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## AUGUST 2003

### Review was granted in the following cases during the month of August:

Secretary of Labor, MSHA v. Twentymile Coal Company, Docket No. WEST 2002-194.  
(Judge Manning, July 7, 2003)

Secretary of Labor, MSHA v. Twentymile Coal Company, Docket No. WEST 2000-480-R, and  
WEST 2002-121. (Judge Barbour, July 14, 2003)

### Review was denied in the following case during the month of August:

Secretary of Labor, MSHA v. D.A.S. Sand & Gravel, Docket Nos. YORK 2001-67-M, et al.  
(Judge Schroeder, July 7, 2003)



COMMISSION DECISIONS AND ORDERS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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WASHINGTON, DC 20001

August 4, 2003

SECRETARY OF LABOR :  
Mine Safety and Health :  
Administration, MSHA, :  
 : Docket No. WEST 2001-473-RM  
v. :  
 :  
WESTERN INDUSTRIAL, INC. :

BEFORE: Duffy, Chairman; Beatty and Suboleski, Commissioners<sup>1</sup>

DECISION

BY THE COMMISSION:

This contest proceeding involves a citation issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Western Industrial Insulating, Inc. (“Western”) under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”). Administrative Law Judge Avram Weisberger concluded that the violation charged in the citation had occurred and that it was significant and substantial (“S&S”). 24 FMSHRC 269, 273-74 (Mar. 2002) (ALJ). The Commission granted Western’s petition for review in which it challenged the judge’s conclusions with regard to those issues. For the following reasons, we affirm the judge’s decision.

I.

Factual and Procedural Background

In April 2001, Western was employed as a subcontractor at the Holnam Portland Cement Plant in Florence, Colorado. 24 FMSHRC at 269. Holnam had hired CDK General Contractors

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<sup>1</sup> Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been delegated to exercise the powers of the Commission.

to expand and modify its cement plant, and CDK, in turn, subcontracted with Western to install insulation and sheet metal on duct work and a vertical cyclone.<sup>2</sup> *Id.*; Tr. 9-10.

In order to perform the installation work on the cyclone, Western erected scaffolding with work platforms at varying heights. 24 FMSHRC at 269. Because the cyclone was cone-shaped, the scaffolding was built like a box around it. Tr. 25-26. The lowest work platform was approximately 80 inches above the catwalk at the base of the cyclone. 24 FMSHRC at 269; Tr. 26-27. Each work platform incorporated the horizontal scaffolding bars as a top rail and a mid-rail that were spaced 22 ½ inches apart. 24 FMSHRC at 270; Tr. 27. Below the mid-rail, planking made up the floor of the work platform with a toe-board on the edge to prevent falls. 24 FMSHRC at 269; Tr. 27, 105. Workers accessed the work platform by climbing up a ladder next to it. 24 FMSHRC at 269.

On April 24, 2001, MSHA Inspector Jack Eberling conducted an inspection at the Holnam plant. *Id.* at 270. The MSHA inspection was triggered by a fatal fall from scaffolding maintained by another company. Tr. 93. While examining the north side of the plant where the cyclone was located, Eberling observed Western's scaffolding and the access to the work platform.<sup>3</sup> Tr. 96-97. Eberling issued a citation charging that access to the scaffolding was "unsafe" in violation of 30 C.F.R. § 56.11001. 24 FMSHRC at 270. The citation stated: "The inboard side of the ladder was 15 inches away from the handrail on the 80 inch high working platform, and access required stepping across the span and through the two handrails onto the wood planking." Ex. C-3. The inspector designated the violation as S&S and charged that it was due to Western's unwarrantable failure.<sup>4</sup> *Id.* Western filed a notice of contest, and a hearing was held.

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<sup>2</sup> A "cyclone" is defined as, "[t]he conical-shaped apparatus used in dust collecting operations and fine grinding applications." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 142 (2d ed. 1997).

<sup>3</sup> In moving to the work platform from the ladder, a worker had to stand on a rung on the ladder that was even with the platform. 24 FMSHRC at 270. A gap of 15 inches separated the outer edge of the ladder from the scaffolding. *Id.* at 272-73. To gain access to the work platform a worker had to crouch under a horizontal I-beam that supported another work platform. *Id.* at 270, 273. The worker had to swing his leg across the 15-inch gap and shift his weight from the foot on the ladder to his other foot before it was on the work platform, while crouching below the I-beam, and then fit through the 22 ½ inch opening separating the top rail and mid-rail. *Id.* at 270, 272-73; Tr. 35-37, 97-99, 115-17.

<sup>4</sup> The S&S terminology is taken from section 104(d)(1) of the Act which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d)(1). The unwarrantable failure terminology also is taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." *Id.*

In addressing the fact of violation and Western's contentions that the standard at issue is overly broad and provides inadequate notice as to what constitutes compliance or noncompliance, the judge stated that the test for evaluating the regulation was "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard at issue would have recognized the applicability of the standard to the cited facts at issue." 24 FMSHRC at 270 (citing *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)). The judge credited the testimony of MSHA Inspector Eberling, who had climbed scaffolding frequently during inspections and in prior jobs, that he had never seen such restricted clearance and that the access was dangerous. 24 FMSHRC at 272. The judge found that Western's witnesses had no basis for their assertions that the access was safe. *Id.* at 271-72. The judge concluded, based on Eberling's testimony, that a reasonably prudent person would have recognized that the access was unsafe and did not meet the requirements of section 56.11001.<sup>5</sup> *Id.* at 272-73.

With regard to the inspector's S&S designation, the judge concluded that the violation contributed to a hazard and that workers would have continued to use the access to reach the work platform during normal operations, subjecting them to a risk of injury by losing their balance and falling over six feet to the floor below. *Id.* at 274. Therefore, the judge concluded that the violation was S&S. *Id.* The judge further concluded that Western's conduct was not aggravated and, therefore, the violation was not the result of its unwarranted failure.<sup>6</sup> *Id.*

## II.

### Disposition

Western argues that the judge erred in concluding that it violated section 56.11001 and that the violation was S&S. W. Br. at 1-4. It submits that substantial evidence does not support the judge's conclusion that the scaffolding was unsafe. *Id.* at 4-7, 9-10; W. Reply Br. at 4-7. Western further contends that section 56.11001 failed to provide adequate notice that the cited conditions were prohibited by the standard. W. Br. at 7-9. Finally, it asserts that there is insufficient evidence to support an S&S finding because there was no showing of a hazard resulting from the violation. *Id.* at 11-14; W. Reply Br. at 7-8.

The Secretary responds that the judge's decision should be affirmed. S. Br. at 32. She argues that Western had fair notice of the requirements of the regulation, and that the objective criteria relied upon by the judge compel a conclusion that Western should have recognized the hazard. *Id.* at 6-7, 8-10. In addition, the Secretary contends that substantial evidence supports the

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<sup>5</sup> The judge inadvertently referred to section 56.11002, instead of section 56.11001, in this portion of his decision. 24 FMSHRC at 273.

<sup>6</sup> The Secretary did not appeal the judge's unwarrantability conclusion; therefore, that issue is not before the Commission.

judge's determinations that Western violated the standard and that the violation was S&S. *Id.* at 13-31.

Section 56.11011 requires “[s]afe means of access . . . to all working places.” 30 C.F.R. § 56.11001. The Commission has held that “section 56.11001 comprises the dual requirements of providing and maintaining safe access to working places.” *Watkins Engineers & Constructors*, 24 FMSHRC 669, 680 (July 2002) (citation omitted). In reading and applying the terms of section 56.11001, the Commission has previously utilized a plain meaning approach. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 707-708 (July 2001) (using plain meaning of word “maintained” in the regulation). Here, the judge examined the definition of “safe” in *Webster’s Third New International Dictionary* 1998 (1993), which defines “safe” as “secure from threat of danger, harm, or loss.”<sup>7</sup> The case, then, turns on whether the record supports the judge’s determination that the access to the work platform posed a danger to the workers.

When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test.<sup>8</sup> 30 U.S.C. § 823(d)(2)(A)(ii)(I). We find that there is substantial credited evidence to support the judge. Inspector Eberling testified that even a casual observer would have recognized that the access to the work platform was dangerous. 24 FMSHRC at 272. He added that he had never seen such restricted clearance. *Id.* As Eberling explained, a worker would have to shift his weight from his foot on the ladder rung to his foot that was extended across a 15 inch gap to reach the work platform and squeeze through the 22 ½ inch opening between the top and mid-rail. *Id.* at 272-73. Additionally, in accessing the platform, a worker would have to crouch under an I-beam that limited overhead clearance. *Id.* at 273. Based on Eberling’s testimony, the judge concluded that this awkward maneuvering subjected a worker to a risk of injury by causing him to lose his balance and fall over six feet to the catwalk below. *Id.*

In contrast to Eberling’s testimony, the judge noted that Western’s director of industrial safety, Michael Howell, gave no basis for his opinion that the access was safe, nor did he explain it. *Id.* at 271. Similarly, the judge found that David Aldridge, who was Western’s project

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<sup>7</sup> In the absence of an express regulatory definition or an indication that the drafters intended a technical usage, the Commission has relied on the ordinary meaning of the word construed. *Lopke Quarries, Inc.*, 23 FMSHRC at 708 n.2 (citing *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff’d*, 111 F.3d 963 (D.C. Cir. 1997) (mem.)).

<sup>8</sup> “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that “fairly detracts” from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

manager at the Holman plant, did not provide any basis for his opinion that the access was safe. *Id.* at 272. The judge further found that the opinions of two other Western employees were hearsay. *Id.* at 271. Finally, the judge noted that no CDK employee testified concerning safe access to the platform, even though CDK inspected the area daily. *Id.* at 272.

Western asserts that the judge erred in crediting Eberling over Western's witnesses. However, the Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Here, there is no compelling reason that would lead us to take the extraordinary step of overturning the judge's decision to credit the opinion of Eberling that the scaffolding access was unsafe. Indeed, the judge articulated a well-grounded factual basis for crediting the Secretary's witness over Western's witnesses. See *Lopke Quarries, Inc.*, 23 FMSHRC at 709.

In a further effort to overturn the violation, Western argues that Eberling did not attempt to use the ladder to access the work platform nor did he observe anyone accessing the platform. W. Br. at 6-7; W. Reply Br. at 4-5. Once an inspector has identified a violation, there is no requirement in the Mine Act or Commission case law that he endanger himself or a miner by exposure to the conditions giving rise to the violation.<sup>9</sup> Nor does Western offer any support for the argument that the inspector had to consider the age and physical condition of individual workers who used the work platform in determining whether a regulation was violated.

Finally, with regard to the merits of the violation, Western urges the Commission to consider that access to the work platform was changed by moving the ladder only two inches closer to the platform to abate the violation. However, the method of abatement is not determinative of the existence of a violation. See also *Asarco Mining Co.*, 15 FMSHRC 1303, 1309 (July 1993) (method of abatement not before Commission in a contest proceeding); *U.S. Steel Mining Co.*, 6 FMSHRC 2305, 2308 n.6 (Oct. 1984) (judge's discussion of abatement method in resolving merits of S&S finding was error). In short, the manner of abatement is not pertinent to the existence of a violation.

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<sup>9</sup> Western cites *Virginia Slate Co.*, 22 FMSHRC 378, 384-85 (Mar. 2000) (ALJ), in support of its assertion that a citation cannot be upheld if there is insufficient evidence to establish how the violative "condition is actually used." W. Reply Br. at 4. However, the portion of the judge's decision upon which Western relies was not appealed to the Commission, although other issues in the case were. See *Virginia Slate Co.*, 23 FMSHRC 482 (May 2001). Accordingly, even if the analysis in the judge's decision upon which Western relies were analogous to the instant facts, it was unreviewed and, therefore, under Commission Rule 72, 29 C.F.R. § 2700.72, is not precedent binding upon the Commission. See *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1061 n.3 (Sept. 2000) (citation omitted).

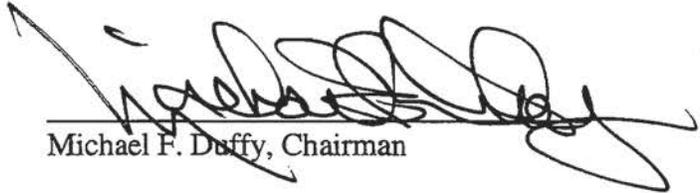
At its core, Western's "notice" argument is in furtherance of its position that the access was not unsafe and, therefore, not within the scope of the regulation. Western does not contend that the language of the regulation was vague or ambiguous; rather, it argues that its director of industrial safety, Howell, and others, who evaluated the ladder access to the work platform, thought it was safe. W. Br. at 9-10 ("While one cannot argue with the basic premise that access should be safe, the legal and factual bases do not exist to sustain this violation, as the Secretary seeks to apply that standard to the circumstances here." *Id.* at 10.). Moreover, when the meaning of a standard is clear from its plain language, it follows that the standard has provided the operator with adequate notice of its requirements. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997) (holding that adequate notice provided by unambiguous regulation).

Western challenges the judge's S&S determination. Western disputed generally the inspector's S&S designation in its Notice of Contest. However, Western did not raise any issue or make any evidentiary or legal arguments related to the S&S designation in its post-trial brief to the judge. W. Proposed Findings of Fact and Legal Argument at 6-12. Therefore, Western is foreclosed from asserting before the Commission that the factors in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), are not met. Section 113(d)(2)(A)(iii) of the Mine Act provides that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii); *accord* 29 C.F.R. § 2700.70(d). *See Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992). In the absence of any explanation from Western regarding why it failed to raise the S&S designation before the judge, we cannot find good cause to consider Western's arguments relating to the S&S designation.

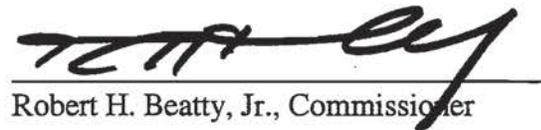
III.

Conclusion

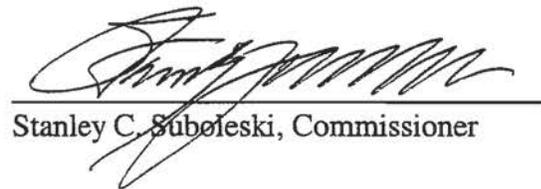
Based on the foregoing, we affirm the judge's decision that Western violated section 56.11001 and that the violation was S&S.



Michael F. Duffy, Chairman



Robert H. Beatty, Jr., Commissioner



Stanley C. Suboleski, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 11, 2003

SECRETARY OF LABOR, :  
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ADMINISTRATION (MSHA) :  
 :  
v. : Docket Nos. WEST 2001-166-RM  
 : WEST 2002-223  
BLACK BUTTE COAL COMPANY :

BEFORE: Duffy, Chairman; Beatty and Suboleski, Commissioners<sup>1</sup>

ORDER AND DECISION

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). Black Butte Coal Company ("Black Butte" or "the operator") filed a petition for interlocutory review ("PIR") challenging an order issued by Administrative Law Judge Avram Weisberger denying its motion to certify for interlocutory review an earlier order by the judge. In his earlier order, Judge Weisberger denied Black Butte's motion to dismiss the instant proceeding. See Unpublished Order Denying Motion to Dismiss and Consolidation Order at 4-6 (June 4, 2002) (ALJ) ("June 4th Order"). For the reasons set forth below, we grant Black Butte's request for interlocutory review, but deny its request to dismiss this proceeding.

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<sup>1</sup> Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been delegated to exercise the powers of the Commission. Commissioners Mary Lu Jordan and Michael G. Young assumed office after this case had been considered and decided. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioners Jordan and Young have elected not to participate in this matter.

## I.

### Factual and Procedural Background

On December 11, 2000, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued the citation at issue in this contest proceeding as a result of an investigation following a fatal accident on July 29, 2000, at the Black Butte and Leucite Hills Mine in Sweetwater County, Wyoming. The citation alleged that the operator failed to maintain a haulage truck in a safe operating condition. *See* Citation No. 7625876 (dated Dec. 11, 2000) (attached to BB PIR as "Attach D"). A miner died from injuries sustained when he lost control of the truck due to a failure of the steering system, which caused the truck to travel uncontrollably through a berm. *Id.* The miner was not wearing a seat belt and was ejected through the windshield of the driver's cab. *Id.*

On January 10, 2001, the operator filed a notice of contest. On January 16, 2001, MSHA released its accident report, which was revised after a conference between the operator and MSHA in February 2001 based on 30 items which the operator disputed. The revised report was released two months later on April 24, 2001. On January 17, 2002, thirteen months after the underlying citation was issued, the Secretary issued a proposed penalty assessment.

Black Butte filed a motion to dismiss based on the Secretary's 13-month delay in proposing a penalty. On June 4, 2002, Judge Weisberger issued an order denying Black Butte's motion to dismiss. Black Butte subsequently filed with Judge Weisberger a motion to certify for interlocutory review his June 4th Order, which motion was denied on July 9, 2002. The judge also stayed the proceedings on the same date. On August 8, 2002, Black Butte filed a PIR requesting the Commission to review Judge Weisberger's June 4th Order. The Secretary of Labor filed an opposition to Black Butte's PIR, and Black Butte subsequently filed a reply to the Secretary's opposition.

## II.

### Disposition

Commission Procedural Rule 76(a)(2) provides that the Commission may, in its discretion, grant interlocutory review "upon a determination that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding." 29 C.F.R. § 2900.76(a)(2). Here, the issue presented by Black Butte involves a controlling question of law. Black Butte's motion to dismiss for the Secretary's failure to timely propose penalty assessments involves a dispositive question, analogous to whether a statute of limitations has been met, which could end the underlying proceedings well before a full hearing on the merits. *See, e.g., Chailland v. Brown & Root, Inc.*, 45 F.3d 947, 949 (5th Cir. 1995) (reviewing dismissal for failure to exhaust administrative remedies); *Chan v. City of New York*, 1 F.3d 96, 101 (2d Cir. 1993) (reviewing motion to dismiss

where complaint asserted claims under 42 U.S.C. § 1983).<sup>2</sup> Those requirements having been met, we exercise our discretion to grant the operator's petition and consider it on the merits.

At issue is whether the judge erred in denying Black Butte's motion to dismiss on the basis of the Secretary's delay in issuing the proposed penalty assessment pursuant to section 105(a) of the Mine Act. Section 105(a) provides in pertinent part:

If, after an inspection or investigation, the Secretary issues a citation or order . . . , [s]he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed . . . for the violation cited.

30 U.S.C. § 815(a).

In *Steel Branch Mining*, the Commission addressed this issue and concluded that the requirement of section 105(a) that the Secretary propose a penalty assessment within a reasonable time was not a jurisdictional limitations period barring a contest proceeding. 18 FMSHRC 6, 13-14 (Jan. 1996). The Commission looked to the legislative history of the Mine Act, which noted that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the [Senate] Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." *Id.* (citing S. Rep. No. 95-181, at 34 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978)). The Commission then examined whether adequate cause existed for the Secretary's 11-month delay in proposing a penalty, and whether the delay prejudiced the operator. 18 FMSHRC at 14. The Commission concluded that the Secretary's case could go forward because adequate cause was established and no prejudice was shown. *Id.* See also *Rhone-Poulenc of Wyo. Co.*, 15 FMSHRC 2089, 2092-94 (Oct. 1993), *aff'd*, 57 F.3d 982 (10th Cir. 1995) (allowing a petition for assessment of penalty filed 11 days late); *Salt Lake County Rd. Dept.*, 3 FMSHRC 1714 (July 1981) (same, 60 days late); *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982) (same, 15 days late).

When reviewing a judge's pre-trial rulings, the Commission set forth its standard of review as follows:

[T]he Commission cannot merely substitute its judgment for that of the administrative law judge . . . . The Commission is required, however, to determine whether the judge correctly interpreted the

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<sup>2</sup> Under the federal law, a controlling question of law includes issues that will resolve the action entirely, such as the applicability of a statute of limitations. See 19 James Wm. Moore et al., *Moore's Federal Practice* § 203.31[2] at 203-87 through 203-90 (3d ed. 2002).

law or abused his discretion and whether substantial evidence supports his factual findings.

*Asarco, Inc.*, 12 FMSHRC 2548, 2555 (Dec. 1990) (reviewing a judge's discovery rulings) (citations omitted). Applying an abuse of discretion standard is consistent with the discretion accorded judges in matters related to the conduct of a trial. See *Medusa Cement Co.*, 20 FMSHRC 144, 147 (Feb. 1998) (applying the abuse of discretion standard when reviewing a judge's pre-trial order); *Buck Creek Coal, Inc.*, 17 FMSHRC 500, 503 (Apr. 1995) (same). Accordingly, the appropriate standard to apply on interlocutory review of the judge's ruling is abuse of discretion, though any factual determinations he made in arriving at his conclusion are subject to substantial evidence review.<sup>3</sup>

In denying the operator's motion to dismiss, the judge considered the factors the Commission set forth in *Steel Branch*. See June 4th Order at 4-5. The judge reviewed the parties written submissions, considered the Secretary's reasons for the delayed penalty proposal, and concluded that she had provided adequate explanation. *Id.* According to the Secretary's counsel's written submission to the judge, the thirteen month delay was due in part to the need to conduct a fatality investigation and write an accident report, which was released over a month after the citation was issued. *Id.*; S. Br. at 9. She explained that as a consequence of the operator's submission of 30 items of concern on the initial accident report, she was required to issue a revised report resulting in an additional three-month delay. See June 4th Order at 4-5; S. Br. at 9-10. The counsel for the Secretary also pointed to an extremely high case load and less than normal staffing levels due to training and leave absences. See June 4th Order at 4-5. The judge noted that the operator did not refute these allegations. *Id.*

Although Black Butte appears to challenge the judge's conclusion that the Secretary provided adequate cause on substantial evidence grounds, it fails to identify any evidence in the record contradicting the Secretary's allegations. The operator merely challenges the judge's conclusion by asserting that the Secretary's reasons as to the cause of the delay were "unsworn and unattributed statements" made by her counsel. See BB PIR at 1-2, 7-8. The judge, however, reviewed the record, considered all the evidence, and accepted the representations made by the Secretary's counsel. Moreover, Black Butte does not point to any evidence in the record undermining the Secretary's representations. We conclude that it was well within the judge's discretion to accept the Secretary's representations, and thus reject the operator's assertions on this point.

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<sup>3</sup> When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

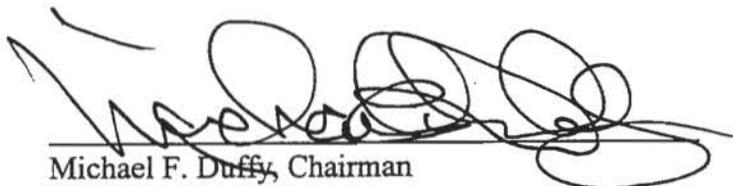
The judge also considered whether Black Butte suffered any prejudice as a result of the Secretary's delay. The judge concluded that the operator had not asserted any specific prejudice and thus, had not shown that it was prejudiced by the delay. *See* June 4th Order at 5-6. We conclude that the judge did not abuse his discretion in denying the operator's motion to dismiss, and that his decision is amply supported by substantial evidence.

Moreover, we note that this is a fatality case. Under the circumstances, any delay that may have resulted during the investigation and as a result of revising the accident report in accordance with the operator's changes is understandable. The operator knew about the investigation and citation, and clearly was able to gather evidence in support of its position. To absolve Black Butte of liability due to a late issuance would undermine the purpose of the Mine Act, especially here where the operator has not demonstrated any prejudice from the delay.

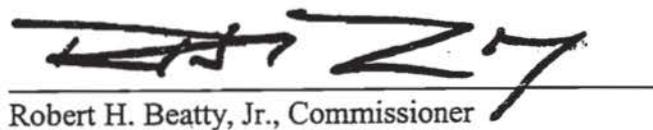
III.

Conclusion

Accordingly, we lift the stay on this proceeding, deny Black Butte's request to dismiss, and affirm the judge's order. This proceeding shall proceed for disposition on the merits.



Michael F. Duffy, Chairman



Robert H. Beatty, Jr., Commissioner



Stanley C. Suboleski, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
SUITE 9500  
WASHINGTON, DC 20001

August 22, 2003

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket Nos. WEST 2000-480-R
v.	:	WEST 2002-131
	:	
TWENTYMILE COAL COMPANY	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER AND DIRECTION FOR REVIEW

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On July 14, 2003, Chief Administrative Law Judge David Barbour issued a decision in part affirming the allegations of violation set forth in Order No. 7618153. *Twentymile Coal Co.*, 25 FMSHRC 373, 389 (July 2003) (ALJ). On August 18, 2003, the Commission received from Twentymile Coal Company (“Twentymile”) a Motion to Excuse Late Filing of Petition for Discretionary Review.

In its motion, Twentymile states that on August 8, 2003, it sent its petition for discretionary review challenging the judge’s July 14, 2003, decision to the Commission by Federal Express, and served trial and appellate counsel for the Secretary of Labor by certified mail, return receipt requested. Mot. at 2. It further states that, according to the return receipts, the Secretary’s counsel received the petition on August 11 and August 13, 2003. *Id.* Twentymile explains that on August 15, 2003, it was informed by the Secretary’s appellate counsel that the Commission had not received Twentymile’s petition for discretionary review. *Id.* Twentymile submits that upon further inquiry, it discovered that Federal Express had attempted to deliver the copy of the petition addressed to the Commission to an incorrect address. *Id.* at 3. It states that Federal Express did not attempt to contact Twentymile to reveal that delivery to the Commission

had not been accomplished. *Id.* Twentymile attached to its motion a copy of a Federal Express Air Bill, a copy of the petition for discretionary review, and a copy of its counsel's letter conveying the petition.

On August 19, 2003, the Commission received the Secretary's response to the operator's motion. The Secretary states that because of the unique circumstances surrounding the misdelivery of Twentymile's petition for discretionary review, she believes that the Commission has jurisdiction to consider the petition. S. Resp. at 2. As to the merits of the petition, the Secretary argues that the petition should not be granted because the judge's decision is supported by substantial evidence. *Id.* at 2-3.

On August 20, 2003, Federal Express delivered Twentymile's petition for discretionary review to the Commission. The Federal Express envelope reveals that the petition was mailed on August 8, 2003; that the petition was mailed priority overnight mail; and that the petition was to be delivered by August 11, 2003.

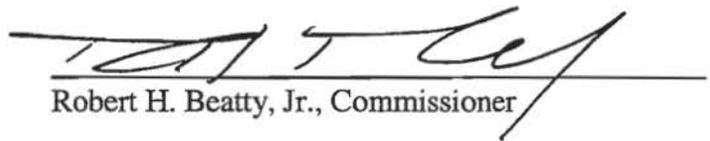
The judge's jurisdiction over these proceedings terminated when he issued his decision on July 14, 2003. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). Filing of a petition for discretionary review is effective upon receipt. 29 C.F.R. § 2700.5(d). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Here, Twentymile was required to file its petition for discretionary review with the Commission by August 13, 2003. The Commission received Twentymile's petition past the 30-day deadline, but before the judge's decision had become a final order of the Commission.

The Commission has entertained late-filed petitions for discretionary review where good cause has been shown. *See, e.g., McCoy v. Crescent Coal Co.*, 2 FMSHRC 1202, 1204 (June 1980) (vacating judge's order of dismissal and finding good cause where petitioner was pro se during part of the proceedings, subsequently-retained counsel obtained judge's decision only 10 days prior to deadline for petition, and petition was mailed on the 30th day). We conclude that Twentymile has shown good cause for its late filing.

Accordingly, we excuse the late filing and accept Twentymile's petition for discretionary review as filed on this date. Furthermore, upon consideration of the merits of Twentymile's petition for discretionary review, it is hereby granted.



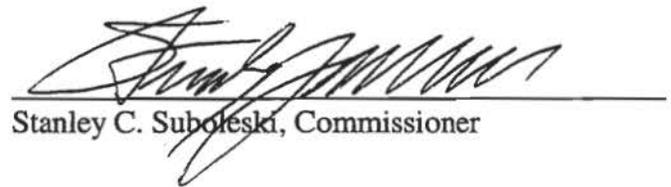
Michael F. Duffy, Chairman



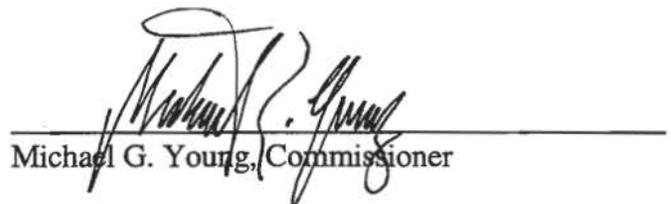
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Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

August 20, 2003

JAMES WOMACK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. WEST 2002-138-DM
	:	WE MD 01-17
	:	
GRAYMONT WESTERN US,	:	
Respondent	:	Tacoma Plant
	:	Mine ID 45-03290

**SUPPLEMENTAL DECISION**  
**AND**  
**FINAL ORDER APPROVING SETTLEMENT**

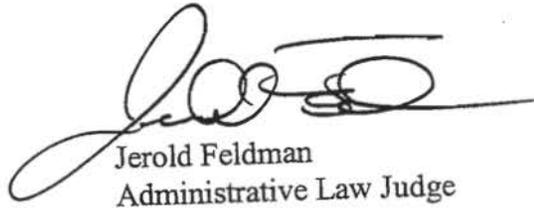
Appearances: James Womack, *pro se*, Tacoma, Washington, for the Complainant; Robert Leinwand, Esq., Stole Rives, LLP, Portland, Oregon, for the Respondent.

Before: Judge Feldman

This case is before me based on a discrimination complaint filed pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (1994) (the "Act"), by James Womack against Graymont Western US Inc. ("Graymont"). Following an evidentiary hearing, it was determined that Graymont's termination of Womack's employment violated section 105(c) of the Act. *Decision on Liability*, 25 FMSHRC 235 (May 2003) (ALJ). After filing proposals for relief, the parties agreed to settle this matter. On July 8, 2003, the parties filed a joint stipulated motion for approval of the terms of their settlement agreement. The parties agreed that the provisions of their agreement shall remain confidential.

On July 17, 2003, I issued an *Interim Decision Approving Settlement*. The *Interim Decision* specified that this matter would be dismissed upon a demonstration that the parties had substantially performed the terms of their agreement. On August 4, 2003, I received documentation of substantial performance.

**ACCORDINGLY**, the parties' motion for approval of settlement **IS GRANTED**. Pursuant to the parties' agreement, the terms and conditions of the settlement **ARE DECLARED CONFIDENTIAL**. The settlement **IS ORDERED PLACED UNDER SEAL** subject to review only by the Commission or other appellate body. In view of the settlement, this discrimination matter **IS DISMISSED** with prejudice.



Jerold Feldman  
Administrative Law Judge

Distribution: (Certified Mail)

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Robert Leinwand, Esq., Stole Rives, LLP, 900 S.W. Fifth Avenue, Suite 2600,  
Portland, OR 97204

/hs

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

August 22, 2003

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on behalf of	:	Docket No. KENT 2003-313-D
CHARLES SCOTT HOWARD,	:	BARB CD 2003-07
Complainant	:	
v.	:	Cave Spur No. 1
	:	Mine ID 15-18197
CAVE SPUR COAL, LLC, PANTHER	:	
MINING, LLC, and BLACK MOUNTAIN	:	Panther No. 1
RESOURCES, LLC.,	:	Mine ID 15-18198
Respondents	:	

**DECISION**

Appearances: J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;  
Stephen A. Sanders, Esq., Appalachian Citizens Law Center, Inc., Prestonsburg, Kentucky, on behalf of Charles Scott Howard;  
Stephen M. Hodges, Esq., PennStuart, Abingdon, Virginia, on behalf of the Respondents.

Before: Judge Melick

This case is before me upon the complaint of discrimination filed by the Secretary of Labor pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1994) the "Act," alleging that Charles Scott Howard was discharged by Panther Mining, LLC (Panther Mining) on February 3, 2003, in violation of Section 105(c)(1) of the Act.<sup>1</sup> In particular, the Secretary alleges in her complaint that Howard was discharged from

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<sup>1</sup> Section 105(c)(1) of the Act provides 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 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

his employment with Panther Mining because he had engaged in protected activity related to health and safety at the No. 1 Mine of Cave Spur Coal, LLC (Cave Spur). The Secretary further alleges that both Cave Spur and Panther Mining are controlled by, or their operations are directed by, Black Mountain Resources, LLC (Black Mountain).

Cave Spur and Panther Mining are wholly owned subsidiaries of Black Mountain. The individual complainant, Charles Howard, had been a day shift production foreman at Cave Spur for five months until January 28, 2003, when his section was closed and he, along with 34 other miners, was laid off.<sup>2</sup> All the laid-off miners were advised by Cave Spur Superintendent Larry Mosely that they could apply for jobs at Panther Mining. Howard was among the 28 who applied and among the 20 who were hired by Larry Adams, the superintendent of the Panther Mine. Although preferring to work as a day shift production foreman, Howard was hired as a night or “graveyard” shift maintenance foreman working from 11:00 p.m. to 7:00 a.m. According to Howard, when he met with Adams he told him that they got rid of him at Cave Spur because he would not do “outlaw” work, *i.e.*, in violation of health and safety practices, and that “if they expected that at Panther, [he] wouldn’t do that.” Howard acknowledges that Adams assured him that the Panther Mine did not operate that way.

Howard claims that during his five months at Cave Spur he complained “40 to 50 times,” mostly to Larry Mosely, about the lack of ventilation. According to Howard, Mosely’s only response to these complaints was the word “well” (Tr. I. 26). He also claims that mine foreman Harold Spurrier would occasionally come in and tell him to go ahead and work in spite of the lack of ventilation. Howard also alleges that during his employment at Cave Spur he was twice told to use crib blocks to elevate a roof bolting machine. According to Howard, this practice was unsafe on these two occasions (Tr. I. 29). Howard also claims as a protected activity that on one occasion he and Spurrier came upon a water hole and Spurrier told him “we’ll take care of that later” (Tr. I. 27). Finally, Howard claims that on his last day of work at Cave Spur, January 28, 2003, he complained to Mosely and Spurrier about insufficient air where he was planning to cut coal. According to Howard, even though a Federal inspector was present Mosely told him to mine without sufficient air. Howard claims he refused to comply.<sup>3</sup>

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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 the Act.

<sup>2</sup> The complaint herein does not allege that this layoff was discriminatory or in violation of the Act even though Howard purportedly made more than 40 to 50 health and safety complaints during his five months at Cave Spur.

<sup>3</sup> The Federal inspector who was present at that time, Alice Blanton, of the Department of Labor’s Mine and Safety and Health Administration (MSHA) testified however

Although dissatisfied with the unsafe and unhealthy “outlaw” operations at Cave Spur, Howard nevertheless wanted to return to Cave Spur as a day shift production foreman and felt he had been unfairly treated by being laid-off, while another foreman, who was a friend of Superintendent Mosely’s, was retained. Because of this dissatisfaction, on the morning of January 30, 2003, Howard took the unusual step to see Black Mountain’s vice president of operations, Ross Kegan. Howard complained to Kegan about problems with insufficient air and excess water at Cave Spur and that he had not been treated fairly by being sent from Cave Spur to the Panther Mine. In response Kegan purportedly told Howard that “certain individuals would hang their self [*sic*] if that’s the way their practices were,” and that Howard should “keep a good attitude, do a good job and just keep [his] mind focused on that.” Howard admits that he never did specifically ask to return to his job at Cave Spur.

According to Howard, following his meeting with Kegan, he called a friend at the Kentucky Department of Mines and Minerals (KDMM) alleging ventilation problems at the Cave Spur Mine. Howard also called the “hotline” maintained by MSHA and left an anonymous complaint about ventilation problems at the Cave Spur Mine and allegedly reported that they would have to “blitz” the mine to catch them in violation.

The next day, Friday, January 31, 2003, KDMM Inspector George Johnson went to Cave Spur in response to the anonymous complaint (Tr. I. 42-146). Johnson testified that he did not know who made the complaint. His inspection took four hours. Superintendent Mosely accompanied him. (Tr. I. 169-170). Johnson found some deficiency in airflow, but it was not a violation and the deficiency was corrected during the inspection. By the end of the inspection, Johnson concluded that the mine had adequate ventilation and had no violations. He issued no citations. (Tr. I. 146).

During the inspection, Cave Spur superintendent Mosely mentioned to Johnson that Cave Spur had just laid off a lot of people, and that he was not surprised that someone had called in a complaint. (Tr. I. 146). According to Johnson, when there is a lay off at a mine, laid off miners are likely to make complaints. (Tr. I.151). Mosely testified that he never suspected Howard to be the person who called in the anonymous complaint. “I had no reason to suspect that Scott Howard was the one that called it in. There were 35 people that were laid off, not all of them were happy.” (Tr. I.168). Several of the laid-off miners either did not apply for employment at Panther, or applied and were rejected.

Sometime later, probably on the same day, Mosely called Kegan and reported that there had been an anonymous complaint, that a state inspector had been at the mine and that

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that she was at Howard’s section sometime before 8:50 a.m., and was present for up to four hours. She found 26,100 cubic feet of air (cfm) where only 9,000 cfm was required, *i.e.*, at the last open crosscut. Blanton further testified that she found no air deficiencies in Howard’s section. She also talked to Howard who apparently registered no complaints (Tr. II. 152-155).

“everything checked out okay” (Tr. I.160). Mosely testified that he did not know who made the complaint when he spoke with Kegan and did not mention Howard (Tr. I.168).

Also, on Friday, January 31, 2003, Kegan called Adams to inform him that Howard had visited him the day before. (Tr. I.175). According to Kegan this call was made before Kegan knew of the state inspection at Cave Spur (Tr. II. 22-23). Kegan testified that he called Adams because he thought Howard’s supervisor should know that his subordinate, Howard, had “gone around” him. (Tr. II.22). Kegan told Adams that Howard was unhappy at being a night shift “move” foreman and that he had made some complaints about issues at Cave Spur. (Tr. II. 21). Kegan testified that he could not recall telling Adams of any of Howard’s specific complaints about safety issues at Cave Spur. (Tr. II. 21).

Both Kegan and Adams maintain that, in their phone conversation, Kegan never directed Adams to fire Howard, never suggested that Adams consider firing Howard, and never suggested that Adams take any action against Howard. (Tr. II. 23, 194,196). According to their testimony, Kegan simply informed Adams that his subordinate, Howard, had approached Kegan outside the normal chain of command and that he, Kegan, had advised him to do a good job at Panther and that he would be treated fairly there. (Tr. I.175-177; Tr. II. 21, 196).

Howard began working at Panther on January 29, 2003. One of his responsibilities as foreman of the third shift crew was to move the belt forward so that the next shift production crew could begin production upon their arrival. Howard acknowledges that on this first shift he was unable to complete the belt move. Howard next returned to work on Sunday night February 2, 2003. After the shift, which ended on the morning of February 3<sup>rd</sup>, he met with superintendent Adams. It was at this meeting that Howard was fired. Howard described the meeting in the following colloquy at hearing:

Q. [By Mr. Giannikas] Okay. Now what happened after that shift? The morning of Monday, February 3, 2003?

A. I came outside and Larry come out, Larry Adams and said I need to talk to you before you leave. So, I finished filling out my on-shift and my time and went to the office to see what he wanted.

Q. What happened next?

A. He was sitting there and he said - - the first thing he asked me was that Cecil Seals.

Q. And who is Cecil Seals?

A. Cecil Seals was one of the bull crew workers on my crew.

Q. And what is bull crew?

A. Bull crew is like just call them just manual labor. It is different jobs. They do more than one job.

Q. To make it clear cut, is a bull crew the same thing as maintenance crew pretty much?

A. Yeah, it's considered maintenance, the main hand.

Q. Okay. You were saying Mr. Cecil Seals; is that his name?

A. Yes. He hadn't showed up Sunday night to work at 9:00 when we began. Somebody said he had called in, he had got to the mines - - somebody said he had called in and Tim Hughes had answered the phone on their section. They said Cecil Seals wanted a ride and Tim Hughes - - Cecil Seals wanted a ride and Tim Hughes told him if he wasn't driving, he would have to walk. Evidently he had come inside.

Q. What did you tell Mr. Adams with respect to Mr. Seals?

A. I told him that I was told that he had quit. I hadn't talked to him. I couldn't say for sure.

Q. What else did Mr. Adams speak to you about?

A. He asked me who told me that I needed to come in early Sunday night.

Q. What was your response?

A. I told him some other fellows said it would be all right.

...

JUDGE MELICK: You said you told him Tim Hughes told you you could go in early?

THE WITNESS: I was told Tim Hughes was the other section foreman on the third shift. Now I had had some problems, or some questions I could ask him and he knowed basically, but I also discussed it when I said fellows, the electrician. They said they didn't see no problem coming in early. When they worked at Cave Spur and they had a lot of work to do, they come in early.

JUDGE MELICK: So, you talked to your electrician also?

THE WITNESS: Yes, but it was more than one person originally. I told Tim Hughes was just the first mine foreman I had.

BY MR. GIANNIKAS:

Q. How many active sections did Panther run?

A. Then I went there they had three sections.

Q. So, Tim Hughes was the other maintenance foreman?

A. He was the foreman on the section.

Q. He had your job on another section?

A. Yes.

Q. So, in any event, you told Mr. Adams these things; correct?

A. I told him Tim Hughes told me that, yes.

Q. So, tell me what Mr. Adams said?

A. I don't know the exact words, but we talking about the time when we went in early and I told him if he didn't want us to come in early that we wouldn't come in early no more.

Then he started telling me that when I got in the office, before my job through and he looked and his door to his office was open. He got up and walked by me and he's done these action while he was going to the door, oh, no - - my job was done and basically said - -

JUDGE MELICK: I'm sorry. I didn't [hear] the rest of that response.

THE WITNESS: When he was talking to me?

JUDGE MELICK: Yes.

THE WITNESS: He went to shut the door and come back where I was at and was standing where his where I was at.

JUDGE MELICK: And he told you to come out the mine early that shift?

THE WITNESS: We had come out early, yes.

JUDGE MELICK: Did he ask you to come out early?

THE WITNESS: No. He said not to come out out of the mine early until our job was done or to - -

BY MR. GIANNIKAS:

Q. So this is in respect to your activities that day, do not come out of the mine until told - -

A. That's the way I took it.

JUDGE MELICK: I'm sorry. I'm from Maryland and I'm having a little bit of difficulty with your accent. Could you [re]state what you just said?

THE WITNESS: If you want to know what - -

JUDGE MELICK: No. Please restate your answer.

THE WITNESS: About coming out early?

JUDGE MELICK: Yes.

THE WITNESS: I hadn't come out early I thought that he was - -

JUDGE MELICK: Didn't you tell me that you had come out early?

THE WITNESS: I figured he knowed.

JUDGE MELICK: You didn't actually tell me that?

THE WITNESS: No.

JUDGE MELICK: So, you thought this was in reference to your future?

THE WITNESS: Yes.

BY MR. GIANNIKAS:

Q. What happened next?

A. Well, he started - - he didn't said nothing out of the way.

Q. Who is this?

A. He was starting to question me and don't do this and don't do this. He kept saying about the job I had done and he started with his hands up in my face - -

Q. Hold on. Hold on. You said he was talking to you about this and talking about that. What exactly was he talking about?

A. Just like he was asking me if I had any questions about what Cecil Seals. He asked questions about the time and he was asking about a tie off.

Q. What is a tie off?

A. The tie off he was talking about on shuttle car which is a restraining cable, the pulley supports the cable on the power center.

Q. Okay. And what did he say about the tie off?

A. He said I hadn't moved them. I told him I didn't move nothing I wasn't supposed to.

Q. And - -

A. This was on Thursday.

Q. So, he was referring to Thursday?

A. No, it was a Sunday night. We moved on a Sunday night.

Q. Listen to my question. So this is the Thursday nigh shift you were referring to about the tie off?

A. That's what I believed.

Q. And what was your response?

A. I told him we hadn't moved - -

Q. And how much truth was there to this accusation about a tie off?

A. I hadn't done it so if he was saying to me I did, then he was lying. I didn't move them. I did what I was told to do. I didn't have time to move anything on that shift.

Q. And this was the shift that began on the 30<sup>th</sup>, correct?

A. Yes.

Q. So, you were describing, when I interrupted you, you were describing Mr. Adams' demeanor toward you. Could you continue, sir?

A. And he was talking and got a little louder, louder and his face was getting red and he stuck his hand in my face and he was getting mad. I told him, yeah, you know, I'm a grown man and that's not the way I want to be talked to. I don't want to be talked to like a dog.

Q. How far away was his hand from your face, sir?

A. It was as close approximately as from here to that podium, the wood podium up there.

Q. Which podium is that, sir?

A. That's about how far.

JUDGE MELICK: Do you want to state for the record how far you think that is?

THE WITNESS: About three foot, I would say approximately three foot.

MR. GIANNIKAS: Three feet. Three feet away.

BY MR. GIANNIKAS:

Q. You say he stuck his hand in your face, how far away was his hand from your face?

A. About when he raised his hand. You know, if he raised his hand up, I just seen his left hand come up. I raised my hand up like this.

JUDGE MELICK: For the record, when you say I raised my hand like this, you mean you raised your hand to kind of stop his hand?

THE WITNESS: Shake his, no.

JUDGE MELICK: Why did you do that?

THE WITNESS: Because I didn't want to get mad.

JUDGE MELICK: So, he was getting mad at you?

THE WITNESS: Yeah.

JUDGE MELICK: What did you [say] to him?

THE WITNESS: I told him that I was a grown man and that's the way I was supposed to be talked to, I didn't want to be talked to like a dog.

JUDGE MELICK: What was his response to you?

THE WITNESS: He said he didn't have any respect for me; to get off the property.

JUDGE MELICK: What happened then?

THE WITNESS: I said what do you mean. He said you to turn your stuff in and get off the property.

THE WITNESS: I said what do you mean for to turn my stuff in. What do you mean.

He said you need to turn your stuff in. I said are you firing me and he said, yes, you're fired. I said you are firing me because I was putting safety first. He said, no, I'm firing you because of your work performance and your attitude.

JUDGE MELICK: Well, while this was going [on] how was he acting?

THE WITNESS: Not a lot. He started getting mad and he fired me.

JUDGE MELICK: You said he started getting mad?

THE WITNESS: I mean I don't know what happened. I just knew he was starting to get angry and I didn't want the situation to go there, but I did it did. It went too far.

JUDGE MELICK: So, once you understood he was firing you, what did you say to him?

THE WITNESS: I believe the first word out of his mouth he let me know he was firing me, and I look at him and I said, piss on you, and I called him a prick. (Tr. I. 64-75).

Howard's description of the meeting was somewhat clarified on cross-examination in the following colloquy at hearings:

BY MR. HODGES:

Q. Now let's talk about the events of February 3<sup>rd</sup>. I believe you testified that there were at least three different topics that were discussed that morning; is that correct?

A. Yes.

Q. One was the walk out of a certain member of your crew named Cecil?

A. Yes.

Q. And you and Mr. Adams talked about that and that did not generate any controversy or shouting friction between you?

A. No.

Q. What was the second issue that you talked about?

A. The second issue they brought up was who told me I could come out early because we had come out early.

Q. Who had told you to come out early?

A. Yes.

Q. And then you - - was that a legitimate thing for him to ask you about; why your crew went in early; you didn't object to that did you?

A. No, he could ask anything about the job.

Q. He's your boss isn't he?

A. Yes.

Q. All right. Did you and Mr. Adams talk about that?

A. A little bit, yeah.

Q. And you told him that and that was resolved was it not?

A. I was hoping it was.

Q. And there wasn't any trouble that came up until the third issue came up and that is why certain things hadn't been done on your shift that ended prior to that?

A. When he started talking about that, he didn't seem upset.

Q. But he eventually when you were talking on that subject is where the trouble came up; is that right?

A. Toward the end of the entire conversation that's the time - -

Q. The entire conversation lasted then minutes [or] so?

A. Yeah, 10, not long. Maybe 15 at the most.

Q. Now when the thing accelerated into I'll call it an argument, did you begin to shout?

A. No, it never got to an argument. Never.

Q. Whether it was an argument or not, did you shout?

A. Before I was fired?

Q. No, at any time during the time that you were meeting with Mr. Adams in the setting in which you got fired, did you shout?

A. Before I left his office, yes.

Q. Did you scream?

A. It's according to what you call scream.

Q. You called him a prick more than once didn't you?

A. Yes.

Q. And you said, piss on you; right, when you told him that?

A. Yes.

Q. Did you use the term "friggin" in talking with him?

A. No.

JUDGE MELICK: I'm sorry. What was that word?

MR. HODGES: Friggin, F-R-I-G-G-I-N.

JUDGE MELICK: And you say you did not use that word?

THE WITNESS: No.

BY MR. HODGES:

Q. You never used that word?

A. No.

Q. And there were several other people in the building if I recall the previous testimony but not in the room?

A. In the office, outside of the office and on back in the building.

Q. I just asked you if there were several?

JUDGE MELICK: I'm sorry I couldn't hear both the question and the answer. I'm going to have to ask [you to] please wait for the question before you answer so the reporter can write it down simultaneously to talking.

BY MR. HODGES:

Q. I'm only asking you if there were several other people in the building?

A. I believe there were.

Q. When Mr. Adams told you to get your things and turn in your equipment, you asked him if you were being fired; is that your testimony?

A. Yes.

Q. And he said yes?

A. Yes.

Q. And he said yes?

A. Yes.

Q. And you said you were being fired because of something at Cave Spur?

A. Yes.

Q. And he said, no, you are being fired for insubordination and not getting the work done?

A. He said my attitude, not insubordination.

Q. Attitude and what else?

A. My work.

(Tr. I. 122-126).

Panther Superintendent Larry Adams described the events leading up to the meeting with Howard and the meeting itself in the following colloquy at hearing:

Q. [BY MR. HODGES:] Did you at some time become aware that Mr. Howard's crew had not completed assigned work on a certain shift?

A. Yes, sir.

Q. Do you remember when that was?

A. It was on Friday morning probably about 7:45 a.m.

Q. And how did you become aware of that?

A. The day shift section foreman David Fugate told us about it and told me that he hadn't finished the work before he ever started drilling coal.

Q. At that time you found out about it was Mr. Howard still around the mine area?

A. No, he'd already left.

Q. This was Friday?

A. Yes.

Q. And did you work Saturdays?

A. No, sir.

Q. So, the next time that you would have seen Mr. Howard was Monday morning?

A. Yes, sir.

Q. Did you attempt to investigate and correct this problem that had occurred with Mr. Howard?

A. Yes, sir.

Q. About what time?

A. He got outside at 7:00. That was his normal time to get out and I think he was out about that time that morning. So, it was a little after 7:00.

Q. And how did you go about discussing this with him?

A. I told Scott to come into my office. I needed to talk to him before he left.

Q. Do you have any practice as to where and when to talk with foreman about job related issues?

A. Yes, sir.

Q. And what was that?

A. I normally take them into the office unless it's just general conversation. If it has something to do with their work or whatever, I take them into the office.

Q. And why is that, sir?

A. Well, coming down through the ranks I never did like to have a superior on me to talk to me in front of the other employees. I had rather do it man one on one. And that's what I do, one on one with employees.

Q. After you got him into the office, what do you recall about the conversation?

A. I told Scott, I said there's some things that he hadn't finished up there on the move on Friday morning. He told he, he said I'm a production foreman and not a move foreman.

And as he was saying this, he was getting louder. I asked Scott, I said, Scott, you are production foreman and I sent you up there to run production, would you know what to do to correct these problems or would I have to send somebody up there to do it for you?

And he said, no, I know what to do. I said, well, if you know what to do, why didn't you do it. He just kept getting louder and louder with me and every word he spoke. That's why I told him, I said, Scott, don't take this attitude with me because I don't tolerate this from employees.

He looked at me and he said, if anybody's got a frigging attitude it's you.

Q. Now the term "frigging" is that a term you use in your conversation?

A. No.

Q. All right. Were you offended by that term?

A. Yes, I was.

Q. Were you offended?

A. Yes, sir.

Q. Did you do anything to attempt to, perhaps, have civil language around your work environment?

A. Yes, sir, I try to.

Q. Once he made the comment about you are one with the frigging attitude, what did you do?

A. I told him to go get his stuff and turn it in. I wouldn't tolerate that. He said are you firing me. I said, yes, I'm firing you for insubordination.

(Tr. II. 197-201).

Panther day shift production foreman David Fugate (the foreman who worked the shift following Howard's) confirmed at hearing that he had informed Adams on January 31, 2003, that Howard's maintenance crew had not completed its assigned work that morning. Howard had already left for the day and, because Adams did not work the following day, a Saturday, Adams was unable to discuss Howard's failure to complete his work until Monday morning February 3, 2003.

#### Motion to Dismiss

The Respondents first allege that the Secretary's complaint herein was untimely filed. They note that Howard's charge of discrimination was filed on February 6, 2003, and that the Secretary did not file her complaint herein until June 10, 2003 - - beyond the 120-day legal time limit. Citing relevant provisions of Section 105 (c) of the Act this Commission in *Secretary, ex rel. Donald R. Hale v. 4-A Coal Company*, 8 FMSHRC 905 at 908 (June 1986) stated as follows:

... we hold that the Secretary is to make his determination of whether a violation occurred within 90 days of the filing of the miner's complaint and is to file his complaint on the miner's behalf with the Commission "immediately" thereafter - - *i.e.*, within 30 days of his determination that a violation of section 105(c)(1) occurred. If the Secretary's complaint is late-filed, it is subject to dismissal if the operator demonstrates material legal prejudice attributable to the delay. *Cf. David Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 23-25 (January 1984), *aff'd mem.*, 750 F.2d 1093 (D.C. Cir. 1984) (table); *Walter A. Schulte v. Lizza Industries, Inc.*, 6 FMSHRC 8, 12-14 (January 1984).

Thus, even assuming that the Secretary filed her complaint beyond the statutory time limits, without a showing that the delay prejudiced the Respondents, dismissal is not warranted. The Respondents in this case failed to present any evidence of prejudice and indeed, affirmatively declined to "undertake to show prejudice." Under the circumstances the Respondents' Motion to Dismiss on these grounds must be denied.

The Respondents also appear to suggest that this case should be dismissed because the Secretary disobeyed an "order" in the related temporary reinstatement proceeding for the Secretary to file her complaint on the merits by May [21], 2003. The fact is, however, that no

such “order” was ever issued. This judge, in the settlement decision in that case, merely restated the terms of the settlement agreement between the parties which included an agreement by the Secretary to file her complaint by May 21, 2003. See *Secretary o/b/o Charles Scott Howard v. Panther Mining, LLC, et al.*, 25 FMSHRC 216 (June 2003). Accordingly, the Respondents’ remedy, if any, is for breach of the contract set forth in the settlement agreement. Under the circumstances the Motion to Dismiss must be, and is, denied.

### The Merits

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and 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, 2797-2800 (October 1980), rev’d on grounds, *sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3<sup>rd</sup> 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 part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner’s unprotected activity alone. *Pasula, supra*; *Robinette, supra*. See also *Eastern Assoc., Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4<sup>th</sup> Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6<sup>th</sup> Cir. 1983) (specifically approving the Commission’s *Pasula-Robinette* test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

The second element of a *prima facie* case of discrimination is a showing that the adverse action was motivated in any part by the protected activity. As this Commission noted in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981), rev’d on other grounds *sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983), “[d]irect evidence of motivation is rarely encountered; more typically the only available evidence is indirect.” The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility towards protected activity; coincidence of time between the protected activity and the adverse action and disparate treatment. In examining these indicia the Commission noted that the operator’s knowledge of the miner’s protected activity is “probably the single most important aspect of the circumstantial case.”

The Secretary alleges three categories or incidents of protected activity for which she argues Howard was terminated: (1) “Howard’s history of safety complaints and refusals to comply with unsafe directives throughout his employment with Cave Spur,” (2) “Howard’s January 31, 2003, safety complaints during his meeting with Kegan in which he told Kegan about ventilation and other problems at the Cave Spur mine” and (3) “Howard’s January 30, 2003, anonymous complaint to KDMM.” The first alleged protected activity apparently relates to Howard’s purported 40 to 50 complaints about the lack of ventilation as well as additional

complaints about the use of crib blocks to elevate a roof bolting machine and certain water problems. In addition, on the last day of his employment at Cave Spur, Howard purportedly refused to mine coal with insufficient air in the face of specific instructions from Mosely and Spurrier to do so and in the presence of an MSHA inspector.

With respect to this alleged “work refusal” the Secretary has failed to support her allegations under the appropriate legal framework, *i.e.*, that Howard entertained a reasonable, good faith belief that to continue working would have been hazardous. *Dykhoff v. Borax Incorporated*, 22 FMSHRC 1194, 1198-1199 (October 2000), *accord*; *Gilbert v. FMSHRC*, 866 F.2d 1433 (D.C. Cir. 1989). Moreover, not only is there no claim in this complaint of immediate adverse action, but Howard was hired later the same day by Panther Mining, another Black Mountain subsidiary. In any event, I do not find Howard’s allegations in this regard to be credible. The MSHA inspector who was present at that time, Alice Blanton, testified that, indeed, she was at Howard’s section sometime before 8:50 a.m., and found 26,100 cfm where only 9,000 cfm was required, *i.e.*, at the last open crosscut. Blanton further testified that she found no air deficiencies in Howard’s section. While Howard maintains that Blanton took her air readings 40 minutes before the deficiency occurred, I note that she was still present and that Howard nevertheless failed to mention the alleged inadequate ventilation to her. In addition, both Mosely and Spurrier denied Howard’s allegations.

I further find that Howard’s alleged 40 to 50 other complaints about ventilation as well as the work refusal itself are also suspect because none of the daily reports Howard completed while at Cave Spur indicated any inadequate ventilation (Tr. II. 27-32). The preshift and on-shift reports (Resp’s Exh. No. 6 and 8) show air flow readings. Of the 210 reports, none showed air flow under 9,000 cfm. Under Cave Spur’s MSHA - approved ventilation plan, 9,000 cfm air flow was required except under certain circumstances, in which case 15,000 cfm air flow was required (Tr. II. 30). While 5 of the 210 reports showed between 9,000 and 15,000 cfm, there is no evidence that the circumstances requiring 15,000 cfm existed at the time of any of these five readings. I find that this evidence largely discredits Howard’s claims that there was a lack of ventilation some 40 to 50 times about which he complained to management during his 5-month tenure at Cave Spur.

However, even assuming, *arguendo*, that Howard did make safety complaints during his 5-month tenure at Cave Spur regarding inadequate ventilation, excess water and the use of timbers to elevate a roof bolter, I do not find that his termination from Panther on February 3, 2003, was motivated in any part by any such complaints made, or work refusal exercised, during this tenure. I first note that the Secretary does not allege in her complaint herein that Howard’s layoff from Cave Spur (along with 34 other miners) on February 28, 2003, was an adverse action attributable to the above alleged protected activities. I also note that Howard was among those laid-off miners who were immediately rehired at Panther, another subsidiary of Black Mountain, in spite of his alleged protected activities at Cave Spur and in spite of his reporting to the hiring official at Panther Mining, Superintendent Adams, about the alleged unlawful and unsafe practices at Cave Spur and of his purported statement to Adams that he would refuse to perform

such “outlaw” practices at Panther Mining.

I next consider Howard’s third alleged protected activity, *i.e.*, “Howard’s January 30, 2003, anonymous complaint to KDMM.” There is no dispute that at no time before his discharge was Howard’s identity as the anonymous complaine to the Kentucky mine officials disclosed. What is known is that Kentucky Inspector George Johnson, went to Cave Spur on January 31, and told Cave Spur officials only that he was there on an anonymous complaint. It is also noted that after his inspection Johnson concluded that the mine had adequate ventilation and that there were no violations.

I find Superintendent Mosely’s testimony credible that he did not in fact suspect that Howard was the person who called in the anonymous complaint because, as he explained, 35 people were laid-off and “not all of them were happy.” Indeed, several of those laid-off miners either did not apply for employment at Panther Mining or applied and were rejected. I therefore also find Mosely’s testimony credible, that he in fact did not know who made the anonymous complaint when he spoke to Kegan later that same day. However, even if Mosely and Kegan had suspicions that Howard had made the anonymous complaint both Kegan and Adams denied that any such suspicions were communicated to Adams before Adams discharged Howard. In light of Kegan’s and Adams’ credible denials I cannot infer that Kegan indeed suspected that Howard was the anonymous complainant or that Kegan relayed any such suspicions to Adams. Under these circumstances I do not find that Adams’ discharge of Howard was motivated by any suspicion that Howard was the anonymous complaine to the Kentucky mine officials about the Cave Spur mine.

The Secretary’s second alleged protected activity, *i.e.*, “Howard’s January [30], 2003, safety complaints during his meeting with Kegan in which he told Kegan about ventilation and other problems at the Cave Spur mine,” appears to be undisputed. As previously noted, Ross Kegan was vice president of operations for parent company Black Mountain. Kegan’s and Howard’s versions of the meeting differ to some extent. However, in critical respects, it is clear that, during the meeting, Howard raised the subject of ventilation problems and the use of crib blocks to elevate the roof bolter at Cave Spur (Tr. II. 14). Howard testified that he also raised questions about water conditions at Cave Spur (Tr. I. 36-48). The fact that Howard was no longer working at Cave Spur where the alleged unsafe conditions had previously existed and in the overall context of Howard’s dissatisfaction with being transferred from a day production shift to a night maintenance shift and his belief that Cave Spur management had showed favoritism toward another foreman who had been retained at Cave Spur, I find Kegan’s version of the meeting to be the more credible. Howard’s testimony is also considered in light of the credibility issues previously noted. Kegan described the meeting in the following colloquy at hearing:

Q. [BY MR. HODGES] Now did Mr. Scott Howard come to visit you on January 30 of 2003?

A. Yes, he did.

Q. Was that the first and only time you had ever met with him?

A. Yes, it was.

Q. Is it usual or unusual for a foreman to visit with you about job related issues?

A. It would be unusual, if I recall I think it was through the three years and nine months I've been in my position at Black Mountain he was the first foreman that ever come in my office to visit.

Q. And within the operations of the companies who would the foreman go to if he did have problems?

A. The superintendent of his mine.

Q. When he came to visit you that day, just describe what happened. First, did he have an appointment?

A. No.

Q. All right. Then what happened?

A. He came to the office and notified my receptionist that Scott Howard was there and I considered it unusual and I didn't have any other appointments scheduled at that time, so it was no problem to get to see him.

I was seated at my desk; he sat across the desk from me and began describing several issues that he seemed somewhat agitated about. Among them were complaints he made about Cave Spur. He had in this area, especially overriding of employment, that was that he considered himself a better foreman than the numbers had shown, and production had shown on his section at Cave Spur.

He didn't feel like he had gotten a fair shake at Cave Spur. He described some issues at the Cave Spur. He described some issues at the Cave Spur that he felt contributed to his performance at Cave Spur, among them were ventilation problems. He did say that he had problems getting air on the section.

He said that it was common for the superintendent Larry Mosely to pull people off his section and take to the other section which had him operating short-handed.

He mentioned that he had been asked, if I recall correctly, to run roof bolter up on crib blocks so the ATRS would reach the top. And that's the gist of what he complained about at Cave Spur.

He did say that he felt the section foreman on 001 section on the day shift Jimmy Thomas was a favorite of Superintendent Larry Mosely. He felt that Larry Mosely tried to favor Jimmy Thomas so that Jimmy Thomas' production numbers looked better than his. And that was the motivation of the superintendent, he wanted Jimmy Thomas and didn't want anybody to run more coal.

Scott specifically said that the mine management didn't want him to run coal.

Q. Cave Spur mine management didn't want him to run coal?

A. Yes.

Q. What did you say to that?

A. I said that didn't make sense to me. Why would anybody not want you to run coal. He reiterated it was the desire to make Jimmy Thomas look good and have better production numbers than Scott's section?

Q. Now did Mr. Howard ask anything specific of you during that meeting?

A. No.

Q. Did he tell you about making complaints to management of Cave Spur?

A. I don't recall him saying that.

Q. Did he tell you that he intended to make safety complaints to both officials?

A. No.

Q. And did you make some response to Mr. Howard?

A. Well, he, as I stated, he was a little bit agitated and I'm not sure if he was aware of it or not, but the loudness of his voice had become somewhat elevated while we were discussing and so much so that after he left our office

manager wanted to know what he was so upset about, she made a specific comment about that.

My response to Scott, one, kind of calm him down a little bit and I told him my advice to him and I considered it good advice was that he focus on his new job at Panther and he needed to have good positive work attitude. He needed to work hard.

The superintendent there, Larry Adams, was a gentleman that I had known and worked around many years. I told him a lot of people like to work with Larry. And people that had worked for Larry for any length of time had developed a lot of loyalty to him and wanted to stay in his employ because of the way he operated his mines.

And that if Scott would focus on his job and work hard, that he would get along with Larry Adams just fine because Larry Adams did things by the book and he would have a long career, that Panther was a good mine, had a lot reserve and a long life there and he would have a good career in front him.

(Tr. II. 13-18).

Thus, while Howard clearly made what may be considered to be protected safety complaints during his meeting with Kegan, it is apparent that the thrust of the meeting was Howard's unhappiness with being transferred from day shift production foreman to night shift maintenance foreman. Indeed, at the end of the meeting it is apparent that Kegan assured Howard that if he focused on his job, and worked hard, he would have a good career in front of him, and could move up with more favorable job shifts and pay. Within this framework it would not be reasonable to infer that Kegan would have harbored ill-will toward Howard, such as would motivate him to seek his discharge.

It is uncontradicted, however, that following this meeting between Howard and Kegan, Kegan called Panther Mine superintendent Adams, and discussed with Adams the meeting he had with Howard. As previously noted, there is no sound evidentiary basis on which I can discredit Kegan's and Adams' testimony that Kegan did not tell Adams of any suspicions that Howard was the anonymous complainant giving rise to the KDMM inspection at Cave Spur. In regard to the telephone call with Kegan, Adams testified that "[he] told me that Scott had been to see him and he talked a little bit about Cave Spur, but he said he hadn't had any problems with Panther Mine." (Tr. II. 196).

This statement strongly suggests, and it may reasonably be inferred, that Kegan did however in fact relate to Adams some, if not all, of Howard's complaints about the Cave Spur operation, including complaints about the ventilation problems, water problems and/or using timbers to elevate a roof bolter. I therefore conclude, that as of the afternoon of January 31, 2003, Adams was aware by way of Kegan's call, of Howard's protected activities. I note

however that both Kegan and Adams, denied that Kegan directed Adams to fire Howard or suggested that Adams consider firing Howard, or suggested that Adams take action against Howard. I have no reason to discredit this testimony. Thus, it is clear that when Adams terminated Howard on February 3, 2003, he was aware of Howard's protected activity by way of two sources, *i.e.*, Howard's own statement to him at the time he hired Howard on January 28, 2003, and Kegan's telephone call on January 31, 2003.

There is also a coincidence of timing (six days and three days respectively) between Adams' obtaining knowledge of Howard's protected activity and the adverse action. Ordinarily, this evidence might suggest that Howard's termination may have been motivated by his protected activity. That evidence is negated however by the absence of evidence of hostility by Adams (or even Kegan) toward the protected activity. Indeed, Adams hired Howard with full knowledge of Howard's safety complaints about Cave Spur and only after Howard told him that he would refuse to perform the illegal "outlaw" work he claims he had performed at Cave Spur. According to Adams, Kegan also told him that Howard had not any problems with Adams' mine, *i.e.*, the Panther Mine. The only safety problems raised by Howard were allegedly at Cave Spur over which Adams had no responsibility, or particular interest. Thus, Howard's complaints, limited to prior conditions at another mine and his apparent satisfaction with the conditions at Adams' mine, suggest that Adams would have had little reason to be hostile toward Howard.

Finally, any finding that Adams would have been motivated to discharge Howard by Howard's protected activity concerning Cave Spur is further negated by the actual circumstances of his discharge. In this regard, I give the greater weight to Adams' description of the events leading up to that discharge. Howard's version of events that are in conflict with Adams' must be viewed in light of not only his own self interest but also because of his vague and confused description of that meeting. Howard's testimony, with this exception, was generally articulate. This suggests to me that, at best, Howard had a poor recollection of that meeting. Adam's version is also consistent with Howard's lingering dissatisfaction over what he felt was favoritism and unfair treatment at Cave Spur and his new job as a maintenance foreman on the "graveyard" shift. Howard's general credibility is also damaged for the reasons previously stated.

Adams credibly testified with respect to this meeting that he called Howard into his office on February 3, 2003, to discuss Howard's failure to complete his work the previous Friday. As previously noted, this was the first opportunity Adams had to meet with Howard following that Friday. Adams had been informed by the production foreman, David Fugate, that Howard had not completed the "moveup" on his Friday shift, causing a delay in production. (Tr. II. 205-206). Adams testified that when he called Adams into his office to discuss this issue, Howard lost his temper. According to Adams, Howard got louder and louder and told him that he was a production foreman and not a move foreman. At hearing, Adams further described Howard's actions in the following colloquy:

And as he was saying this, he was getting louder. I asked Scott, I said, Scott, [if] you are [a] production foreman and I sent you up there to run production, would you know what to do to correct these problems or would I have to send somebody up there to do it for you?" And he said, "No, I know what to do." I said, "Well, if you know what to, why didn't you do it." He just kept getting louder and louder with me in every word he spoke. That's why I told him, I said, "Scott, don't take this attitude with me because I don't tolerate this from employees." He looked at me and he said, "If anybody's got a friggin attitude it's you." (Tr. II. 199).

In response to Howard, Adams "told him to go get his stuff and turn it in [and said] I wouldn't tolerate that. He said, are you firing me. I said, yes, I'm firing you for insubordination." (Tr. II. 200). As previously noted, I find Adams' version of events to be the most credible and I find that this evidence further negates any inference that Adams' knowledge of Howard's protected activities provided any basis for his discharge of him.

In any event, even assuming, *arguendo*, that Howard engaged in all the alleged protected activities and that Respondents were motivated in part by such activities, I find that Respondents would have taken the adverse action in any event for his unprotected activities alone, *i.e.*, Howard's insubordinate behavior. In *Chacon*, 3 FMSHRC at 2510, the Commission also explained the proper criteria for analyzing an operator's non-protected business justification for an adverse action:

Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may be conclude that the justification is weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. *Cf. Youngstown Mines Corp.*, 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." *Cf. NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 (1<sup>st</sup> Cir. 1979). The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis . . . , then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or sense of fairness or enlightened business practice. Rather, the narrow statutory

question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. *Cf. R-W Service System Inc.*, 243 NLRB 1202, 1203-04 (1979) (articulating and analogous standard).

The Secretary appears to argue in this regard, that the reasons stated by Adams for his termination of Howard were merely pretextual and speculates that the decision was no doubt influenced by instructions from Kegan. This argument is premised however, on a rejection of the testimony of Kegan and Adams which I have found credible. In addition, to accept the Secretary's argument would require acceptance of a scheme so complex as to stretch credulity beyond rational limits. First, Adams would have had to wait until Howard committed an obvious failure of his duties, then Adams would have had to trigger Howard's temper by bringing such failure to his attention and then hope that Howard would react in a disrespectful, offensive and insubordinate manner, thereby presenting the alleged pretextual grounds for Howard's discharge.<sup>4</sup>

The Secretary also argues that Kegan admitted that, to his recollection, no one had ever previously been terminated for insubordination and that accordingly Howard's termination on such grounds was evidence of disparate treatment and was therefore discriminatory. There is no evidence however that any other employee had ever acted in a manner such as Howard acted. Without such evidence a discriminatory or pretextual inference can not properly be made. Under the circumstances I find that Adams' stated reasons for discharging Howard, were credible, not pretextual and provided a reasonable and rationale basis to have legitimately moved Adams to discharge Howard.

Under all the circumstances, I do not find that the Secretary has sustained her burden of proving that Howard was discharged in violation of Section 105(c) of the Act.

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<sup>4</sup> While Adams testified that Howard used the term "frigging" while acting insubordinately, and while such term may be considered by some to be a profanity, insubordination and not merely the use of profanity was the stated basis for Howard's termination. Accordingly the "profanity analysis" set forth in *Secretary o/b/o Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 521 (March 1984) is inapposite.

**ORDER**

Discrimination Proceeding Docket No. KENT 2003-313-D, is hereby dismissed. The order for economic reinstatement issued May 13, 2003, in the related Temporary Reinstatement Proceeding, *Secretary o/b/o Charles Scott Howard v. Panther Mining, LLC., et al.*, 25 FMSHRC 216 (June 2003) is hereby terminated 30 days from the date of this decision, unless a petition for review with this Commission is filed within that time. Commission Rule 70, 29 C.F.R. § 2700.70. *Secretary, o/b/o Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947 (September 1999).



Gary Melick  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 22, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-347-M
Petitioner	:	A.C. No. 45-03260-00000
	:	
v.	:	
	:	
GRAYMONT WESTERN U.S., INC.,	:	
Respondent	:	Tacoma Plant

**DECISION APPROVING SETTLEMENT**

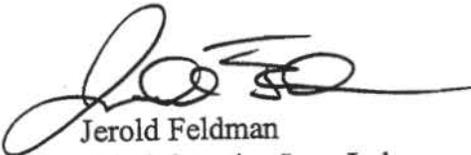
Before: Judge Feldman

This civil penalty matter concerns a discrimination complaint filed pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (1994) (the "Act"), by James Womack against Graymont Western US Inc. ("Graymont"). Following an evidentiary hearing, it was determined that Graymont's termination of Womack's employment violated section 105(c) of the Act. *Decision on Liability*, 25 FMSHRC 235 (May 2003) (ALJ). After filing proposals for relief, the parties agreed to settle this matter. On August 20, 2003, I issued a *Supplemental Decision and Final Order Approving Settlement*. The parties agreed that the settlement terms would remain confidential. Consequently, the settlement agreement was placed under seal subject to review only by the Commission or other appellate body.

In accordance with the provisions of Commission Rule 44(b), 29 C.F.R. § 2700.44(b), the Secretary was provided with a copy of the *Decision on Liability* so that she could initiate a civil penalty proceeding for the subject 105(c) violation. 25 FMSHRC at 265. As a consequence of Womack's discrimination case, on June 17, 2003, the Secretary filed a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act) that has been assigned as Docket No. WEST 2003-347-M. The Secretary's petition sought to impose a \$12,000 civil penalty.

On July 17, 2003, the Secretary filed a motion to approve a settlement agreement and to dismiss this case. A reduction in civil penalty from \$12,000 to \$5,000 is proposed. The settlement terms stipulate that nothing in the parties' agreement shall be construed as an admission by Graymont that it violated section 105(c) of the Mine Act. *See Amax Lead Company of Missouri*, 4 FMSHRC 975, 980 (June 1982) (a violation is established for Mine Act purposes as a consequence of a settlement even though the respondent does not admit that a violation occurred).

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED**, and **IT IS ORDERED** that Graymont Western US Inc., pay a civil penalty of \$5,000 within 30 days of this Decision, and, upon receipt of timely payment, the civil penalty matter in Docket No. WEST 2003-347-M is case **IS DISMISSED**.



Jerold Feldman  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

August 26, 2003

CONCRETE AGGREGATES, LLC,	:	EQUAL ACCESS TO JUSTICE
Applicant	:	PROCEEDING
	:	
	:	Docket No. EAJ 2003-01
v.	:	
	:	Formerly CENT 2002-230-DM
SECRETARY OF LABOR,	:	Id. No. 23-01840
MINE SAFETY AND HEALTH	:	Eureka Materials Quarry
ADMINISTRATION (MSHA),	:	
on behalf of JOHN G. MUEHLENBECK,	:	
Respondent	:	

**DECISION**

Before: Judge Manning

This proceeding is before me upon the application of Concrete Aggregates, LLC, for an award of fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (“EAJ Act”). Concrete Aggregates prevailed over the Department of Labor’s Mine Safety and Health Administration (“MSHA”) in the underlying discrimination proceeding brought under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the “Mine Act”). *Sec’y of Labor on behalf of John G. Muehlenbeck v. Concrete Aggregates, LLC*, 25 FMSHRC 270 (May 2003). The EAJ Act provides that an eligible applicant may be awarded attorney’s fees and expenses unless the position of the United States is substantially justified or that special circumstances make an award unjust. The Commission’s rules for the implementation of the EAJ Act in Commission proceedings are set out at 29 C.F.R. § 2704.100 *et seq.*

Concrete Aggregates contends that it qualifies as an eligible applicant and that the position of the Secretary was not substantially justified. The Secretary does not dispute that Concrete Aggregates is a prevailing party within the meaning of 29 C.F.R. § 2704.202 and that Concrete Aggregates satisfies the eligibility criteria for a prevailing party set out in 29 C.F.R. § 2704.104(b). The Secretary contends that Concrete Aggregates is not entitled to an EAJ Act award because her decision to proceed with the underlying case was substantially justified and because special circumstances exist that would make an award unjust.

A brief summary of my decision in underlying case is critical to understand the parties' arguments in this case. Mr. Muehlenbeck, who was the superintendent at the quarry, was terminated from his employment at Concrete Aggregates after he left the quarry on September 28, 2001, without permission or the knowledge of his supervisor. Because Concrete Aggregates was a small company, it contracted out its payroll and human resources functions. Concrete Aggregates was in the process of engaging a new provider for these functions when several employees raised concerns about one of the forms that they were required to sign. As important here, an arbitration clause on one form required all employees to agree to resolve any disputes with Concrete Aggregates or the provider through binding arbitration. This clause prohibited administrative agencies from resolving disputes or proceeding on behalf of an employee. Muehlenbeck raised concerns about the effect of this clause on his Mine Act rights and refused to sign the form. Concrete Aggregates tried to convince him to sign the form and told Muehlenbeck that he could have an attorney of his choosing review the form at company expense. Muehlenbeck attended a meeting with the provider but his concerns were not allayed. On September 28, 2001, Muehlenbeck was presented with a copy of the form by the office secretary and it was suggested that he sign the form "under protest." Muehlenbeck became angry and he left the property before quitting time without the permission or knowledge of the quarry manager. On the following work day he was terminated for leaving his post.

In my decision, I held that the facts in the case most closely resemble a work refusal and I analyzed the case on that basis. I found that Muehlenbeck had a reasonable, good faith belief that the arbitration clause would interfere with his Mine Act rights. Based on my analysis of the record, I held that the Secretary established a *prima facie* case of discrimination. I also found that Concrete Aggregates was unable to establish that Muehlenbeck's termination was unrelated to his continuing refusal to sign the form. I dismissed Muehlenbeck's complaint of discrimination after analyzing the record as a mixed-motive case. I found that Muehlenbeck's termination was precipitated by the fact that he left the quarry without notice or permission coupled with the fact that he was unable to offer any explanation for his absence. I determined that Concrete Aggregates would have terminated Muehlenbeck for that reason alone. Finally, I found that, by asking Muehlenbeck to sign the form under protest, Concrete Aggregates did not wrongfully provoke Muehlenbeck and his response to the suggestion was excessive and unreasonable.

## I. ANALYSIS OF THE ISSUES

### A. Substantial Justification

The Secretary has the burden to establish that her position both before and during litigation was "substantially justified." Neither the EAJ Act nor the Commission's rules define "substantial justification." The United States Supreme Court has defined the phrase "substantially justified" as " 'justified in substance or the main' . . . justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The

position of the government “can be justified even though it is not correct” and it can be “substantially (*i.e.* for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.” *Id.* n. 2.

### **1. Summary of the Parties’ Arguments**

The Secretary contends that her case had a reasonable basis in fact. She states that MSHA completed a thorough investigation of Mr. Muehlenbeck’s discrimination complaint and her solicitors continued that investigation through discovery. She determined that the factual basis of Muehlenbeck’s complaint was substantiated by both witness testimony and documentary evidence. The administrative law judge concurred with the Secretary’s position that Muehlenbeck had engaged in protected activity and that Concrete Aggregates did not establish that his termination was not motivated, at least in part, by his protected activity. The judge dismissed the complaint of discrimination only after evaluating and weighing the evidence concerning the particular circumstances of Muehlenbeck’s departure from the mine on September 28, 2001. The Secretary did not prevail in the underlying case because the judge, after making “difficult credibility determinations,” concluded that Muehlenbeck was not reasonably provoked by the company into leaving his post at the mine without the permission or knowledge of his supervisor. (Secretary’s Objection at 8). The judge’s credibility determinations and resultant findings of fact could not have been predicted by the Secretary.

The Secretary also contends that her case had a reasonable basis in law. The underlying discrimination proceeding presented novel legal issues and was a case of first impression. The Secretary argues that she was not proceeding in bad faith in prosecuting her case and she presented valid legal arguments consistent with existing law. She points to the fact that the judge determined that she presented a *prima facie* case. The judge also determined that Concrete Aggregates failed to establish that Muehlenbeck’s protected activity was not a motivating factor in his termination. She argues that she did not prevail in the underlying case only because the judge found that Concrete Aggregates would have terminated Muehlenbeck for his unprotected activities alone.

Concrete Aggregates argues that the Secretary’s “good faith” and her thorough investigation are not sufficient to meet her burden of establishing that she had substantial justification for proceeding with the case. Concrete Aggregates afforded Muehlenbeck every opportunity to pursue his “good faith concerns.” (Applicant’s Response at 3). Muehlenbeck did not refuse to work; he returned to the quarry the next business day after he walked off the job. Muehlenbeck admitted at the hearing that he has difficulty expressing his concerns when he is flustered. Concrete Aggregates offered Muehlenbeck the opportunity to raise his concerns before an attorney of his choice at company expense. Because the company made every effort to address Muehlenbeck’s concerns, the Secretary’s prosecution of the underlying case was unreasonable. In addition, the Secretary offered no evidence that the arbitration provision in the form actually threatened Muehlenbeck rights under the Mine Act. Thus, the

Secretary's decision to litigate the underlying case was not substantially justified.

## **2. The Position of the Secretary was Substantially Justified**

I agree with the Secretary that her position in this case was substantially justified because it had a reasonable basis in law and fact. The parties agree that the issues in the underlying proceeding presented a case of first impression. When a government agency acts in good faith in prosecuting a case of first impression, its position may be considered to be substantially justified. *Griffon v. U.S. Dep't of Health and Human Services*, 832 F. 2d 51, 52-53 (5<sup>th</sup> Cir. 1987). Although the facts presented in the underlying case had never been litigated before, the Secretary based her legal arguments on sound Commission precedent. The Secretary was not attempting to stretch the boundaries of section 105(c) beyond what presently exists but was attempting to apply existing law to a factual situation that had not previously arisen. Indeed, in a very real sense, the Secretary prevailed in the underlying case on the issues of law, but she did not convince the trier of fact that she should prevail on the particular facts of the case.

As stated above, I determined that the Muehlenbeck's refusal to sign the form containing the arbitration clause was reasonable and was made in good faith. On that basis, I found that Muehlenbeck engaged in protected activity and that Concrete Aggregates did not adequately address his concerns so that they reasonably should have been quelled. I next determined that Concrete Aggregates had not established that its termination of Muehlenbeck was in no part motivated by his protected activity. In performing a mixed-motive analysis, I found that Concrete Aggregates would have terminated Muehlenbeck for his unprotected activities alone. The most significant and difficult factual issue was whether Muehlenbeck had been wrongfully provoked into impulsively abandoning his post at the quarry by the company's continuing insistence that he sign the arbitration clause. After reviewing the evidence, considering the demeanor of the witnesses, and making credibility determinations, I found that Muehlenbeck had not been provoked to act in an impulsive manner by Concrete Aggregates. 25 FMSHRC 283-84. Reasonable people could reach opposite conclusions on this factual issue. Consequently, the Secretary's position was substantially justified on the facts. The Secretary cannot be expected to predict how the judge will analyze the evidence when making credibility determinations and findings of fact on close issues. *James Ray, employed by Leo Journagan Construction Co.*, 20 FMSHRC 1014, 1027 (Sept. 1998).

The Applicant's arguments are not well taken. Most of its arguments quarrel with the factual findings and legal conclusions in the underlying decision. For example, contrary to the Applicant's argument, the Secretary was not required to establish that the arbitration provision in the subject form actually threatened Muehlenbeck's rights under the Mine Act. Consequently, Applicant's arguments are rejected.

## **B. Special Circumstances**

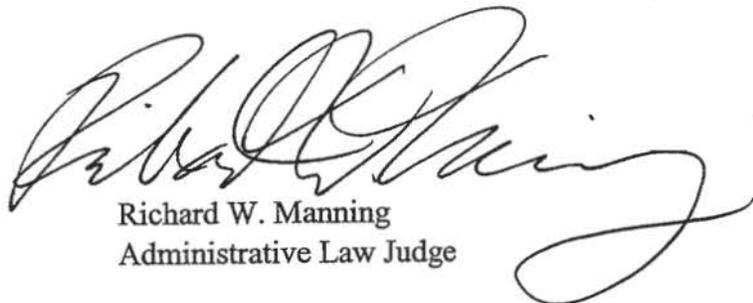
The Secretary argues that the granting of fees and expenses in cases brought under section 105(c) of the Mine Act will have an undue chilling effect upon the exercise of miners' rights. She maintains that it was not the intention of Congress, when it enacted the EAJ Act, to deter miners from pursuing the enforcement of their rights under the Mine Act. She cites the legislative history of the Mine Act which states, in the Senate Report, that section 105(c) was put in place to protect miners from any interference with the exercise of their statutory rights and that the Secretary is expected to rigorously enforce section 105(c). The Secretary argues that rigorous enforcement of the Mine Act will become more difficult if she is "preoccupied with concern that if she loses a case, for virtually any reason, she will automatically have to pay fees and expenses to the prevailing party." (Secretary's Objection at 10). The Secretary believes that the "award of fees and expenses in the context of section 105(c) cases in general, and this case in particular, presents special circumstances that make such an award unjust." *Id.* at 11.

Concrete Aggregates maintains that the \$14,200 that its counsel is seeking cannot reasonably be expected to have any chilling effect on the rights of miners. Since the Secretary expended substantially more resources in pursuing this case than \$14,200, if fiscal soundness is to be considered when evaluating a "chilling effect," then the Secretary should have paid Muehlenbeck his back wages and costs directly rather than bringing the underlying case. Concrete Aggregates argues that paying a mine operator's costs when the Secretary brings a discrimination case that is not substantially justified will not in any manner discourage miners or the Secretary from enforcing section 105(c) of the Mine Act.

In essence, the Secretary is asking that I rule that fees and expenses should never be awarded in discrimination cases, including cases in which the Secretary is unable to establish that her position was substantially justified, except in the most egregious of circumstances. Because I hold that the Secretary established that her position was substantially justified in the underlying case, I do not need to address this issue and I decline to do so.

## **II. ORDER**

For the reasons set forth above, the application for fees and expenses is **DENIED** and this proceeding is **DISMISSED**.



Richard W. Manning  
Administrative Law Judge

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RWM



**ADMINISTRATIVE LAW JUDGE ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

August 1, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-181-M
Petitioner	:	A.C. No. 42-00854-05557
	:	
v.	:	
	:	Bonanza Mines
AMERICAN GILSONITE COMPANY,	:	
Respondent	:	

**ORDER DENYING MOTION TO AMEND PETITION FOR  
ASSESSMENT OF PENALTY**

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the "Act"). On September 11, 2002, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 6274098 against American Gilsonite Company ("American Gilsonite") at its Bonanza Mines in Uintah County, Utah. The citation alleged a violation of the Secretary's safety standard at 30 C.F.R. § 57.6102(a)(1). That standard, entitled "Explosive Material Storage Practices," provides: "(a) Explosive material shall be – (1) stored in a manner to facilitate use of oldest stocks first." The body of the citation states:

At the powder/booster magazine located on the surface two boxes (both approximately ½ full) of Gelcoalite Z explosives were present. Both boxes showed severe signs of deterioration. The mine operator failed to establish a system for the use of the oldest stocks first; and a date of manufacture or shelf life of the explosives could not be provided. Employees were exposed to the possibility of injury due to its nature, as a chemical substance with severe deterioration.

On April 7, 2003, the Secretary filed a petition for assessment of a \$196 penalty for the citation. American Gilsonite filed its answer to the Secretary's petition on June 24, 2003, and the case was assigned to the undersigned judge.

On July 18, 2003, the Secretary filed a motion to amend her petition for assessment of penalty to allege a violation of 30 C.F.R. § 57.6900 rather than the safety standard cited by the MSHA inspector. As grounds for the motion, the Secretary states that "[u]pon further investigation, the Secretary believes that the facts underlying this Citation more appropriately constitute a violation of 30 C.F.R. § 57.6900, rather than section 57.6102(a)(1)." (S. Motion

1). Section 57.6900 provides: “Damaged or deteriorated explosive material shall be disposed of in a safe manner in accordance with the instructions of the manufacturer.”

Citing Commission case law, the Secretary contends that she is entitled to amend her petition for assessment of penalty because American Gilsonite “will not be prejudiced by the granting of [the] motion insofar as the facts and circumstances underlying the violation are identical, as is the evidence the Secretary will rely upon at the hearing in this matter.” *Id.* at 2. The Secretary also maintains that because the parties have not yet engaged in discovery, American Gilsonite has ample opportunity to prepare its defense.

American Gilsonite maintains that it will be prejudiced by the granting of the motion because the proposed amendment places different facts at issue than the original citation. Under the citation as issued by the inspector, the facts at issue are “whether the explosive material was stored in a manner to facilitate the use of the oldest stocks first.” (A.G. Response 2). Under section 57.6900, the facts at issue would be “whether the explosives at issue were damaged or deteriorated” and “whether American Gilsonite failed to dispose of the explosives in a safe manner . . . in accordance with the manufacturer’s instructions.” *Id.* at 3. As a consequence, the critical facts at issue are completely different. A violation of the cited safety standard does “not hinge on whether the explosives were damaged or deteriorated, nor [does] it matter how American Gilsonite intended to dispose of the explosives.” *Id.* Under the proposed amendment, “the age of American Gilsonite’s explosives and its inventory system are meaningless and all the above-mentioned facts that did not matter before are now critical.” *Id.* at 4. American Gilsonite states that, because of the nature of the allegations in the citation, it did not believe that it was necessary to photograph the explosives, to preserve a sample of the explosives, or to have an expert examine the explosives and render an opinion on the “precise nature and extent of their ‘deterioration’ and stability prior to their return to the manufacturer for destruction.” *Id.* at 7. American Gilsonite believes that amending the citation at this time will severely prejudice its ability to defend itself.

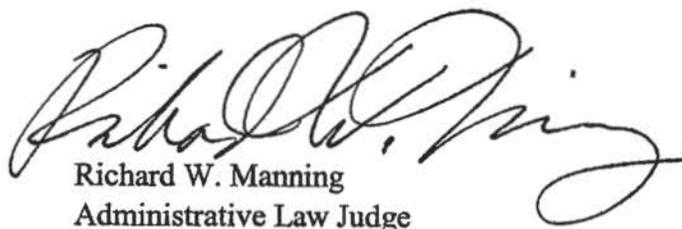
The Commission has held that the modification of a citation is analogous to the amendment of pleadings under Fed. R. Civ. P. 15(a). *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990). Leave to amend pleadings “shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). Amendments are to be liberally granted unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed. *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (citation omitted). It is clear that this case does not fall into any of these exceptions.

Prejudice to the opposing party may also bar an otherwise permissible amendment. *Wyoming Fuel*, 14 FMSHRC at 1290; *Cyprus Empire*, 12 FMSHRC at 916; *Higman Sand & Gravel, Inc.*, 25 FMSHRC 175, 183 (April 2003) (ALJ). The issue here is whether American Gilsonite will suffer “legally recognizable prejudice” if the motion to amend is granted. *Wyoming Fuel*, 14 FMSHRC at 1290. For the reasons set forth below, I find that American Gilsonite will be legally prejudiced if I grant the Secretary’s motion.

The facts underlying a violation of section 57.6102(a)(1) is quite different from the facts underlying a violation of 57.6900. Although both standards concern explosives, their similarity ends there. Under the standard cited by the inspector, American Gilsonite would be required to produce evidence concerning its manner of storing explosives. If the citation is amended, American Gilsonite would be required to marshal evidence concerning the condition of the explosives cited by the inspector and the method of their disposal. American Gilsonite disposed of the explosives to abate the citation. Because the citation did not charge American Gilsonite with a violation of section 57.6900, American Gilsonite did not attempt to gather evidence as to the condition of the explosives. If American Gilsonite had been initially charged with a violation of section 57.6900, it could have had the cited explosives analyzed to determine whether they were sufficiently "damaged or deteriorated" to violate the standard or to create a safety hazard. The citation alleges that the violation was of a significant and substantial nature. Although the citation states that the cited explosives "showed severe signs of deterioration," that was the backdrop for the inspector's conclusion that the company was not properly storing the explosives to ensure that the oldest stocks were used first. The method of storing explosives was at issue in the citation rather than the degree of deterioration and manner of disposal of explosives. Thus, I find that the proposed amendment to the petition for assessment of penalty will legally prejudice American Gilsonite.

Commission Administrative Law Judge Gary Melick reached a similar conclusion in *Harmon Mining Corp.*, 15 FMSHRC 143 (Jan. 1993). In that case, the Secretary sought to amend a citation alleging a violation of section 75.520, requiring that safe switches be provided for electric equipment, to a violation of section 75.514, requiring that electrical connections and splices be mechanically and electrically suitable. The mine operator did not perform any tests on the electrical circuits because such tests would not be necessary to defend against the citation as written by the inspector. By the time the Secretary filed the motion to amend, the mine was closed and sealed. As a consequence, the judge found that the mine operator was "at an extreme disadvantage in attempting to defend itself . . . and would indeed suffer legal prejudice by the proposed amendment." *Id.* at 148.

For the reasons set forth above, I find that the proposed amendment will legally prejudice American Gilsonite. Consequently, the Secretary's motion to amend the petition for assessment of penalty in this case is **DENIED**.

  
Richard W. Manning  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

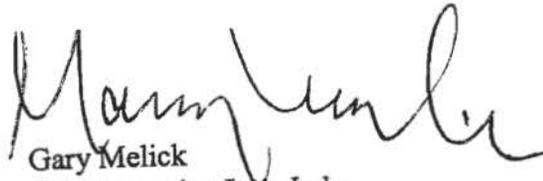
OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001

August 5, 2003

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on behalf of	:	Docket No. KENT 2003-313-D
CHARLES SCOTT HOWARD,	:	BARB CD 2003-07
Complainant	:	
v.	:	Cave Spur No. 1
	:	Mine ID 15-18197
CAVE SPUR COAL, LLC, and PANTHER	:	
MINING, LLC, and BLACK MOUNTAIN	:	Cave Spur No. 1
RESOURCES, LLC.,	:	Mine ID 15-18198
Respondent	:	

**ORDER TO PROVIDE ADDITIONAL SERVICE**

Mr. J. Phillip Giannikas of the Nashville Office of the Solicitor has reported that he will be on extended vacation and otherwise engaged from August 11, 2003 through September 24, 2003, and asks that no proceedings be scheduled in this case for that period. It is unacceptable that Commission proceedings expedited under Section 105(c) of the Federal Mine Safety and Health Act of 1977, be delayed under such circumstances. Accordingly, during the period of Mr. Giannikas' absence all pleadings, notices and other matters in this case will be served upon Mr. Giannikas as well as to Theresa Ball, who is in charge of the Nashville Solicitor's Office, to assure that the Secretary is appropriately represented during Mr. Giannikas' absence.

  
Gary Melick  
Administrative Law Judge  
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