrued day of interest} \times .0004444 = \underline{\$.44}$

Plus,

(b) At 11% interest for the entire third quarter through date of payment:

$\$1,000 \times 105 \text{ accrued days of interest} \times .0003055 = \underline{\$32.07}$

(c) Total = $\$.44 + \$32.07 = \underline{\$32.51}$

(3) Third Quarter:

At 11% interest for the last day of the third quarter through date of payment:

$\$1,000 \times 16 \text{ accrued days of interest} \times .0003055 = \underline{\$4.88}$ total

(4) Total Interest Award:

$\$72.51 + 32.51 + 4.88 = \109.90

This amount is added to the total amount of back pay (\$3,000), for a total back pay award of \$3,109.90.

The major alternative computational approach would involve awarding interest on the total lump sum of net back pay from the date of discrimination to the time of payment. We recognize that this method would involve less complex calculations. We reject the lump sum method, however, because it would penalize the operator by assuming that the entire amount of the back pay debt was due and owing on the first day of the back pay period. We will carefully monitor the experience of our judges and parties in applying the computational system announced in this decision. We will modify the system if that experience over time demonstrates the desirability of adjustment.

In discrimination cases, our judges should advise the parties of the methodology for calculating back pay and interest. The parties shall submit to the judge the requisite back pay figures and calculations, and are urged to make as much use of stipulation as possible. The burden of computation of interest on back pay awards should be placed primarily on the parties to the case, not the judge, in order to comport with the adversarial system.

We apply the foregoing principles in this proceeding because the issue of the appropriate rate of interest in discrimination cases arising under the Mine Act was squarely raised on review. As a matter of discretionary policy in judicial administration, we will otherwise apply these principles only prospectively to discrimination cases pending before our judges as of the date of this decision or filed with the Commission as of, or after, the date of this decision. We do not mean to intimate that any previous awards of interest by our judges in other cases, based on different computational methods, are infirm.

Applying our formula to the present case, we conclude that reversal is necessary. The judge's award of 6% interest is so disparate from the adjusted prime rates in effect from the date of Bailey's discharge on June 27, 1980, as to raise questions concerning whether the complainant would truly be made "whole" if the judge's award stands. Accordingly, we hold that the judge erred in awarding 6% interest, and will remand for recalculation of interest pursuant to the interest formula and computational methods announced in this case.

IV. Tolling of the back pay award

The judge concluded that Bailey was not entitled to back pay after October 20, 1980, the date on which Bailey's complaint was filed. That complaint requested reinstatement, but it was amended January 22, 1981. The amended complaint sought back pay and requested the Commission to "order respondents to pay Mr. Bailey \$900.00 for one year college tuition plus \$400.00 book and maintenance expense allowance in lieu of reinstatement at respondents' mine." The accompanying motion to amend stated:

Subsequent to his filing of the complaint the Secretary was informed by complainant Bailey that he did not wish to be reinstated by respondents and that in lieu of reinstatement he would accept tuition for one year of college plus an allowance for expenses.

The judge granted the motion to amend and, when determining the back pay award, applied Rule 15(c), Fed. R. Civ.P., and tolled the award on October 20, 1980. Rule 15(c) provides that where a claim or defense in an amended pleading arises out of the same circumstances set forth in the original pleading, the amendment relates back to the date of the original pleading. Relation back has been generally permitted where the movant seeks to enlarge the basis or extent of a demand for relief. See, for example, Goodman v. Poland, 395 F. Supp. 660, 682-86 (D. Md. 1975)(change of theory of recovery from equity to law permitted); Wisbey v. Amer. Community Stores Corp., 288 F. Supp. 728, 730-32 (D. Neb. 1968)(amendment seeking additional damages in FLSA action permitted). We do not believe that the restrictive application of relation back by the judge was appropriate in this case.

Rather, in determining when back pay should terminate, we look to the date when Bailey informed the Secretary he no longer sought reinstatement at Arkansas-Carbona. We agree with the judge's related conclusion: "It would be unfair and improper to require a mine operator to pay a former employee back pay for a period of time when the employee has unequivocally stated that he does not want to return to his former employment." 3 FMSHRC at 2321. In a case involving similar issues, this judge compared a miner's lack of desire to be reinstated to a rejection of an offer of reinstatement under the National Labor Relations Act. Secretary on behalf of Ball v. B&B Mining, 3 FMSHRC 2371, 2378 (October 1981)(ALJ). We concur with the NLRB rule that an employer is released from his back pay obligations when the employee rejects an appropriate offer of reinstatement, and consider the analogy to the facts of this case appropriate. See, for example NLRB v. Huntington Hospital, 550 F.2d 921, 924 (4th Cir. 1977); NLRB v. Winchester Electronics, Inc., 295 F.2d 288, 292 (2d Cir. 1961); Lyman Steel Co., 246 NLRB 712 (1979).

Tolling the back pay award on the date Bailey informed the Secretary that he no longer desired reinstatement effectuates the preceding principles, while the judge's relation back to the original complaint needlessly and unfairly penalizes Bailey. Therefore, we reverse the judge's relation back to the date of the original pleading. The present record does not reveal the date Bailey informed the Secretary of his waiver of reinstatement. Accordingly, we additionally remand for determination of that date in order that the back pay period may be established and the necessary computations properly made.

V. College tuition and related expenses.

Bailey's remaining contention concerning the award is that the judge erred in not granting him tuition and miscellaneous college expenses. The judge held, "Complainant failed to establish any entitlement to an award of 1 year of college tuition plus \$400 book and miscellaneous expense allowance." 3 FMSHRC at 2322. We affirm the judge on this point.

The Secretary argued in his brief before the judge that Bailey would not have paid tuition and expenses, but for his accepting the position at Arkansas-Carbona. 16/ The judge found that, prior to his employment with

16/ The Secretary did not raise this issue on review and, although Bailey briefly raised it in his petition for review, he did not file a brief before us.

Arkansas-Carbona, Bailey worked as a campus security guard at Arkansas Tech, and as a fringe benefit of that campus job did not pay tuition. 3 FMSHRC at 2315. (The judge made no finding on whether Bailey's campus job also entitled him to college expenses.) After Bailey accepted a position at Arkansas-Carbona, and resigned from his campus job, he paid his own tuition.

The remedial goal of section 105(c) of the Act is to return the miner to the status quo before the illegal discrimination. Secretary on behalf of Dunmire and Estle v. Northern Coal, 4 FMSHRC at 142. Had Bailey not been discharged illegally, he would have been working at Arkansas-Carbona and would have had to pay tuition for his classes. We do not see how Arkansas-Carbona can be held responsible for a fringe benefit Bailey did not receive from that company. Although at times we may need to seek alternative remedies to make a miner whole for illegal discrimination (for example, where reinstatement is impossible or impractical), such considerations are not present in this case.

Accordingly, we affirm the judge's refusal to award tuition and college expenses.

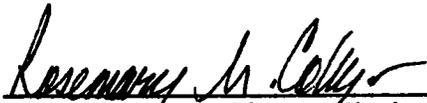
VI. Conclusion

For the foregoing reasons, we affirm the judge's severing of the request for a civil penalty from the merits of the discrimination case, and hold that in future cases the Secretary must propose in his discrimination complaints a specific penalty supported by allegations relevant to the statutory penalty criteria. As we have stated above, we are accordingly in the process of amending our Procedural Rule 42 to provide for unified proceedings in the future.

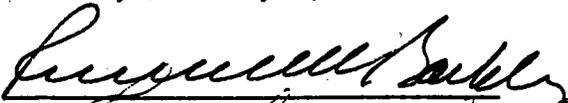
We reverse the judge's assessment of 6% interest on back pay, and remand to the Chief Administrative Law Judge for assignment to a judge for calculation of back pay and interest according to the principles and methodology announced in this decision. 17/ We reverse the judge's tolling of the back

17/ The judge who decided this case has left the Commission.

pay award on the date the complaint was filed, and additionally remand for determination of the date Bailey informed the Secretary he no longer wished reinstatement. Finally, we affirm the judge's denial of Bailey's request for college tuition and related expenses.



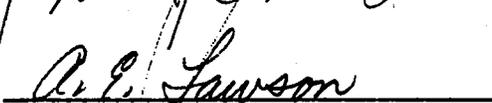
Rosemary M. Collyer, Chairman



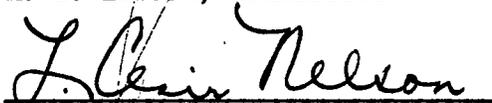
Richard V. Backley, Commissioner



Frank F. Jastrab, Commissioner



A. E. Lawson, Commissioner



L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 20, 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 84-69
Petitioner : A.C. No. 33-00945-03506
v. :
INDUSTRIAL MINING COMPANY, : Rogers Pit Mine
Respondent :

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

The Solicitor has filed a motion to approve settlements for the three violations involved in this matter. Each violation was originally assessed at \$54 and the Solicitor moves for settlements in the amount of \$40 apiece.

The Solicitor's motion advises that the operator is small in size, a history of prior violations is low, and the negligence was moderate. I accept these representations.

I cannot, however, accept the Solicitor's representations regarding gravity. The Solicitor advises "These violations involve the failure to provide 200 feet of berms on a roadway into a pit in violation of § 77.1605(k) (Citation No. 02326985); the failure to provide safety belts on a pan loader equipped with a roll over protective structure in violation of § 77.1701(i) (Citation No. 02326986), and an accumulation of oil and grease on the motor and transmission of a front-end loader in violation of § 77.1104 (Citation No. 02326987). Therefore, there was little likelihood of any danger to Respondent's miners."

The mere recitation of the facts of each violation does not support the conclusion that there is little likelihood of danger. Moreover, there is no explanation of the Solicitor's proposed conclusions that the probability of occurrences of the event against which the violated standard were directed was unlikely and that the gravity of projected injury would be slight. On the contrary, all of the violations appear to involve a significant degree of gravity, in light of which, the originally assessed penalties of \$54 apiece are modest.

In light of the foregoing, I am unable to approve the recommended settlement.

This case is hereby assigned to Assistant Chief Administrative Law Judge Gary Melick. All future communications regarding this case should be addressed to Judge Melick at the following address:

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Two Skyline Place, Suite 1000
5203 Leesburg Pike
Falls Church, VA 22041

Telephone: 703-756-6261

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive, flowing style with a large initial "P".

Paul Merlin
Chief Administrative Law Judge

Distribution:

F. Benjamin Riek III, Esq., Office of the Solicitor, U.S.
Department of Labor, 881 Federal Office Building, 1240 East
Ninth Street, Cleveland, OH 44199 (Certified Mail)

Mr. Ed Browne, Industrial Coal Mining Company, Inc., P.O.
Box 1, Lisbon, OH 44432 (Certified Mail)

/nw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 20, 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. YORK 84-9-M
Petitioner : A.C. No. 19-00018-05503
v. :
: Lee Quarry and Mill
LEE LIME CORPORATION, :
Respondent :

DISAPPROVAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion for approval for settlement for the one citation involved in this matter.

The Solicitor asserts that the assessment sheet which he has submitted contains findings concerning the size of Respondent's business, the health or safety standards violated, prior history, negligence, gravity, and good faith. This is a single penalty assessment and contrary to the Solicitor's representations, the assessment sheet has no information whatsoever on it. I do not, therefore, have before me the information necessary to make a de novo penalty assessment as authorized by section 110 of the Act.

Moreover, the Solicitor states that the "excessive nuisance dust condition cited was not known to the operator nor was it caused by its negligence." The dust condition may not have been known to the operator, but this does not mean that it should not have known. Based upon what the Solicitor has told me, I would not be warranted in finding that the operator was not negligent.

I am also surprised that the Solicitor recommends reducing the proposed penalty from \$20 to \$10. \$20 denotes a lack of gravity. For a further reduction in this minimal penalty to be warranted, there must be additional justification such as imposition of the original penalty would impair the operator's ability to continue in business. The Solicitor has submitted no such information.

In light of the foregoing, therefore, it is Ordered that within 30 days, the Solicitor submit an amended motion for settlement which complies with the requirements of the Act.



Paul Merlin
Chief Administrative Law Judge

Distribution:

David L. Baskin, Esq., Office of the Solicitor, U.S. Department of Labor, John F. Kennedy Federal Building Government Center, Room 1607, Boston, MA 02203 (Certified Mail)

Frank McQuade, Vice President, Lee Lime Corporation, Box 250, Lee, MA 02138 (Certified Mail)

/nw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 23 1984

LOCAL UNION 2274 : COMPENSATION PROCEEDING
DISTRICT 28, UNITED MINE- :
WORKERS OF AMERICA, : Docket No. VA 83-55-C
Complainant :
v. : McClure No. 1 Mine
: :
CLINCHFIELD COAL COMPANY, :
Respondent :

RULING ON MOTION FOR SUMMARY JUDGEMENT

Before: Judge Moore

In ruling on a Motion for Summary Decision it is appropriate to view the facts in the light most disfavorable to the moving party. Assumptions I make for the purpose of ruling on this Motion, are therefore not binding regarding any other case that may arise due to the explosion of the McClure No. 1 Mine on June 21, 1983. I am assuming for example that the safety standard violations which MSHA says existed prior to the explosion, did in fact exist and did lead to the explosion which killed seven miners.

In this action United Mine Workers is seeking one week's compensation for each of the miners idled by the explosion and subsequent orders issued by MSHA. Section 111 of the Federal Mine Safety and Health Act of 1977 provides in part as follows:

If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

Viewed in the light most favorable to the United Mine Workers of America, the events following the explosion

were as follows. At 3:42 A.M. on June 22, 1983, an MSHA inspector issued a withdrawal order pursuant to section 103(k) of the Act. At 2:00 P.M. on the same day he issued an imminent danger order pursuant to section 107(a) of the Act. Neither order alleged or referred to a violation of a health or safety standard.

MSHA's comprehensive underground investigation lasted from June 25, 1983 to August 12, 1983, and various interviews were conducted in July and August of that year. According to the accident report, which is not a part of the record in this case but which I nevertheless have, the transcripts of all testimony taken were released to the general public on September 9, 1983. I can not find anything in that accident report, however, that indicates when it was published. In any event it was not until March of 1984 that MSHA issued a section 104(d) citation and four section 104(d) orders all alleging violations of safety standards that led to the explosion. It is noted that the citation bears the number 2352610 but each of the four orders refers to it as number 2352601. I assume that was a clerical error. The original section 107(a) imminent danger order was not modified.

On December 16, 1983, I denied Clinchfield's original motion for summary decision (I referred to it as a motion to dismiss) relying for the most part on the Commission's decision in United Mine Workers of America v. Westmoreland Coal Company, 5 FMSHRC, 1406 (August 1983). At that time MSHA had not released its accident report and the posture of the case was thus very similar to the situation before the Commission in the Westmoreland case. The Commission remanded the Westmoreland case to Judge Steffey with directions that he retain it on his docket until MSHA had completed its investigation and taken whatever action it deemed necessary. The Commission expressed no opinion as to whether MSHA could legally amend the section 107(a) order to allege a violation or whether such an amendment would entitle the miners to the week's compensation involved. It said these questions should be first resolved by the judge after the investigation.

As I have stated previously, the MSHA investigation report is not a part of the official record in this case. It is, however, an official public document of the United States Department of Labor and as such it is entitled to "official notice" status and under the summary decision criteria statements therein detrimental to Clinchfield could be "officially noticed". I am including a copy of that

report with the material forwarded to the Commission in this case for whatever use it wishes to make of the report.

After the parties had rebriefed the issues, I asked the Solicitor if it wished to express a view. The Solicitor did write a letter in which it agreed with the United Mine Workers' arguments and stated,

"as the instant 107(a) order was terminated by the time the accident report was issued, no thought was given to issuing a modification of the terminated order to tie it formally to the 104(d) orders issued with the report."

I would have thought that after the Commission's Westmoreland decision and my ruling herein of December 16, 1983, that some thought would have been given to the question of modification. Clinchfield has moved to strike the Solicitor's letter but inasmuch as I invited the Solicitor's views I can hardly strike his compliance with my request.

The issue before me in this case presents a very close question. I sympathize with the arguments of the United Mine Workers of America and the Solicitor, but I believe that the law is to the contrary. The mine was closed because an inspector thought an imminent danger existed not because he thought there was "a failure of the operator to comply with any mandatory health or safety standards." The fact that the explosion that led to the order was actually, in accordance with my assumptions, caused by the violations does not affect the fact that the inspector did not issue the order "for a failure of the operator to comply with . . . safety standards".

The Motion is GRANTED and the case is DISMISSED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution:

Joyce A. Hanula, Legal Assistant, United Mine Workers of America, 900 15th Street, NW., Washington, D.C. 20005
(Certified Mail)

Timothy M. Biddle, Esq., Crowell and Moring, 1100 Connecticut Avenue, NW., Washington, D.C. 20036 (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

JUL 24 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 84-38
Petitioner	:	A.C. No. 11-00599-03548
v.	:	
	:	Orient Mine No. 6
FREEMAN UNITED COAL MINING	:	
COMPANY,	:	
Respondent	:	

DECISION

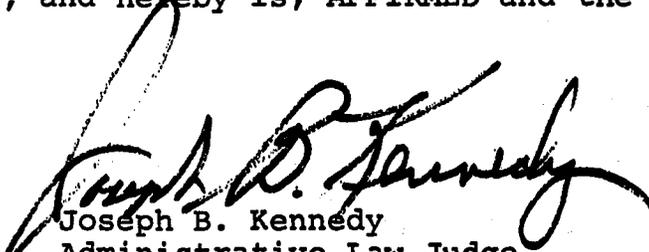
Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Harry M. Coven, Esq., Gould & Ratner, Chicago, Illinois, for Respondent.

Before: Judge Kennedy

The captioned penalty proceeding came on for an evidentiary hearing in Chicago, Illinois on May 17, 1984. The 104(a) S&S citation charged a violation of 30 C.F.R. 75.304, failure to make an adequate onshift examination for hazardous conditions.

During examination of the inspector it became apparent that the violation charged could not in fact have occurred. Whereupon, counsel for the Secretary moved to vacate the citation and dismiss the proposal for penalty. There being no opposition the motion was granted and the case dismissed.

The premises considered, it is ORDERED that the bench decision in this matter be, and hereby is, AFFIRMED and the matter DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 340 S. Dearborn St., 8th Fl., Chicago, IL 60604 (Certified Mail)

Harry M. Coven, Esq., Gould & Ratner, 300 W. Washington St., Suite 1500, Chicago, IL 60606 (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

JUL 24 1984

VESTA MINING COMPANY, : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. PENN 83-212-R
: Order No. 2104660; 6/16/83
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. PENN 83-225-R
ADMINISTRATION (MSHA), : Order No. 2105163-02; 7/25/83
Respondent :
: Vesta Mine
: :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 83-230
Petitioner : A.C. No. 36-00962-03552
v. :
: Vesta Mine
VESTA MINING COMPANY, :
Respondent :

DECISION

Appearances: Barbara L. Krause, Esq., Smith, Heenan,
Althen and Zanolli, Washington, D.C., for
Contestant/Respondent;
James Crawford, Esq., Office of the Solicitor,
U.S. Department of Labor, for Respondent/
Petitioner.

Before: Judge Kennedy

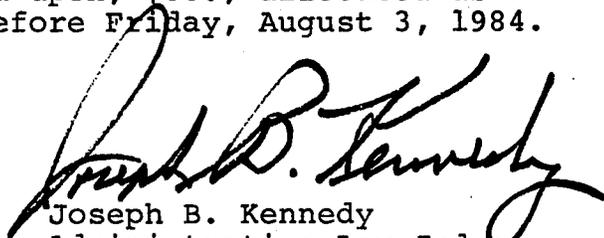
The captioned review-penalty proceedings are before me on the parties' motion to approve settlement of two of the three violations charged and to vacate the 104(d)(2) Order involving an alleged roof control violation.

The matters were first considered at a prehearing/settlement conference that resulted in an agreement to settle the sanding devices (Order No. 2105135) and the shelter holes (Order No. 2105163) charges at the amounts initially assessed, \$750 and \$130 respectively.

Thereafter, the roof control violation (Order No. 2104660) came on for an evidentiary hearing in Pittsburgh, Pennsylvania, on March 14, 1984. At the close of the solicitor's case, the operator moved to dismiss for failure to prove a prima facie case. For reasons best appreciated by reading the transcript,

the solicitor did not oppose. Whereupon the trial judge vacated the order and dismissed the proposal for penalty.

The premises considered, therefore, it is ORDERED that (1) the motion to approve settlement be, and hereby is, GRANTED and the contest of the shelter holes order (Docket PENN 83-225-R) DISMISSED, (2) the contest of the roof control order (Docket PENN 83-212-R) is GRANTED, and (3) the order is vacated and the proposal for the penalty thereon are DISMISSED. It is FURTHER ORDERED that the operator pay the amount of the penalty agreed upon, \$880, allocated as initially assessed, on or before Friday, August 3, 1984.



Joseph B. Kennedy
Administrative Law Judge

Distribution:

Barbara L. Krause, Esq., Smith, Keenan, Althen & Zanolli,
1110 Vermont Avenue, N.W., Washington, D.C. 20005 (Certified
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James B. Crawford, Esq., Office of the Solicitor, U.S. Depart-
ment of Labor, 4015 Wilson Blvd., Arlington, VA 22203
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/ejp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUL 26 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 84-151
Petitioner : A. C. No. 15-03881-03520
: :
v. : Pyro No. 9 Slope
: William Station
PYRO MINING COMPANY, :
Respondent :

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for Petitioner;
William M. Craft, Assistant Safety Director,
Sturgis, Kentucky, for Respondent.

Before: Judge Steffey

An expedited hearing was held on February 28, 1984, in Evansville, Indiana, pursuant to section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977 with respect to two notices of contest filed by Pyro Mining Company in Docket Nos. KENT 84-87-R and KENT 84-88-R. I rendered a bench decision, but the final decision containing the bench decision was not issued until May 15, 1984, because the transcript of the expedited hearing was not received until May 1, 1984.

The hearing with respect to the issues raised in the contest proceeding was consolidated with the civil penalty issues which would be raised when the Secretary of Labor filed a proposal for assessment of civil penalty seeking to have penalties assessed for the two violations which had been cited in the orders of withdrawal which were the subject of the notices of contest. I stated on page one of the decision issued in the contest proceeding that I would decide the civil penalty issues on the basis of the record made in the contest proceeding after I had received the civil penalty case pertaining to the violations involved in the contest proceeding. The civil penalty case was thereafter assigned to me on June 27, 1984, in the above-entitled proceeding, and if the Secretary of Labor's proposal for assessment of civil penalty had requested that penalties be assessed for only the two violations cited in the two orders already considered at the hearing held in the contest

proceeding, this supplemental decision would be able to dispose of all issues raised in Docket No. KENT 84-151. The proposal for assessment of civil penalty seeks, however, to have a penalty assessed with respect to a third violation alleged in a citation which was not the subject of the hearing held in the contest proceeding. Therefore, this decision will dispose of only the two violations involved in the contest proceeding in Docket Nos. KENT 84-87-R and KENT 84-88-R.

For the reason stated in the preceding paragraph, a pre-hearing order will be issued with respect to the third violation involved in Docket No. KENT 84-151 and a subsequent hearing will be held with respect to the issues pertaining to that citation if the parties do not settle all issues concerning the third violation involved in Docket No. KENT 84-151.

Issues

In most civil penalty cases, the issues are whether violations occurred and, if so, what civil penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. In this proceeding, however, Pyro Mining Company (hereinafter referred to as Pyro) stipulated at the hearing held in the contest proceeding that the violations occurred and that the only issue it was raising was whether the inspector had properly issued the orders under unwarrantable-failure section 104(d)(1) of the Act (Tr. 4; 133). 1/ I held in my decision issued May 15, 1984, in Docket Nos. KENT 84-87-R and KENT 84-88-R that Order No. 2338185 was properly issued under section 104(d)(1) and that Order No. 2338186 was not properly issued under section 104(d)(1) of the Act. Paragraph (B) of my decision vacated Order No. 2338186 insofar as it purported to have been issued under section 104(d)(1) of the Act and modified the order to a citation issued under section 104(a) of the Act with a check mark in the "significant and substantial" block shown on such citation. 2/

1/ All references to transcript and exhibits are to the record made at the hearing held in Docket Nos. KENT 84-87-R and KENT 84-88-R.

2/ 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 or health hazard.

Since Pyro has already stipulated that the violations occurred, the only issue remaining for me to consider in this supplemental decision is what civil penalty should be assessed for each violation. Four of the six assessment criteria set forth in section 110(i) of the Act may be given a general evaluation which will be applicable to both violations. The proposed assessment sheet in Docket No. KENT 84-151 shows that Pyro produces about 1,665,000 tons of coal annually at the Pyro No. 9 Slope and produces over 3 million tons of coal annually on a company-wide basis. Those figures support a finding that Pyro is a large operator and that penalties in an upper range of magnitude should be assessed in this proceeding to the extent that they are determined under the criterion of the size of the operator's business.

Pyro did not introduce at the hearing any evidence pertaining to its financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd Sellersburg Stone Co. v. FMSHRC, _____ F.2d _____, 7th Circuit No. 83-1630, issued June 11, 1984, that if an operator fails to present 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 Pyro's ability to continue in business. Consequently, it will not be necessary to reduce any penalties determined pursuant to the other criteria under the criterion of whether the payment of penalties will cause the operator to discontinue in business.

The criterion of whether an operator demonstrates a good-faith effort to achieve rapid compliance after a violation is cited is generally evaluated on the basis of whether the operator abates the violation within the period of time given by the inspector. Inspectors do not provide an abatement period in withdrawal orders. Since both of the violations here under consideration were cited in withdrawal orders, it is not possible to evaluate the criterion of good-faith abatement on the basis of whether Pyro corrected the violations within the time given by the inspector. The inspector's testimony, however, shows that both of the violations were abated promptly. The violation cited in Order No. 2338185 was abated within 30 minutes after the violation was cited by the hanging of red ribbons which serve as a warning of unsupported roof in Pyro's mine (Tr. 14; Exh. 1). The other violation was abated in a period of 2 hours and 25 minutes by installation of two rows of roof bolts in an area of unsupported roof. The inspector remained at the site of the unsupported roof until the bolts had been installed and he believed that Pyro had done the necessary abatement work as rapidly as it could have been accomplished in view of the fact that a mechanic was working on the roof-bolting machine's brakes and also was repairing the machine so as to make it apply a proper amount of torque to the roof bolts being installed (Tr. 76-77).

The evidence discussed above supports a finding that Pyro demonstrated a good-faith effort to achieve compliance after each violation was cited. It is my practice to reduce a penalty otherwise determined under the other criteria if an operator shows an outstanding effort to achieve rapid compliance and to increase the penalty determined under the other criteria if the operator fails to make a good-faith effort to achieve rapid compliance. If the operator makes a normal good-faith effort to achieve compliance, as occurred in this instance, I neither increase nor decrease the penalty under the criterion of good-faith compliance.

No exhibits were presented to show Pyro's history of previous violations, but the parties stipulated that Pyro has been cited for 21 previous violations of section 75.200 in the period between January 9, 1983, and the citing on January 24, 1984, of the two violations of section 75.200 here involved (Tr. 4-6). S. REP. NO. 95-181, 95th Cong., 1st Sess. 43 (1977), made the following comment about using the criterion of history of previous violations in assessing penalties:

In evaluating the history of the operator's violations in assessing penalties, it is the intent of the Committee that repeated violations of the same standard, particularly within a matter of a few inspections, should result in the substantial increase in the amount of the penalty to be assessed. Seven or eight violations of the same standard within a period of only a few months should result, under the statutory criteria, in an assessment of a penalty several times greater than the penalty assessed for the first such violation. 3/

It has been my practice to assess a part of a civil penalty under the criterion of history of previous violations when there is an indication, as there is here, that the operator has repeatedly violated the same section of the regulations which is under consideration. It is a fact, however, that Congress reviewed some statistics showing the amounts of the penalties which MSHA had imposed for the repeat violations referred to in the legislative history. In this proceeding, I only have a stipulation of "21 prior of 75.200" (Tr. 6) to use as the basis for assessing a portion of the penalty under the criterion of history of previous violations. The Commission majority in U. S. Steel Corp. v. MSHA, 6 FMSHRC _____, decided June 26, 1984, Docket No. LAKE 81-102-RM, et al., reduced one of my civil penalties from \$1,500 to \$400 because they did not think there was substantial evidence to support my findings. In light of the majority's ruling in the U. S. Steel case, I conclude that there is not sufficient evidence to support findings for

3/ Reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 631 (1978).

assessing any part of the penalty under the criterion of history of previous violations.

Order No. 2338185

I have already considered above the four criteria of the size of the operator's business, the question of whether payment of penalties will cause the operator to discontinue in business, the operator's good-faith effort to achieve compliance, and the operator's history of previous violations. Consideration of the remaining criteria of negligence and gravity requires specific discussion of the violations here at issue. Order No. 2338185 was issued on January 24, 1984, under section 104(d)(1) of the Act and cited a violation of section 75.200 because (Exh. 1):

The approved roof control plan (dated 8/12/83, see page 4, paragraph 12C) was not being followed on the No. 5 Unit, ID No. 005, in that the last open crosscut between Nos. 5 and 4 entries (100 feet inby Spad No. 1380 #5 entry) was unsupported for an area of approximately 15 ft. long by 20 ft. wide and the area had not been dangered off, so as to warn persons that the area was unsupported.

In my decision issued May 15, 1984, in the contest proceeding, at pages 8 and 9, I upheld the issuance of Order No. 2338185 under the unwarrantable-failure provisions of the Act because the section foreman on the shift preceding the writing of the order had failed to assure that devices were installed to warn miners of the fact that the roof was unsupported.

A mitigating factor in assessing the degree of negligence may be found in the fact that the preshift examiner, who inspected the crosscut here involved just prior to the writing of the order, noticed that the roof was unsupported and indicated in the preshift book (Exh. C) that the area of unsupported roof had been dangered off. Nevertheless, mechanics were working on the section at the time the order was issued and the inspector could find no warning devices outby the crosscut (Tr. 54; 59). The inspector said that two other roof falls had occurred in the No. 5 Unit and that his specific purpose for being in the No. 5 Unit on the day the order was written was to examine the site of an unintentional roof fall which had just been cleaned up prior to the inspector's arrival in the No. 5 Unit (Tr. 40; 44).

The inspector further testified that during close-out inspection conferences held on April 22, 1983, May 12, 1983, June 16, 1983, and November 11, 1983, he had warned Pyro's

supervisory personnel of the fact that the miners were failing to hang the required warning devices at the site of unsupported roof (Tr. 82). There is considerable evidence, therefore, to support a finding that a high degree of negligence was associated with the violation of section 75.200 cited in Order No. 2338185. Consequently, an amount of \$500 will be assessed for that violation under the criterion of negligence.

The preponderance of the evidence shows that the roof in the crosscut was hazardous. The inspector testified that he saw "Nothing that would indicate to me it was fixing to fall in However, you had at least two falls on this section that I knew about" (Tr. 44). The mechanic who had been sent to repair the roof-bolting machine which was being used in the crosscut at the time the order was written testified that there were "heads" or "big pieces of rock that hang from the roof" near the site where the roof-bolting machine was working to install roof bolts in the unsupported roof and that he asked the operator of the roof-bolting machine to back the machine toward the No. 5 entry so that it would be in a safer place than it was then situated for him to repair it (Tr. 102-103).

The operator of the roof-bolting machine gave the following testimony about the condition of the roof (Tr. 114-115):

He [the mechanic] said, "I got to work on the brakes." Right up above where I had put the pins, there was two big heads in the middle of the crosscut, and which recently I've had one to fall out and almost get me. So I backed the pinner up, and Mike said, "No, there is some bad top here." So I just pulled the pinner through the crosscut.

The testimony of the inspector and two of Pyro's witnesses shows that the roof was very hazardous in the crosscut where Pyro's section foreman had failed to have the warning devices installed. In view of the evidence showing that the violation was very serious, I believe that a penalty of \$1,000 should be assessed under the criterion of gravity. Since, however, the Commission majority in the U. S. Steel case, hereinbefore cited, have indicated that they think my assessment of civil penalties is excessive, I shall reduce that amount to \$500.

Inasmuch as a large operator is involved, a total penalty of \$1,000 does not appear to be excessive, bearing in mind that an amount of \$500 is being assigned under the criterion of negligence and an additional amount of \$500 is being assigned under the criterion of gravity.

Citation No. 2338186

In my decision issued on May 15, 1984, in the contest proceeding, I found, at page 10, that the preponderance of the evidence failed to show that Pyro should be held liable for the negligence of the operator of the roof-bolting machine when he acted aberrantly and pulled the roof-bolting machine through the area with unsupported roof in his effort to find a place where the mechanic could repair its brakes without being exposed to hazardous roof. Nacco Mining Co., 3 FMSHRC 848 (1981). At the end of that shift during which the roof-bolting machine's operator had pulled it through the area of unsupported roof, Pyro's management issued a company citation reprimanding him for having done so and suspended him from work for 1 day (Tr. 121-122).

I also noted in my decision in the contest proceeding that the Commission in Southern Ohio Coal Co., 4 FMSHRC 1459 (1982), had distinguished between relying upon the acts of a rank and file miner for the purpose of finding that a violation had occurred, as opposed to relying upon the acts of a rank and file miner for the purpose of imputing negligence to the operator. In other words, an operator is liable for the occurrence of a violation without regard to fault (U. S. Steel Corp., 1 FMSHRC 1306 (1979)), but the negligence of a rank and file miner should not be imputed to the operator for the purpose of assessing penalties.

For the foregoing reasons, my decision in the contest proceeding modified Order No. 2338186 to a citation issued under section 104(a) of the Act with a check in the block showing that the violation was "significant and substantial". As I have noted above, the Commission has already held that the negligence of a rank and file miner should not be attributed to the operator for assessing civil penalties. Consequently, no portion of the penalty for the violation of section 75.200 involved in Citation No. 2338186 should be assessed under the criterion of negligence. I believe that assignment of no portion of the penalty under the criterion of negligence is especially warranted in this case in view of Pyro's having cited the miner for the violation and its action of having suspended him for 1 day for the unfortunate act done in haste in an effort to place the roof-bolting machine in a safe place for the mechanic to repair it.

The gravity of the violation involved in Citation No. 2338186 is precisely the same as that considered above in assessing a penalty for the violation of section 75.200 cited in Order No. 2338185 because the unsupported roof under which the operator of the roof-bolting machine passed in trying to find a safe working place for making repairs is the same area of unsupported roof which was involved in the violation cited

in Order No. 2338185. There is a difference in assessing the penalty, however, because in the previous violation, Pyro's management was responsible for the fact that no device had been installed to warn miners to avoid passing under the unsupported roof in the last open crosscut. In this instance, while the unsupported roof exposed the operator of the roof-bolting machine to possible death from a roof fall, he was exposed to that hazard through no fault of Pyro's management.

The following question and answer show that it would be improper to assess a large penalty under the criterion of gravity in this instance (Tr. 121):

Q. Had you ever been told by anybody in management not to go under unsupported roof?

A. Yes, sir. I knew better. I just wasn't thinking at the time. He didn't--I wasn't wanting him working under those heads, and top was bad behind him. So I just automatically pulled it through. And after I realized, when I got him through, realized what I had done, I turned the pinner around and started pinning from my way in so I wouldn't back my pinner back.

It should also be noted that the pulling of the roof-bolting machine through the area of unsupported roof occurred on a non-producing shift (Tr. 94-95), that the operator of the roof-bolting machine had been sent by a foreman to the No. 5 Unit to do the roof bolting as "catch-up" work (Tr. 112), and that there was no section foreman on duty in the No. 5 Unit at the time the roof was being bolted (Tr. 113).

In light of the circumstances described above, I believe that a minimal penalty of \$25 should be assessed under the criterion of gravity, taking into consideration that a large operator is involved and that assessment of a penalty is mandatory under the Act. Tazco, Inc., 3 FMSHRC 1895 (1981).

WHEREFORE, it is ordered:

Within 30 days after issuance of this decision, Pyro Mining Company shall pay civil penalties totaling \$1,025.00 for the violations listed below:

Order No. 2338185 1/24/84 § 75.200	\$1,000.00
Citation No. 2338186 1/24/84 § 75.200	25.00
Total Penalties Assessed in This Proceeding ..	<u>\$1,025.00</u>

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

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

JUL 26 1984

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 83-101-D
ON BEHALF OF Z.B. HOUSER, : MSHA Case DENV CD-82-34
Complainant :
v. : Grass Creek Mine
NORTHWESTERN RESOURCES CO., :
Respondent :

DECISION

Appearances: James H. Barkley, Esq., and Robert J. Lesnick, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado,
for Complainant;
Edward Bartlett, Esq., Northwestern Resources
Company, Thermopolis, Wyoming,
for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

This case involves a discrimination complaint brought by the Secretary of Labor, on behalf of Z.B. Houser (Houser) under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act) against Northwestern Resources Company (Northwestern). Houser alleges that Northwestern discriminatorily retaliated against him by recalling all of the other laid off mine employees except complainant after a production shut down of the mine in violation of section 105(c) of the Act. Northwestern contends that Houser was not rehired because of his unsatisfactory work performance and further contends that the complaint is barred by time limitations.

A hearing was held, pursuant to notice, on March 21 and 22, 1984, in Thermopolis, Wyoming. Post-hearing briefs have been filed by both parties. Based on the evidence presented at the hearing and the contentions of the parties, I make the following decision. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

STATUTORY PROVISIONS

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

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 chapter because such miner, representative of miners, or applicant for employment has filed or made a complaint under or related to this chapter, 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. ...

Section 105(c)(2) of the Act, provides in pertinent part as follows:

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. ...

Section 105(c)(3) of the Act, provides in pertinent part as follows:

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 has 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). ...

FINDINGS OF FACT

1. Northwestern has operated a surface coal mine called the Grass Creek Mine at a location 35 miles from Thermopolis, Wyoming since 1979. In conjunction with the Grass Creek Mine, it maintained a load-out facility along the railroad tracks in Kirby,

Wyoming, which is approximately 60 miles from the mine. The load-out facility at Kirby consisted of a parcel of land approximately 100 feet wide by 400 feet long. Coal was hauled by truck from the mine and stockpiled at the Kirby site until it could be loaded in railroad cars.

2. The period of time involved in this case is from October 1, 1981 to September, 1982. Houser was hired by Northwestern as a crusher operator commencing work at the Grass Creek mine on October 1, 1981 (Transcript at 27). On that date, there were two other employees at the mine, Frank Henning, a dozer operator and Roger Sprague, the mine foreman. Monte Steffans, mine manager, maintained an office in Thermopolis, Wyoming. Dick Meisinger worked at the Kirby load-out area loading coal on the rail cars.

3. Harold Heeter was hired to work at the Grass Creek mine as a crusher operator in November, 1981 (Tr. at 154). Ralph L. Allen was hired as an equipment operator during the latter part of November, 1981 (Tr. at 185). Dennis Householder was hired sometime after the above date as a temporary laborer to help Heeter build the scale and a scale house (Tr. at 30).

4. In December, 1982, Houser was transferred to the Kirby load-out area where he remained for approximately two months before being transferred back to the mine (Tr. at 46). Houser's residence was located in Kirby, approximately 300 to 400 yards from the load-out site. A 992 Caterpillar Tractor equipped with a ten yard capacity bucket was furnished the employee at the load-out area to stockpile coal, keep the area clean so the trucks could dump their loads, and to load coal on the railroad cars for shipment to Northwestern's customers. Also, the employee assigned to this job was expected to do maintenance work on the tractor including lubrication. The large size of the bucket on this machine made it possible for the operator to clean up a truck load of coal and stockpile it in approximately five minutes. A rail car could be loaded with a hundred tons of coal in ten to fifteen minutes. Usually there were ten rail cars to a shipment (Tr. at 37, 38). Houser had considerable "free time" at the Kirby site which he spent greasing the tractor or sitting around waiting for the trucks to arrive. At times he went to his residence for coffee or to use the toilet and sometimes he would run his hunting dogs up and down the road (Tr. at 43).

5. The trucks hauling coal from the mine to the load-out site were operated by independent contractors who were paid by the load. Hauling of coal commenced early in the morning and continued at times to eight or nine o'clock at night (Tr. at 41).

Houser's regular hours at Kirby were from 7 o'clock in the morning to 3:30 p.m. with a half hour off for lunch. On some occasions, the truck drivers would use the loader at the mine to load their trucks and the loader at Kirby to clear an area to unload. This happened when they started early and worked beyond the Northwestern's employees regular working hours.

6. There is a sharp conflict in the testimony on the question of whether Houser did a satisfactory job while he was assigned to the Kirby load-out area. I generally accept the testimony of Roger Sprague, Houser's immediate supervisor, and Thomas C. Anderson, an independent contractor hired by the respondent to haul coal from the mine to Kirby during the period involved here. The main thrust of this testimony was that Houser was not always present when the trucks pulled in to unload which caused the drivers to wait for him to show up (Tr. at 319). Sprague testified that he received complaints about this from the truck drivers. Monte Steffans testified that he also found the complainant was absent from the load-out site when he was supposed to be there (Tr. at 221, 222). Anderson testified that after Meisinger replaced Houser at the Kirby site, those problems no longer occurred. However, he did admit that they changed the unloading area to a better site for their purposes (Tr. at 319). Sprague also testified that the loader was not maintained properly by Houser, that rail cars were overloaded, and Houser objected to using a smaller, substitute loader when the larger machine was not operating due to the engine being repaired (Tr. at 228).

7. After Houser had worked at the load-out facility for approximately two to three months, he was transferred back to the mine to work as lead man during the night shift. Houser operated the loader and Allen operated the crusher. The transfer occurred when Meisinger was involved in an automobile accident and was sent to the Kirby load-out area which was considered to be an easier job. In April of 1982, the night shift was suspended and Houser was transferred to the day shift (Tr. at 45-48). During this period, Henning continued to operate the dozer removing overburden and breaking up the coal (Tr. at 49). Houser loaded the coal in the crusher and, after it was crushed, into the trucks hauling to Kirby (Tr. at 50). Allen operated the crusher and occasionally traded off with Houser on the loader. Heeter was the utility man and Householder was a laborer.

8. In the spring of 1982, Houser expressed concern to Sprague about the dusty conditions at the mine (Tr. at 56).

Sprague then furnished him with painter's type paper dust masks. Houser did not find these satisfactory so Sprague furnished a better type of mask (Tr. at 57).

9. During the spring of 1982, Houser operated a 7251 Terex front-end loader equipped with a cab. The glass in the side windows were both broken and the windshield had a gap between it and the frame. The rubber boots around the pedals and levers to keep dust out were not effective (Tr. at 55). Houser complained to Sprague about the coal dust that entered the cab of the loader (Tr. at 56). Glass in the doors of the Terex operated by complainant were broken several times due to the door not being kept latched. It was replaced as was the windshield (Tr. at 245).

10. In the middle of May 1982, a Mine Safety and Health Administration (MSHA) inspector arrived at the Grass Creek mine and placed dust sampling devices on Houser and Allen for a dust test. As a consequence of the results of this test, Northwestern was issued a citation on May 14, 1982, alleging that the average concentration of respirable dust in a designated work position exceeded the allowable amount. Northwestern was directed to take corrective action to lower the concentration of dust and sample each normal work shift until five valid respirable dust samples were taken (Exh. C-1).

11. Houser also complained on numerous occasions to Sprague about the steering mechanism on the Terex loader. He also wrote this on the machine's operator's log. Sprague's response was to keep on running it. After Sprague operated the loader at a later date, mechanics came out to the mine and repaired it (Tr. at 61, 62).

12. On June 10, 1982, Steffans was advised that a major coal customer of the Grass Creek mine was curtailing its purchases. Steffans telephoned Sprague and discussed which employees at the mine would be "laid-off" due to the resulting reduction in coal production. It was decided that Henning would be retained to continue work on building the scale and scale house. Heeter would continue working operating the dozer for the stripping crew. Four employees were to be laid-off including Houser, Allen, Meisinger, and Householder. Steffans and Sprague were not laid-off. This was ultimately Steffan's decision although he discussed it with Sprague (Tr. at 356-358).

13. On June 11, 1982, Steffans first went to his office

where he prepared pay-checks for the four employees to be terminated. After getting into his vehicle to go to the mine, he remembered that he also had to fill out termination reports on each miner. He returned to the office and prepared the required forms (Exh. C-2). After completion of the termination forms, Steffans drove to the mine arriving around the lunch hour. Steffans had mistakenly signed the four forms on the line designated for the supervisor's signature which would be Sprague. Steffans showed the forms to Sprague, crossed out his signature and placed it on the line designated "Reviewed". Sprague signed the forms as "supervisor". Each employee signed the termination report presented to him. After reviewing the termination report, Houser inquired of Sprague as to why he was rated lower than the other employees (Tr. at 254). Also, he wanted to know what "initiative" meant. The term was explained to him by Steffans and Sprague (Tr. at 363). Steffans had rated Meisinger the best employee of the four terminated, followed by Allen, Houser, and Householder (Tr. at 365)

14. Approximately two weeks after his termination, Houser met Steffans at a grocery store in Thermopolis and had a conversation in which Steffans indicated that the mine would start operating again soon (Tr. at 65). On July 19, 1982, Meisinger and Allen were called back to work at the mine (Tr. at 65). Householder returned to work on approximately September 1, 1982 (Tr. at 66). After Meisinger and Allen returned to work, Houser telephoned Steffans to find out when he would be going back. He did not remember the date but thought it was in July, 1982. Steffans told Houser that he was not being called back to work because Sprague did not want him back. Houser went to the the office and talked to Steffans about the reasons Sprague did not want him back and was told that Steffans would check further into the matter (Tr. at 69).

15. In September, 1982, after Householder, who was originally employed as a temporary laborer, returned to work at the mine, Houser concluded he was not going to be called back to work and contacted Arthur Kunigee, the local business agent for the union that covered the employees at the mine. The agent contacted Mr. Neill, respondent's vice president, about the reason for not recalling Houser. Neill referred the inquiry to Steffans. In reply, Neill sent the business agent a memorandum from Steffans which contained the four following reasons for not rehiring Houser:

1. During the course of his employment it was found that the proper maintenance of equipment was not

being performed by him: Example - loader bucket pins had not been lubricated one week after replacement resulting in them being dry and having to replace them again.

2. During his tenure at the loadout site in Kirby, several times when the foreman went to check on how things were going, employee could not be found at the job site. It was discovered by the foreman that he was running his dogs during working hours.
3. Due to the fact that he was absent from the Kirby area at different intervals the coal stockpile was not worked regularly and the trucks did not have a place to dump until he would show up and move and load coal.
4. Direct insubordination of orders from the mine foreman. Z/B was told to load out trucks at the mine pit with two or three buckets of fines per truckload of coal, but was continually trying to load complete truckloads of coal with the fines materials.

(Exh. C-3).

16. On September 22, 1982, Houser filed a complaint of discrimination with MSHA (Tr. at 73). On November 15, 1982, MSHA notified him by letter, with a copy to Northwestern, that a determination had been made that a violation of section 105(c) of the Act had not occurred. On July 5, 1983, the Secretary of Labor filed a complaint of discrimination on behalf of Houser against Northwestern.

ISSUES

1. Is the complaint barred by the time limitations contained in 105(c) of the Act?
2. Did Northwestern violate § 105(c) when, after a lay off, it rehired other employees but not Houser?

DISCUSSION

Houser's initial complaint of discrimination was filed with MSHA on September 22, 1982, which was approximately three months after he had been laid off with other employees of the Grass Creek mine. However, Houser did not know he was not to be recalled until the middle of July, 1982 during a conversation with Steffans (Finding No. 14). I find the original filing date was

within the 60 days provided by section 105(c)(2). After an investigation by MSHA, the Secretary made a determination that no act of discrimination had occurred and so notified Houser and Northwestern on November 15, 1982. However, on July 5, 1983, the Secretary of Labor reversed this decision and filed a complaint of discrimination with the Federal Mine Health and Safety Review Commission which was approximately 12 months after the complainant became aware he was not going to be called back. The Act provides in section 105(c)(2) that if the Secretary finds a violation, "he shall immediately file a complaint with the Commission." The Secretary argues in his brief that the decision to file the complaint in this case occurred after a re-evaluation of Houser's case following discovery of material evidence in a companion case (Complainant's Brief dated May 30, 1984).

I conclude that none of the filing deadlines involved here are jurisdictional in nature. Rather, they are analogous to statutes of limitation which may be waived for equitable reasons. This determination is in line with prior decisions under the 1969 Coal Act which held that filing deadlines in discrimination cases are not jurisdictional. Christian v. South Hopkins Coal Co., 1 FMSHRC 126, 134-36 (1979). The same result was reached under section 111 of the 1977 Act, which directs mine operators to compensate miners while withdrawn from a mine pursuant to a government order. Local 5429, United Mine Workers v. Consolidation Coal Co., 1 FMSHRC 1300 (1979).

The proper test is whether tolling the filing period is consonant with the purposes of the statute. American Pipe and Construction Co. v. Utah, 414 U.S. 538, 557-58 (1974). Congress spoke plainly on the subject when it declared that the 60 day filing period "should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances." S. Rep. No. 95-181, 95th Cong., 1st Sess. at 36, reprinted in, (1977) U.S. CODE CONG & AD. NEWS at 3436. The deadlines imposed on the Secretary also "are not intended to be jurisdictional. The failure to meet any of them should not result in the dismissal of the discrimination proceedings." Id.

The Secretary's delay in processing the complaint in this case cannot defeat the action in light of the legislative history as quoted above. Further, it is commonly held that the government is not affected by the doctrine of laches when enforcing a public right. See Intermountain Electric Co., 1980 CCH OSHD Para. 24,202 (10th Cir. 1980); Occidental Life Insurance Co., v. EEOC, 432 U.S. 355 (1977); Nabors v. NLRB, 323 F. 2d 686, 688 (5th Cir. 1963). I find no merit in Northwestern's argument as to the timeliness of filing the complaint in this case and reject it.

Northwestern also argues that the Secretary has no authority to file a complaint with the Commission after it had previously determined that no violation of discrimination occurred. However, Northwestern failed to cite any authority for such a position and in view of the legislative history and cases quoted above, this position is not persuasive. Northwestern has not claimed that it was prejudiced in any way by this delay in filing the complaint but rather argues that such a factor should not be considered. I reject this and believe that if any defense is valid to such a delay, it must involve a provable prejudice. That has not been done here and therefore Northwestern's arguments are rejected.

As to the merits of this case, it is necessary to consider the Commission's precedents in the area of discrimination law. The basic analytical guidelines in this field have been recited by the Commission in several recent 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, 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co., v. Marshall, 663 F. 2d 1211 (3rd Cir. 1981); and Secretary on behalf of Robinette v. United 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).

The uncontroverted evidence in this case shows that during the spring of 1982, Houser made several complaints to Sprague, the mine foreman and his immediate supervisor, about the coal dust in the pit of the Grass Creek Mine. These complaints resulted in Sprague furnishing paper painter's type face masks. After further complaints by Houser that the paper masks were not satisfactory, Sprague secured a better type face mask (Tr. at 54-56). During this same period of time, Houser also complained to Sprague several times that the steering mechanism on the Terex loader he was assigned to operate was defective. Sprague replied that Houser was not to worry and to keep running the machine (Tr. at 61). After Sprague operated the machine and observed the problem, the steering mechanism was repaired (Tr. at 62).

I find these two actions on the part of Houser to constitute protected activity under the Act. The amount of coal dust allowed to exist in the pit and around the cab of the Terex loader prompted MSHA to issue a dust citation in May, 1982. This confirms that there was a safety problem and merit to Houser's complaints. Also, the fact that repairs were necessary to correct steering problems on the Terex loader further supports the validity of Houser's concern about the safety of operating this machine. In accord with the Commission's guidelines, I find that the dust in the pit and the faulty steering on the Terex loader were proper safety concerns communicated to Northwestern and constituted protected activity on the part of the complainant. This amounts to establishing a prima facie case of discrimination. The specified issue to be determined, then, is whether the complainant established the necessary casual connection between these complaints and respondent's decision not to rehire him after the lay off.

The evidence in this regard is in dispute. The testimony of the witnesses confirmed that complainant was not the only employee who complained about coal dust in the mine pit. Houser testified that other miners had also expressed concern during the spring of 1982 about the dust conditions to Sprague and Steffans. There was conversation about putting air conditioners or pressurizing the cabs on the crusher and loader (Tr. 143, 144). Henning testified that one time after a lunch period when he and Sprague were the last to leave the room, Sprague called Houser a "damn cry baby" for saying something about dust or the loader (Tr. at 184).

Heeter testified that Sprague stated to him on one occasion that he thought it was Houser who was turning the stuff into MSHA and that he did not want him back (Tr. at 160). Heeter also stated that he had expressed his concerns about the coal dust in the pit to Sprague and Steffans. Henning, Allen, and Meisinger had also discussed the dust conditions several times amongst themselves and also discussed it in the lunch room with Steffans and Sprague (Tr. at 164).

Henning and Allen testified that everyone complained about the dust at the pit including Houser (Tr. at 179, 189). Also, that Heeter had told each of them that Sprague had told him the reason Houser was not called back to work after the lay off was because Sprague thought he was a trouble maker and the one filing complaints with MSHA (Tr. at 179, 190). Henning indicated that Heeter told him this in late July or early August, 1982 when the subject came up as to why Houser was not recalled.

In his testimony at the hearing, Sprague denied he made the statement to Heeter as to the reasons why Houser was not recalled (Tr. at 284). He denied that health and safety matters were in any part a factor in the decision not to recall Houser (Tr. at 287).

This conflict in testimony relates to a material part of Houser's burden of proof in that the testimony by Heeter as to the conversation with Sprague is the only direct evidence which attempts to show that Houser was not rehired because of his protected activity. There is no evidence in this case to show that Houser had contact with or complained to MSHA about safety and health matters at the Grass Creek mine. There is testimony that Steffans called the miners "cowards" for going to MSHA after an electrical inspection in late September or October, 1982. However this was after Houser no longer was working at the mine (Tr. at 183). The evidence shows that there were only two inspections at the Grass Creek mine by MSHA while Houser worked there including the dust inspection in May, 1982. This does not appear to be a sufficient number of inspections to support a conclusion that the retaliatory action by Sprague against Houser was solely based upon such a cause. I find that the facts do show that Houser was more vocal than the other miners about dust conditions in the pit and also complained to Sprague about the dust masks and filters furnished him. Houser also complained about coal dust in the cab of the Terex loader because of broken and misfit glass in the doors and windshield and the machine's faulty steering mechanism.

Based on all the circumstances above, I conclude that Houser has established a prima facie case showing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in part by the protected activity. The Commission in Secretary on behalf of Chacon, supra, stated " ... that direct evidence of motivation is rarely encountered and that reasonable inferences of motivation may be drawn from circumstantial evidence showing such factors as knowledge of protected activity, coincidence in time between the protected activity and the adverse action, and disparate treatment. 3 FMSHRC at 2510." The composite of the three later factors appear to apply in this case. There were the complaints of dust in the pit and the cab of the loader, the inspection by MSHA at about the same time, the failure shortly thereafter not to rehire Houser, and the statement to Heeter by Sprague that Houser was a "troublemaker and turning all this stuff into MSHA."

Throughout this proceeding, Northwestern has taken the position that its reason for not rehiring Houser was not because of his protected activities, but instead that it made its decision based upon complainant's overall (poor) job performance (Resp's Brief p. 12). These reasons were listed in Exhibit C-3, page 2, as improper maintenance of equipment, poor attendance and running dogs during working hours at the load-out site at Kirby, not keeping the coal at Kirby stockpiled so trucks could dump their loads, and direct insubordination of orders on loading fines at the mine. In light of the foregoing, I find that respondent has presented credible evidence to establish that there were sufficient reasons to create an issue as to why the complainant was not rehired. Under the Pasula test the respondent has presented an affirmative defense that even though part of its motive was unlawful, which it denies, it would have taken the adverse action against the complainant in any event for the unprotected activities alone creating a mixed motive type of discrimination case.

In Wayne Boich d/b/a W. B. Coal Company, supra, the Court stated as follows:

In summary, the proper test in considering mixed motives under the Mine Act is that, upon Plaintiff's showing that an employer was motivated in any part by an employee's exercise of rights protected by the Act, the employer has the burden only of producing evidence of a legitimate business purpose sufficient to create a genuine issue of fact. The plaintiff, who retains the burden of persuasion at all times, may of course rebut the employer's evidence "directly by persuading the trier of fact that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy

of credence." Burdine, 450 U.S. at 256. The plaintiff's ultimate burden is to persuade the trier of fact that he would not have been discharged "but for" the protected activity.

After a careful review of all of the evidence in this case, I find that complainant Houser has not established that he would have been rehired "but for" his protected activities. The basis for this conclusion is that the most credible evidence clearly establishes by testimony of witnesses that is corroborated by employer's written statements that Houser's job performance was unsatisfactory.

I find that two documents entered as exhibits in this case reflect the opinions of Houser's supervisors that he was less than a satisfactory employee. The termination report did state a recommendation to rehire but in the "comments" section, Steffans indicated Houser "could manage time more productively." Also as to initiative, it was written that he "could show improvement." The evidence shows that these forms were hurriedly prepared by Steffans just prior to the lay off. Steffans testified that of the 4 employees laid off at the mine, he would rate Houser third following Meisinger and Allen. Householder, the last employee hired on a temporary basis, was rated fourth. In that Householder was rehired whereas Houser wasn't raises the issue of disparate treatment. However, I am persuaded that there is no merit to such an argument. The facts show that no new employee was hired to replace Houser but rather that Householder remained on the payroll even though he previously had been considered a temporary employee. The fact remains that the employer decided to resume its operation with one less employee. Also, the union contract between Northwestern and the International Union of Operating Engineers, Local No. 800, contained no provision providing seniority (Exh. C-6).

Further evidence in support of Northwestern's defense is Exhibit C-3 which was the reply by Neill to an inquiry by the Union as to the reason for Northwestern's failure to rehire Houser after the lay off. This contained an attached sheet prepared by Steffans outlining the reasons as of August 23, 1982 that Houser's supervisors gave for the action they took. I find that the reasons given are significant for they were given shortly after the event occurred and not statements or testimony given several years later after the start of a discrimination action (Exh. C-3, p.2).

In conjunction with the foregoing, various witnesses testified to occurrences that support Northwestern's position. Sprague testified that he found Houser absent from the load-out area at Kirby at times when he expected to find him there. Also,

he had checked on Houser's attendance at the site as a result of complaints received from some of the truck drivers hauling from the mine to Kirby (Tr. at 221-222). Sprague stated he had to wait as long as 45 minutes to an hour on several occasions for Houser to show up (Tr. at 222). Also, that Houser did not keep the Kirby site in proper condition or maintain the equipment as requested (Tr. at 226-227). On one occasion in January, 1982, Houser informed Sprague that the substitute loader furnished as a temporary replacement for the larger Caterpillar was not large enough to do the job. Sprague sent Houser home and loaded the train himself with the smaller type loader. The next day, Sprague discussed this with Steffans and recommended Houser be discharged but Steffans wanted to give him an additional opportunity (Tr. at 239-232).

Sprague also testified that the cars on the coal train were not always loaded to the proper weight by Houser which required sending a truck and 2 men to Greybull, Wyoming, a distance of 80 miles from the mine, to shovel the excess coal off the cars (Tr. at 232). Also, that Meisinger, after a short period at the Kirby load-out area, seldom had an overloaded car (Tr. at 234).

Carl Bechtold, a driver of one of the independent coal haulers, testified that frequently he would arrive at the Kirby site and find that trucks had unloaded before his arrival and coal had not been moved or stockpiled requiring him to wait. Also, that on other occasions, Houser would not be there. He stated this would occur approximately twice a week during the hours Houser was supposed to be working (Tr. at 336, 337).

Thomas C. Anderson, the owner of the trucks hauling the coal to Kirby, testified that he had received a number of complaints about Houser not being at the site and the drivers having to sit and wait for him. Also, that after Houser was reassigned to the mine, the problem ceased. He did admit that a new and better site was acquired (Tr. 318, 319, 330). These complaints were related by Anderson to Sprague. Anderson further stated that complainant would stop loading his trucks at the mine before the regular time to stop for the lunch period requiring the drivers to wait. That Steffans was with Anderson on one occasion when this occurred and told Houser to go back and load the waiting truck (Tr. at 323). Also, that complainant damaged sideboards on his trucks while loading them (Tr. at 325).

Sprague testified that there were two reasons for reassigning Houser from the Kirby site to the mine. He felt Houser would be more productive if he were not working alone, and to assist Meisinger to recover from injuries received in an automobile accident (Tr. at 236).

Sprague testified that the equipment Houser operated was not maintained properly. One example involved repair of the bucket on the loader in May, 1982. A contract mechanic was called out

to replace the pins on a bucket and felt they had not been properly lubricated (Tr. at 244). Also, Sprague felt that replacement of glass on the cab of the Terex loader was due to Houser's failure to latch the door properly (Tr. at 245-247).

Several of Houser's fellow employees testified that they thought he was a good employee and careful with his equipment. This included Allen, Henning, and Heeter. Allen and Henning are both presently employed by respondent and had been subpoenaed to testify against their present employer and supervisor. I do not discredit their testimony but must find that their statements were too general in terms as to what their opinions of Houser were. In contrast, I find the testimony of Sprague, Steffans, Anderson, and Bechtold more credible as it was specific as to times and occurrences in which they described instances of Houser's unsatisfactory job performance.

Houser argues that Northwestern retaliated against him by not recalling him as a result of management's belief that he was responsible for the MSHA inspections and its subsequent problems. This is supposedly apparent from statements made by management at company meetings and Steffans calling the employees "cowards" (Pet's brief at 11). This argument is not supported by the evidence. The meeting in which employees were called "cowards" occurred after the employees were recalled and did not include Houser's presence. Also, it was directed at all of the employees and arose over an electrical inspection which is too remote from the situation that existed in May, 1982.

From the conflicting evidence in this case, I have difficulty in relating the testimony of Heeter to the proven facts when Heeter stated that Sprague told him that he thought Houser was "turning all that stuff into MSHA, and he didn't want him back". I do have a problem with determining what "all that stuff" was as the record does not show a large number of inspections prior to the lay off. In fact, the dust inspection occurred during a regular inspection in May, 1982 and as of July, 1982, only one citation had been received (Tr. at 280, 281). Although the complaints of Houser about dust and equipment safety are protected activity and apparently irritated Sprague, the evidence does not support a conclusion that this was sufficient cause to not rehire him. Everyone was complaining of dust at the pit. No facts are presented to show Houser made a report to MSHA of any safety factors and the inspection in May, 1982 was not unusual or special to indicate a complaint from any employee at the mine.

As I have determined that this is a mixed motive case, the specific issue is whether respondent would have rehired the complainant "but for" the protected activity. The Secretary contends in his brief that the credibility of Sprague's testimony

should be resolved against him and given little, if any, weight? (Pet's brief at 13). I do not agree. I find that much of Sprague's testimony is supported by specific times, dates, and other witnesses testimony. The fact that Houser was not always present during working hours at the Kirby site is supported by testimony from Steffans, Anderson, and Bechtold. Sprague was able to testify as to specific instances regarding lack of equipment maintenance and repairs that became necessary as a result of Houser's lack of maintenance. All the employees that testified as to their doubting Sprague's credibility did so in very general terms except for the instance involving the dust sampling following the May, 1982 inspection. This involves the possible falsification of dust samples. However, this was denied by Sprague and factually not proven. In contrast, a local banker and the Wyoming Deputy State Mine Inspector, who were both acquainted with Sprague testified that his reputation for truth and honesty is beyond reproach (Tr. at 203-205, 349).

I find that this case does not rest upon a general credibility question but rather on the facts that were supported by adequate indicia of probativeness and trustworthiness. The Neill memorandum of August 25, 1982, is a document that is closely related in time to the decision not to recall Houser and recites specific reasons. This is more credible than the testimony of witnesses given at a hearing approximately two years after the occurrence and stating in general terms that complainant "was a good worker" and "took good care of his equipment." Heeter admitted that he did not have first hand knowledge of Houser's activities at Kirby but opined that he "was doing a good job" (Tr. at 156). Henning also was not able to observe Houser at the Kirby site as he was employed at the mine (Tr. at 178).

Heeter left respondent's employment in July, 1983, after a disagreement over damage to his personal vehicle among other reasons (Tr. at 162, 163). Based upon this admission, Heeter's testimony must be weighed in light of his feelings about the company.

The termination report for Houser prepared by Steffans on June 11, 1982, further corroborates the testimony of Steffans and Sprague that they were not completely satisfied with Houser's job performance (Exh. C-2). Although a part of this document states that Houser was recommended for rehire and quality of work was "good", other items referred to a need for improvement. The evidence shows that this document was hurriedly prepared and signed by Sprague without time to reflect on its contents. However, it is material to the case for its relationship to the time of the alleged discrimination act and supports Northwestern's position as to motive for failure to rehire.

In conclusion, I find that Northwestern's proffered explanation for not rehiring Houser is more credible than Houser's argument that it was based upon his protected activity alone. Therefore, complainant's case must be dismissed.

CONCLUSIONS OF LAW

1. Northwestern at all times pertinent to this case was the operator of a mine and subject to the provisions of the Federal Mine Safety and Health Act of 1977.

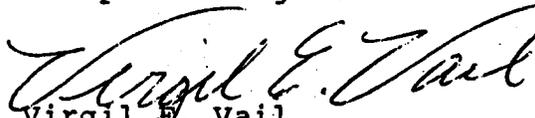
2. I have jurisdiction over the parties and subject matter of the proceeding.

3. Northwestern proved by a preponderance of the evidence that Houser was not rehired for reasons of unsatisfactory job performance.

4. Houser failed to prove that discriminatory reasons alone motivated Northwestern to not rehire him and that the reasons given by Northwestern were unworthy of credence.

DECISION

Based upon the above findings of fact and conclusions of law, IT IS ORDERED that this proceeding is DISMISSED.


Virgil E. Vail
Administrative Law Judge

Distribution:

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/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 30, 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 84-11
Petitioner	:	A.C. No. 01-00758-03561
v.	:	
	:	Docket No. SE 84-15
JIM WALTERS RESOURCES, INC.,	:	A.C. No. 01-00758-03559
Respondent	:	
	:	Docket No. SE 84-16
	:	A.C. No. 01-00758-03560
	:	
	:	Docket No. SE 84-23
	:	A.C. No. 01-00758-03569
	:	
	:	No. 3 Mine

DECISION

Appearances: Terry Price, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner; R. Stanley Morrow, Esq., and H. Thomas Wells, Esq., Birmingham, Alabama, for Jim Walters Resources, Inc., Respondent.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed under section 110(a) of the Act by the Secretary of Labor against Jim Walters Resources, Inc. for alleged violations of the mandatory safety standards.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 5-6):

1. Jim Walters Resources, Inc., 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 these proceedings.
4. The inspectors who issued the subject citations were duly authorized representatives of the Secretary.
5. The subject citations were properly served on the operator.
6. Copies of the citations may be admitted into evidence for the purpose of establishing their issuance but not for the truthfulness or relevancy of the statements asserted therein.
7. Imposition of penalties will not affect the operator's ability to continue in business.
8. The alleged violations were abated in a timely fashion.
9. The operator's prior history is average.
10. The operator's size is large.
11. The inspector and the operator's witnesses are accepted as experts in mine health and safety.

By agreement of both parties, all the docket numbers were consolidated for hearing and decision (Tr. 5).

SE 84-11

Citation No. 2192159

During the course of the inspector's testimony, it became apparent that the inspector was not familiar with the portion of the safeguard notice upon which his citation was based (Tr. 21-25). The Solicitor moved to vacate the citation and withdraw the penalty petition with respect to it. The motion was granted from the bench (Tr. 25).

The citation is Vacated and no penalty is assessed.

Citation No. 2310279

The subject citation dated September 27, 1983, describes the condition or practice as follows:

From the North and West V are the way [sic] to the end of the tail track on Section 007-0 there were [sic] material in the form of rails - metal bands - timbers - crib blocks in the required clearance along the track. Safeguard No. 1 T.J.I. was issued on 7-27-76.

The citation was originally issued under 30 C.F.R. § 75.1403-8(b). By modification dated May 18, 1984, the citation was changed to cite 30 C.F.R. § 75.1403-8(d), which provides as follows:

(d) The clearance space on all track haulage roads should be kept free of loose rock, supplies, and other loose materials.

The citation was based upon Safeguard Notice 1 TJI dated July 27, 1976, which stated in pertinent part as follows:

The clearance space on all track haulage roads should be kept free of loose rock, supplies and other loose materials.

The inspector testified that debris was present on the track haulage road for 1 1/2 miles in the described area (Tr. 27-28). He said the concentration of debris was sporadic along the length of the track but became more cluttered in by toward the section (Tr. 28). The mantrip was running on the debris (Tr. 39). The operator's witness who accompanied the inspector disagreed that the mantrip ran over the materials or that the condition worsened (Tr. 41-42) but he admitted that 5,000 feet of the track were bad (Tr. 43-45). I find the inspector's testimony more persuasive and accept it. The citation properly cited the condition as a violation under 30 C.F.R. § 1403-8(d). Moreover, the citation fits squarely within the terms of the safeguard notice quoted above.

I accept the inspector's testimony that a mantrip could hit some of the debris (Tr. 38-39). I find the testimony of the inspector that the mantrip was riding over the rails

more persuasive than the operator's contrary evidence (Tr. 39, 41). The violation was serious. Moreover, I conclude the operator was negligent. The violation was significant and substantial because it exposed miners to the reasonable likelihood of a serious injury whenever they rode the man-trip.

I have carefully reviewed the operator's arguments regarding the underlying notice to provide safeguards and find them to be without merit. I recognize that safeguards must be narrowly construed. However, the language of § 75.1403-8(d) is plainly mandatory and the language used is easily susceptible of objective interpretation and uniform application. The subject citation as amended was properly based upon the safeguard notice. The operator had notice and knew exactly what it was charged with. Finally, the operator's arguments regarding the safeguard notice are raised for the first time in the post-hearing brief which is too late. If I had found any merit in the operator's assertions, the Solicitor would have been entitled to an opportunity to respond.

The Solicitor's recommendation of a \$20 penalty is unacceptable. As already set forth, the inspector's testimony makes clear this was a serious violation and that the operator was remiss in allowing it to exist. Thus, the representations in the Solicitor's brief that negligence was low and that only one person would be affected is contrary to the evidence the Solicitor himself introduced at the hearing. Penalty proceedings before the Commission are de novo and penalties must be assessed in accordance with the six statutory criteria set forth in section 110(i) of the Act. The original assessment made by MSHA is not binding upon this Commission. This is particularly true when the original assessment is one of the so-called "single penalty assessments" of \$20 made before the hearing in a case where a hearing is actually held.

A penalty of \$100 is assessed.

Citation No. 2192262

The subject citation dated September 8, 1983, describes the condition or practice as follows:

A clear travelway of at least 24 inches on each side of the North Mains No. A and B belt was not maintained in that large rocks, rolls of belt, and belt structures were obstructing the walkways. Safeguard No. 0658641 was issued by T.J. Ingram on 09-08-81.

Safeguard No. 0758641 dated September 8, 1981, states as follows:

24 inches of travel space was not provided between the No. 3 longwall belt and the right rib along the pillar inby No. 7 leader.

24 inches of travel shall be provided on both sides of the belt.

30 C.F.R. § 75.1403-5(g) provides:

(g) A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor.

The inspector testified that the belt in question was used only to transport coal and I so find (Tr. 48, 51). The Solicitor takes the position that 30 C.F.R. § 75.1403-5(g) covers coal-carrying conveyor belts and the operator argues that it does not (Solicitor's Brief p. 4, Operator's Brief pp. 11-13). After extensive consideration Judge Koutras decided this standard does not apply to coal-carrying belt conveyors. Monterey Coal Company, 6 FMSHRC 424, 451-458 (February 1984). I believe Judge Koutras was correct. Section 75.1403 establishes the authority to issue safeguards "with respect to the transportation of men and materials". Section 75.1403 is contained in Subpart O, which is entitled "Hoisting and Mantrips", terms relating to the movement of men and material. Accordingly, I do not believe coal-carrying belts are covered by the cited section. If the Secretary believed coal-carrying conveyor belts properly could be covered under Subpart O, it would have been a simple matter for him to specifically include them. This was not done. I note that coal-carrying belts are specifically mentioned in 30 C.F.R. § 75.303 ordering pre-shifts. Congress was explicit in making certain requirements applicable to these belts in other instances. Here, all indications are that Congress did not intend to have the safeguard provisions apply to coal-carrying belts.

In light of the foregoing, Citation No. 2192262 is Vacated and no penalty is assessed.

Citation No. 2310262

The subject citation dated September 20, 1983, describes the condition or practice as follows:

The approved plan for storage of the S.C.S.R. rescuers was not being complied with in that 3 rescuers were found at the North tool room and no personnel was at the location. 1 self rescuer was found hanging alongside of the track haulage in the North West Mains and no personnel was present in the vicinity.

30 C.F.R. § 75.1714-2 provides as follows:

(a) Self-rescue devices shall be used and located as prescribed in paragraphs (b) through (f) of this section.

(b) Except as provided in paragraph (c), (d), (e), or (f) of this section, self-rescue devices shall be worn or carried at all times by each person when underground.

(c) Where the wearing or carrying of the self-rescue device is hazardous to the person, it shall be placed in a readily accessible location no greater than 25 feet from such person.

(d) Where a person works on or around equipment, the self-rescue device may be placed in a readily accessible location on such equipment.

(e) A mine operator may apply to the District Manager under 30 CFR § 75.1101-23 for permission to place the self-contained self-rescue device more than 25 feet away.

(1) The District Manager shall consider the following factors in deciding whether to permit an operator to place a self-contained self-rescue device more than 25 feet from a miner:

- (i) Distance from affected sections to surface,
- (ii) Pitch of seam in affected sections,
- (iii) Height of coal seam in affected sections,
- (iv) Location of escapeways,
- (v) Proposed location of self-contained self-rescuers,
- (vi) Type of work performed by affected miners,
- (vii) Degree of risk to which affected miners are exposed,
- (viii) Potential for breaking into oxygen deficient atmospheres,
- (ix) Type of risk to which affected miners are exposed,
- (x) Accident history of mine, and
- (xi) Other matters bearing upon the safety of miners.

(2) Such application shall not be approved by the District Manager unless it provides that all miners whose self-contained self-rescuer is more than 25 feet away shall have, in accordance with paragraphs (b), (c), and (d) of this section, at all times while underground, a self-rescue device approved under Subpart I of Part 11 of this chapter or Bureau of Mines Schedule 14F, Gas Masks, April 23, 1955, as amended (Part 13, 30 CFR, 1972 ed.) sufficient to enable each miner to get to a self-contained self-rescuer.

(3) An operator may not obtain permission under paragraph (e) of this section to place self-contained self-rescuers more than 25 feet away from miners on mantrips into and out of the mine.

(f) If a self-contained self-rescue device is not carried out of the mine at the end of a miner's shift, the place of storage must be approved by the District Manager, a sign with the word "SELF-RESCUER" or "SELF-RESCUERS" shall be conspicuously posted at each storage place, and direction signs shall be posted leading to each storage place.

(g) Where devices of not less than 10 minutes and 1 hour are made available in accordance with § 75.1714-1(a)(3)(ii) or § 75.1714-1(b)(2), such devices shall be used and located as follows:

(1) Except as provided in paragraphs (c) and (d) of this section, the device of not less than 10 minutes shall be worn or carried at all times by each person when underground, and

(2) The 1-hour canister shall be available at all times to all persons when underground in accordance with a plan submitted by the operator of the mine and approved by the District Manager. When the 1-hour canister is placed in a cache or caches, a sign with the word "SELF-RESCUERS" shall be conspicuously posted at each cache, and direction signs shall be posted leading to each cache.

Sec. 101, Pub. L. 91-173 as amended
by Pub. L. 95-164, 83 Stat. 745 as amended
by 91 Stat. 1291 (30 U.S.C. 811) .

[43 FR 54246, Nov. 21, 1978]

The permission which the operator received from MSHA regarding the placement of self-contained self-rescuers provides at paragraph 10 (MSHA Exhibit 3E, p. 2):

All miners outby working sections shall be within ten (10) minutes travel time of a self-contained self-rescuer when travelled at a normal pace for that general area of the mine. The self-contained self-rescuer may

be placed with their lunch containers, or in a designated area during the shift. At the end of the shift, the SCSR's for these miners will be left near the bottom of the elevator and will be stored in a designated area which will be identified with a conspicuous "Self-Rescuer" sign.

The inspector's testimony demonstrates that MSHA has failed to make its case with respect to the three self-contained self-rescuers in the tool room. As set forth in the plan, the operator is required to have the self-rescuers within 10 minutes' walking distance of miners who are outby the working sections. The inspector testified that he looked up and down the track haulage which is the primary entrance and exit and did not see anyone (Tr. 69-70). He assumed that because he saw no one in the track entry, the individuals who left the three self-rescuers were electricians who went somewhere else more than 10 minutes away (Tr. 81-82). This is not necessarily so. The inspector did not look anywhere but the track entry (Tr. 82). In particular, he did not look in the belt entry where he admitted there could have been belt cleaners working within 10 minutes' walking distance (Tr. 82-85). Accordingly, no violation can be found with respect to the three self-rescuers.

The situation with respect to the fourth self-rescuer is different. The night before the inspector issued the citation, he saw it hanging up alongside the track haulage in the same place it was when he issued the citation (Tr. 71-73). The inspector so informed the operator's safety inspector who accompanied him (Tr. 94). Based upon the evidence, the inference is warranted that the self-rescuer had not been moved and was in the same place the entire time. This violated that section of paragraph 10 quoted above, which requires that self-rescuers for miners working outby working sections must be left near the bottom of the elevator at the end of the shift.

The inspector testified that in his experience, extra self-rescuers were not taken on the section (Tr. 114-116). There is one self-rescuer per miner on the section (Tr. 117). He has been at this mine frequently and has seen this practice (Tr. 117). Therefore, because one self-rescuer was left behind, someone must have travelled from the section to the bottom near the elevator without one. I accept the inspector's uncontradicted testimony that this is a gassy mine (Tr. 105, 107). Based upon the foregoing, I conclude the violation was serious and that the operator was negligent.

I further conclude that this violation was significant and substantial because traveling to the bottom near the elevator without a self-rescuer in this gassy mine would expose a miner to the reasonable likelihood of reasonably serious harm.

A penalty of \$125 is assessed.

SE 84-16

Citation No. 2310209

The citation dated October 4, 1983, describes the condition or practice as follows:

The approved plan for storage of the S.C.S.R. Rescuers was not being complied with in that 4 rescuers were found in a crosscut approximately 120 feet in by the central storage area and 2 rescuers were found on the No. 2 section that were left after the shift change and no personnel was present in vicinity.

The mandatory standard cited is 30 C.F.R. § 75.1714-2(a), quoted above. That part of paragraph 10 of the plan quoted above, which provides that at the end of the shift self-rescuers will be left near the bottom of the elevator, was relied upon by the inspector (Tr. 109).

The inspector testified that he found four self-rescuers lying in a cross-cut and two more hanging up on the section (Tr. 102). On the shift he issued the citation, the section was idle and no one was working or even present on the section (Tr. 105). The prior shift had been a maintenance rather than a coal producing shift (Tr. 113). The inspector believed the self rescuers had been left from some previous shift but he had no idea how long the six had been where he found them (Tr. 103, 107-108). Given that there was no one on the section, the hazard was not that self-rescuers were located more than 10 minutes away from the miners (Tr. 103). Indeed, the inspector stated that because the self-rescuers were centrally located, they could have been reached within 10 minutes (Tr. 108). According to the inspector, the violation was that the self-rescuers were not left near the bottom of the elevator as required by paragraph 10 of the plan.

I accept the inspector's uncontradicted testimony that the number of miners on the section and the number of self-rescuers were the same. The inference is that men must have

traveled from the section to the elevator bottom without self-rescuers. Accordingly, a violation existed. It was serious because it exposed the men in this gassy mine to danger for the 30 to 35 minutes it would take them to reach the elevator. The operator was especially negligent because six self-rescuers and six miners were involved. Clearly, the operator should be more vigilant to make sure the men do not leave the section without their self-rescuers. The violation was significant and substantial because in this gassy mine and on this section where there has been ignition after ignition, travelling to the elevator bottom without self-rescuers exposed miners to the reasonable likelihood of reasonably serious harm.

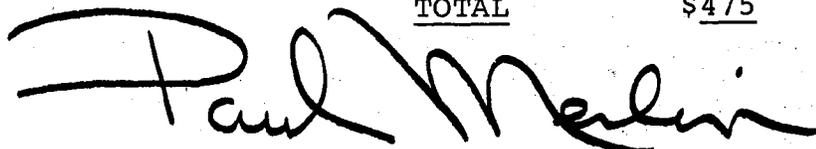
A penalty of \$250 is assessed.

ORDER

In accordance with the foregoing, the operator is hereby Ordered to pay the following penalties within 30 days from the date of this decision:

<u>Docket No.</u>	<u>Citation</u>	<u>Violation</u>	<u>Penalty</u>
SE 84-11	2192159	30 C.F.R. § 75.1403-8(d)	None
SE 84-23	2310279	30 C.F.R. § 75.1403-8(d)	\$100
	2192262	30 C.F.R. § 75.1403-5(g)	None
SE 84-15	2310262	30 C.F.R. § 75.1714-2(a)	\$125
SE 84-16	2310209	30 C.F.R. § 75.1714-2(a)	\$250

TOTAL \$475



Paul Merlin
Chief 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

JUL 30 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 83-31-M
Petitioner	:	A.C. No. 02-00850-05502 A
	:	Docket No. WEST 83-32-M
v.	:	A.C. No. 02-00850-05503 A
	:	
GLINN ARNO GATES, and	:	Anamax Mining Company Twin
PETER G. JOHNSTONE,	:	Buttes Mine (Sulfide Mill and
Respondents	:	Related Activities)

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
William G. Walker, Esq., Stompoly and Even, Tucson, Arizona, for Respondents.

Before: Judge Vail

The above consolidated cases arose upon complaints filed by the Secretary of Labor, under section 110(c) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(c), against respondents Glinn Arno Gates and Peter G. Johnstone. The Secretary alleged the respondents, acting as agents of Anamax Mining Company within the scope of section 110(c) of the Act, knowingly authorized, ordered, or carried out Anamax's violation of 30 C.F.R. § 55.16-14(b) cited in MSHA Citation No. 599853.

Respondents filed answers denying the charges and the above matter came on for evidentiary hearing on June 6, 1984, in Tucson, Arizona. During a recess on the second day of the hearing, the parties negotiated a settlement which they presented for approval. Based upon the record of the case up to that time and the representations of the parties, the proposed settlement was tentatively approved subject to submission of a joint motion of settlement and for dismissal of these cases.

The joint motion for settlement was received on July 20, 1984, and represents in material parts the following:

1. The corporate operator paid an uncontested civil penalty assessment of \$8,000 for the violation cited in Citation No. 599853.

2. During the hearing on June 7, 1984, the respondent's attorney proposed the following settlement and disposition of the subject cases:

- a. That, without admitting liability, respondent Glinn Arno Gates under Docket No. WEST 83-31-M agrees to pay a civil penalty assessment of \$800 for the violation of 30 C.F.R. § 55.16-14(b); and
- b. That the case against respondent Peter G. Johnstone, Docket No. WEST 83-32-M, be dismissed without a civil penalty assessment.
- c. This stipulation of proposed settlement by the parties is in keeping with the Commission's decisions in Secretary of Labor (MSHA) v. Central Ohio Coal Company, 4 FMSHRC 1000 (1982), and Secretary of Labor v. Amax Lead Company of Missouri, 4 FMSHRC 975 (1982).
- d. Both parties agree to bear their own respective costs of litigation in these cases.

CONCLUSION

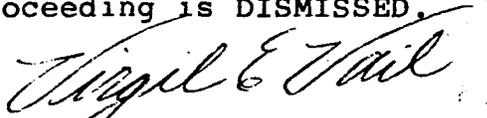
After careful review and consideration of the pleadings, arguments, trial record, and submissions in support of the joint motion to approve the proposed settlement of these cases, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant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

ORDER

Therefore, IT IS ORDERED

1. That the complaint against respondent Peter G. Johnstone under Docket No. WEST 83-32-M is dismissed without a civil penalty assessment.

2. Respondent Glinn Arno Gates is ORDERED to pay a civil penalty in the amount of \$800 in satisfaction of the complaint filed in Docket No. WEST 83-31-M within forty (40) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is DISMISSED.


Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 31 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No: PENN 83-158
Petitioner : A/O No: 36-06472-03501
v. : Brownsville Mine
: :
CICCONI COAL COMPANY, :
Respondent :

DECISION

Before: Judge Moore

The civil penalty proceeding was initiated by the Secretary's petition filed July 5, 1983, which alleged two violations and sought a penalty in the amount of \$40. When respondent did not file a timely answer, Judge Merlin issued a Show Cause Order in October of 1983. The respondent filed a hand written answer to that Show Cause Order on December 7, 1983.

On February 7, 1984, I issued a Prehearing Order to which the Solicitor responded. The respondent refused to claim that order from the Post Office Department. On June 25, 1984, I issued a Show Cause Order ordering respondent to show cause why it should not be held in default for its failure to respond to the Prehearing Order. Respondent failed to claim that Order to Show Cause. The two orders that respondent has failed to claim from the Post Office Department are attached to the file.

Commission Rule 29 C.F.R. 2700.5(v) states:

"The first document filed, and every document filed by a lawyer or other representative, shall include the parties' or other filing persons' address and business telephone numbers. Written notice shall be promptly given of any change of address or business telephone number".

The purpose of the rule is so that a respondent can be served with process. The rule would be totally thwarted if

a respondent could avoid service by merely refusing to claim properly addressed mail. I hold that the refusal to claim mail addressed to an address that a respondent has supplied, constitutes service.

I therefore hold respondent in DEFAULT and order that he pay, within 30 days, a civil penalty of \$40 to MSHA. I also affirm both citations.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

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/db