

SEPTEMBER 1988

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ADMINISTRATIVE LAW JUDGE ORDERS

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SEPTEMBER 1988

Review was granted in the following cases during the month of September:

Secretary of Labor, MSHA v. Southern Ohio Coal Company, Docket No. LAKE 87-95-R, 88-26. (Judge Weisberger, July 28, 1988)

Secretary of Labor, MSHA v. Middle States Resources, Inc., Docket No. WEVA 88-154. (Chief Judge Merlin, Default order of August 15, 1988)

Secretary of Labor, MSHA v. Ten-A Coal Company, Docket No. WEVA 88-136. (Chief Judge Merlin, Default order of August 15, 1988)

Secretary of Labor, MSHA v. Garden Creek Pocahontas Company, Docket No. VA 88-9, 88-10, 88-11. (Judge Melick, August 19, 1988)

Secretary of Labor, MSHA on behalf of Michael Price and Joe John Vacha v. Jim Walter Resources, Docket No. SE 87-128-D. (Judge Broderick, August 26, 1988)

No cases were filed in which review was denied.

QUESTION

1. The following table shows the number of people who attended a concert in each of the five years from 2000 to 2004.

Year: 2000, 2001, 2002, 2003, 2004
Number of people: 1200, 1500, 1800, 2100, 2400

2. The following table shows the number of people who attended a concert in each of the five years from 2000 to 2004.

Year: 2000, 2001, 2002, 2003, 2004
Number of people: 1200, 1500, 1800, 2100, 2400

3. The following table shows the number of people who attended a concert in each of the five years from 2000 to 2004.

Year: 2000, 2001, 2002, 2003, 2004
Number of people: 1200, 1500, 1800, 2100, 2400

ANSWER

COMMISSION DECISIONS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 16, 1988

LOCAL UNION NO. 5817, DISTRICT 17, :
UNITED MINE WORKERS OF AMERICA :
(UMWA) :

v. :

MONUMENT MINING CORPORATION and :
ISLAND CREEK COAL COMPANY :

Docket No. WEVA 85-21-C

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

On February 23, 1988, the United States Court of Appeals for the District of Columbia Circuit issued its decision in this matter, styled International Union, UMWA v. FMSHRC, 840 F.2d 77 (D.C. Cir. 1988), reversing the Commission's decision (Local Union No. 5817, District 17, UMWA v. Monument Mining Corp. and Island Creek Coal Co., 9 FMSHRC 209 (February 1987)), and remanding for further proceedings consistent with its opinion.

In accordance with the Court's order, we are obliged to remand this matter to the administrative law judge originally assigned for further proceedings including, if necessary, consideration of any remaining challenges by Island Creek Coal Company to the complaint for compensation that have not been previously waived.



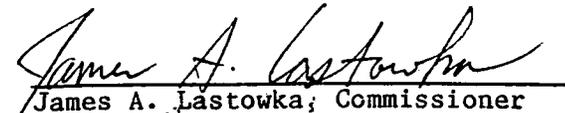
Ford B. Ford, Chairman



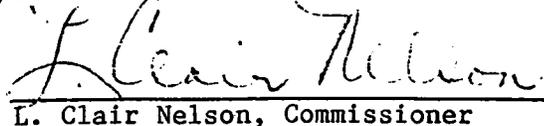
Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



James A. Lastowka, Commissioner



L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 20, 1988

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

v.

WILMOT MINING COMPANY

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Docket No. LAKE 85-47

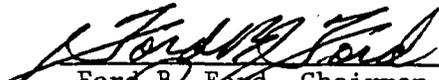
BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

ORDER

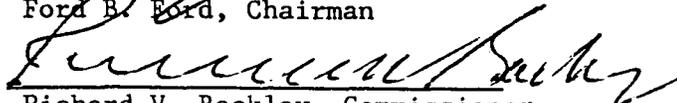
BY THE COMMISSION:

On May 17, 1988, the United States Court of Appeals for the Sixth Circuit issued its opinion in this matter, styled Wilmot Mining Company v. Secretary of Labor, etc., No. 87-3480 (per curiam). The Commission's decision, reported at 9 FMSHRC 684 (April 1984), was affirmed in part, reversed in part, and remanded for further proceedings.

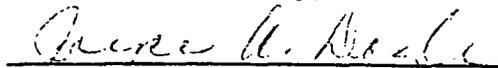
In relevant part, the Court concluded that substantial evidence did not support the Commission's determination, for civil penalty assessment purposes, of negligence with respect to the operator's violation of 30 C.F.R. § 77.403(a). The Court remanded the case to the Commission for reconsideration of the civil penalty assessment for that violation. In accordance with the Court's order, we remand this matter to the Commission administrative law judge originally assigned for further proceedings consistent with the Court's decision.



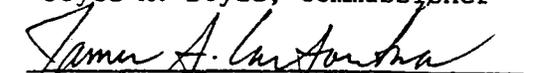
Ford B. Ford, Chairman



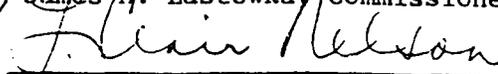
Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



James A. Lastowka, Commissioner



L. Clair Nelson, Commissioner

The conditions alleged by the Secretary of Labor ("Secretary") to constitute violations of section 75.305 occurred at Mettiki's mine located in Garrett County, Maryland. There are ten parallel entries in the main portion of the E-mains section (the "E-mains entries"). The crosscuts ("breaks") are numbered sequentially from the portals. See Exh. C-1. The mine is ventilated by an exhaust fan located at the portal of the No. 7 E-mains return, which exhausts air from the mine. At the same time, fresh air is pulled into the mine through the No. 4 and No. 5 portals.

In the early 1980's, as a result of squeezing 2/ in the E-mains entries, Mettiki drove three additional entries (the "Skipper entries") parallel to the E-mains entries. A block of coal (the "barrier block"), approximately 300 feet wide and 2,000 feet long, separates the E-mains entries from the Skipper entries and extends from Break 11 to Break 39. Intake air flows into the Skipper No. 1 entry from the E-mains intake entries at Break 11, courses the length of the barrier block, is reunited with the intake air in the E-mains entries at Break 40 and Break 50, and flows inby to ventilate the E-1 working section. Having crossed the working face, the air is then exhausted through the E-mains return entries. The Skipper No. 3 entry also exhausts return air and, at the intersection of Break 4 and E-mains No. 7 return entry, the return air from both the E-mains and Skipper No. 3 entry mix and the combined return air flows 600 or 700 feet to the No. 7 portal and out of the mine. (Skipper No. 2 entry is ventilated by neutral air.) See Exh. C-1.

On September 10 and 11, 1986, an inspector for the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted inspections at the mine. At this time, it was Mettiki's daily practice to examine the E-mains No. 5 intake entry and the E-mains Nos. 7 and 9 return escapeway for hazardous conditions. These entries were the only intake and return entries that Mettiki examined in their entirety at least once each week. Because the inspector believed that the Skipper intake and return entries were aircourses separate and distinct from the E-mains intake and return entries, he cited Mettiki for the alleged violations of section 75.305 in orders of withdrawal issued pursuant to section 104(d)(2) of the Act. 30 U.S.C. § 814(d)(2).

Subsequently, Mettiki contested the orders and the Secretary sought civil penalties for the violations. At the hearing on the consolidated matters, the parties disputed whether the Skipper intake and return entries were separate aircourses subject to section 75.305. The Secretary argued that the E-mains section contained two discrete sets of aircourses -- an intake and return aircourse on the E-mains side of the barrier block and an intake and return aircourse on the Skipper side of the barrier block. Mettiki maintained that the intake and

2/ "Squeezing" is defined as "the slow increase in weight on pillars or solid coal eventually resulting in such things as crushing of the coal, heaving of the bottom and the driving of pillars into soft floor or top." Bureau of Mines, U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 1062 (1968).

return entries on both sides of the block were part of the same aircourse. The parties agreed that Mettiki had examined the E-mains No. 5 intake entry escapeway and the E-mains Nos. 7 and 9 return escapeway as required by section 75.305. Therefore, the question before the judge was whether the cited Skipper intake and return entries were an aircourse separate and distinct from the E-mains intake and return entries rather than part of the same aircourse.

In his decision the judge rejected as "completely arbitrary" the Secretary's assertion that the Skipper No. 1 intake entry constituted a separate and distinct aircourse. 9 FMSHRC at 1093. The judge stated that the assertion was "not based on any definition of the term 'air course' in any relevant statute, regulation, MSHA policy, or industry past usage" and that the Secretary "presented no evidence of any prior consistent enforcement ... establish[ing] that Mettiki was on notice regarding the Secretary's interpretation [of section 75.305]." Id. The judge held that the Secretary did not prove that Mettiki violated section 75.305. He further stated that language of section 75.305 makes clear that an aircourse may consist of more than one entry and that in examining on a weekly basis at least one entry in each aircourse in its entirety, Mettiki complied with the standard. Id. For the same reasons, the judge also rejected the Secretary's argument that the Skipper No. 3 return entry constituted a separate and distinct aircourse. Id. Therefore, he vacated the contested orders of withdrawal. We granted the Secretary's petition for discretionary review.

We agree with the judge that the Secretary failed to prove the alleged violations. At the hearing, counsel for the Secretary maintained that the physical separation of the E-mains entries from the Skipper entries, caused by the barrier block, created separate aircourses. Tr. 10-11. MSHA supervisor Barry Ryan testified that while an aircourse may contain one or more entries, if the entries are "common" with one another they constitute a single aircourse, but if they are "split" they constitute separate aircourses. Tr. 98. On review, the Secretary paraphrases Ryan's testimony and argues that "if the air is divided, if the entries are not 'common with each other' and if there is no intermingling of air, then the entries or sets of entries constitute separate 'aircourses.'" S. Br. 7. The Secretary does not explain what is meant by entries that are "common with each other." Further, and as the judge noted, the Secretary offers no evidence regarding any relevant statutory or regulatory definition of aircourse, nor any evidence of custom, practice, or usage from which a meaning can be gleaned.

Mettiki maintains that section 75.305 contemplates that an aircourse may be comprised of many entries and that as long as the entries are ventilated by the same air they constitute a single aircourse. See Tr. 13. Mettiki's witnesses consistently testified that the E-mains and Skipper intake entries and the E-mains and Skipper return entries were all parts of the same aircourse and therefore examination of only one intake and one return entry was required by section 75.305. MSHA supervisor Ryan's testimony agrees with that of Mettiki's chief engineer and its mine foreman that the intake air in the

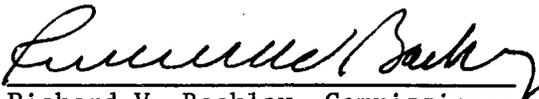
Skipper No. 1 entry mixes with the intake air in the E-mains entries at the bottom of the barrier block. Tr. 93-94, 102, 189, 191, 194-95; see also Exh. C-1. Ryan's testimony also acknowledges that the intake air in the Skipper No. 1 entry mixes with the E-mains intake at Break 50. Tr. 102; see also Exh. C-1. The record further establishes that the return air in the Skipper No. 3 entry is pulled by the exhaust fan up the entry, that it traverses Break 9, flows up E-mains No. 2 and 3 return entries where it mixes with return air at the intersection of Break 4 and E-mains No. 7 return entry. The mixed air then courses 600 to 700 feet to the return portal. Tr. 115-16, 206-07, 212; see also Exh. C-1. Thus, substantial evidence of record supports the judge's finding that in fact the air in the Skipper entries mixes freely with that in the E-mains.

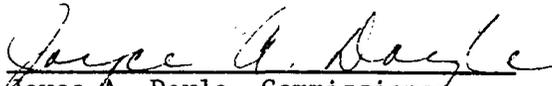
The judge adopted Mettiki's view that because the air in the E-mains and Skipper entries mixes, it is part of the same aircourse and held that Mettiki was in compliance with the standard. 9 FMSHRC at 1092-93. We agree. The plain requirement of section 75.305 is that "at least one entry in each intake and return aircourse be examined" (emphasis added). This obviously contemplates that an aircourse may consist of more than one entry. Thus, we conclude that the judge properly held that the Secretary did not prove that Mettiki violated section 75.305 and that Mettiki, by examining the E-mains No. 5 intake entry escapeway and the E-mains No. 7 and No. 9 return escapeway at least weekly in their entirety, complied with section 75.305.

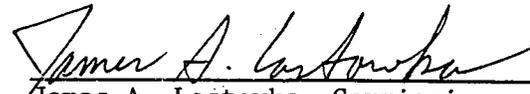
Our disposition is based on the record before us. We are not defining for all purposes the meaning of "aircourse" as used in section 75.305.

Accordingly, the decision of the administrative law judge is affirmed.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

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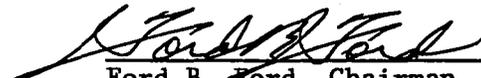
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Administrative Law Judge Gary Melick
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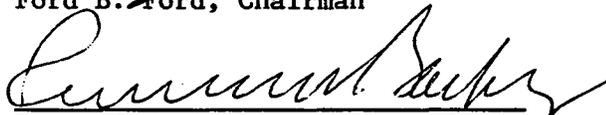
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In a case involving a similar situation, the Commission held that "under appropriate circumstances a genuine problem in communication or with the mail may justify relief from default." Con-Ag, Inc., 9 FMSHRC 989, 990 (June 1987). Upon consideration of the record and MSR's request for relief from default, we conclude that MSR should be afforded the opportunity to raise these issues with the judge, who shall determine whether relief from default is appropriate. Cf. Kelley Trucking Co., 8 FMSHRC 1867, 1869 (December 1986).

Accordingly, the judge's default order is vacated and this matter in remanded for proceedings consistent with this order.



Ford B. Ford, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



James A. Lastowka, Commissioner



L. Clair Nelson, Commissioner

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Federal Mine Safety & Health Review Commission
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 15, 1988

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEVA 88-136
 :
TEN-A COAL COMPANY :

BEFORE: Ford, Chairman; Backley, Lastowka, Doyle and Nelson,
Commissioners

ORDER

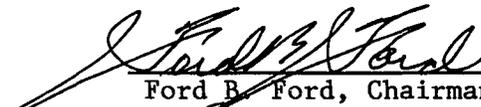
BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). On August 15, 1988, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent Ten-A Coal Company ("Ten-A") in default for failure to answer the Secretary of Labor's civil penalty complaint and the judge's subsequent order to show cause. The judge assessed a civil penalty of \$504 proposed by the Secretary. By letter dated August 29, 1988, addressed to Judge Merlin, Ten-A asserted that it had filed its "Blue Card" request for a hearing in this matter and had "never received any papers on this" until it received the default order. We deem Ten-A's August 29 letter, received by the Commission on August 31, to constitute a timely petition for discretionary review of the judge's default order. See, e.g., Mohave Concrete & Materials, Inc., 8 FMSHRC 1646 (November 1986). We grant the petition and summarily remand this matter to the judge for further proceedings.

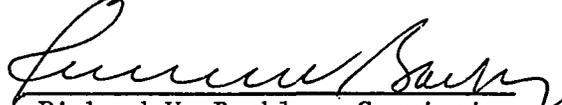
It appears from the record that Ten-A, a relatively small operator acting without counsel, did file a Blue Card request for a hearing in this matter in response to the Secretary's initial notification of proposed penalty. However, Ten-A did not file an answer to the Secretary's subsequent civil penalty complaint, as it was required to do in order to maintain its contest of that penalty proposal. See 29 C.F.R. § 2700.28. Accordingly, on June 9, 1988, Judge Merlin issued an Order to Respondent to Show Cause directing Ten-A to file an answer or be found in default. Ten-A did not respond to the show cause order. Ten-A has alleged that it "never received any papers on this" following its filing of the Blue Card and prior to receipt of the default order.

The record reflects that the Secretary's penalty proposal was served by first class mail on Ten-A at its proper address. The record also shows that the judge's show cause order was mailed to Ten-A on June 9, 1988, by certified mail, return receipt requested, at the proper address, attention of Patrick H. Cunningham, Partner. The record contains the certified mail return receipt for that mailing, signed on June 14, 1988, by one Frank Cunningham. The Commission has recently noted that "under appropriate circumstances a genuine problem in communication or with the mail may justify relief from default." Middle States Resources, Inc., 10 FMSHRC ___, No. WEVA 88-154, slip op. at 2 (September 9, 1988), quoting Con-Ag, Inc., 9 FMSHRC 989, 990 (June 1987)(emphasis added). The record does not contain sufficient information to permit us to rule with respect to Ten-A's claims, but we remand this matter to the judge, who shall afford Ten-A the opportunity to present its explanation. The judge shall determine whether relief from default is appropriate under the circumstances presented. Cf. Perry Drilling Co., 9 FMSHRC 377, 380 (March 1987).

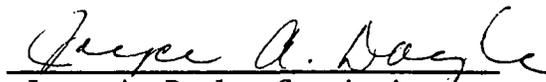
Accordingly, the judge's default order is vacated and this matter is remanded for proceedings consistent with this order. Ten-A is reminded to serve the Secretary of Labor with copies of all its correspondence and other filings in this matter. 29 C.F.R. § 2700.7.



Ford B. Ford, Chairman



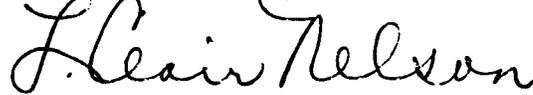
Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



James A. Lastowka, Commissioner



L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 19, 1988

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEVA 86-190-R
	:	WEVA 86-194-R
SOUTHERN OHIO COAL COMPANY	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	WEVA 86-254
	:	
SOUTHERN OHIO COAL COMPANY	:	

BEFORE: Ford, Chairman; Backley, Lastowka, Doyle, and Nelson,
Commissioners

ORDER

BY THE COMMISSION:

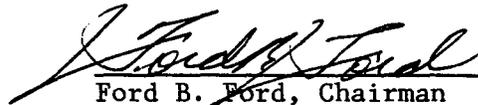
At issue in this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"), was the validity of a notice to provide safeguard issued to Southern Ohio Coal Co. ("Socco") pursuant to 30 C.F.R. § 75.1403. On August 19, 1988, the Commission issued a decision holding that substantial evidence does not support the Administrative Law Judge's conclusion that the notice to provide safeguard was issued improperly. The Commission reversed the judge's vacation of the contested order, and remanded the matter to the judge to consider Socco's contest of the order's special findings and to assess an appropriate civil penalty. 10 FMSHRC ____ (August 19, 1988). On August 29, 1988, the Commission received from counsel for Socco a Motion to Alter or Amend Judgment. Socco moves the Commission to enter a new decision in Socco's favor or to remand the matter to the judge for the taking of further evidence.

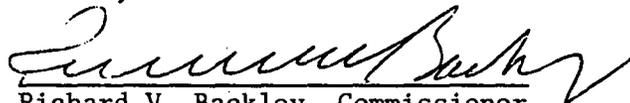
We view Socco's motion as being in the nature of a motion for reconsideration. 29 C.F.R. § 2700.75. The Secretary has not filed a response to the motion.

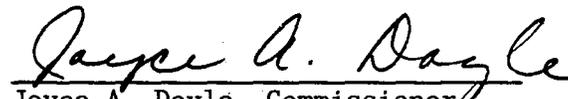
The main thrust of Socco's request is that, under the Mine Act,

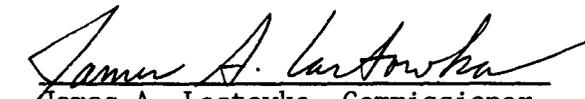
Commission review of an administrative law judge's decision is "limited to questions raised by the petition [for discretionary review]," 30 U.S.C. § 823(d)(2)(A)(iii). It asserts that the Commission has erred in deciding this case on a factual basis not raised in the Secretary's petition for discretionary review. We disagree with Socco's contention that the basis for our disposition was not within the proper scope of review. In her petition, the Secretary had expressly challenged, on evidentiary grounds, the judge's assertion that there was no basis for limiting the safeguard requirement at issue to the subject mine. S. PDR at 8. We agreed, and that was the basis for our decision. Slip op. 5-6. As for Socco's other assertions as to why our decision should be reconsidered, we have reviewed them and find them unpersuasive.

Accordingly, Socco's motion is denied. 1/


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

1/ Socco correctly notes that Docket No. WEVA 86-194-R was not at issue on review and need not be subject to further proceedings on remand.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 26, 1988

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
	:	Docket Nos. PENN 87-37
v.	:	PENN 87-38
	:	PENN 87-127
U.S. STEEL MINING COMPANY, INC.	:	PENN 87-157

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

This consolidated civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), involves four separate citations issued to U.S. Steel Mining Company, Inc. ("USSM") alleging "significant and substantial" violations of 30 C.F.R. § 75.601 for improperly labeled trailing cable receptacles at USSM's Cumberland Mine. 1/ The parties stipulated at the hearing that resolution of the issue in the present matter (Docket No. PENN 87-37) would determine the result in all four proceedings. Tr. 3-4. Accordingly, Commission Chief Administrative Law Judge Paul Merlin

1/ Section 75.601, a mandatory safety standard for underground coal mines, restates section 306(b) of the Mine Act ("Trailing cables"), 30 U.S.C. § 866(b), and provides:

Short circuit protection of trailing cables

Short-circuit protection for trailing cables shall be provided by an automatic circuit breaker or other no less effective device approved by the Secretary of adequate current-interrupting capacity in each ungrounded conductor. Disconnecting devices used to disconnect power from trailing cables shall be plainly marked and identified and such devices shall be equipped or designed in such a manner that it can be determined by visual observation that the power is disconnected.

(Emphasis added.)

consolidated the proceedings for hearing and decision. Judge Merlin determined that USSM violated section 75.601 by failing to plainly mark and identify trailing cable receptacles in order to identify the equipment plugged into each receptacle at the cited power center. 9 FMSHRC 1771 (October 1987)(ALJ). Judge Merlin also found that the violation of section 75.601 was of a "significant and substantial" nature as alleged in the citation and assessed a civil penalty of \$200 in each of the four proceedings. 9 FMSHRC at 1778. We subsequently granted USSM's petition for discretionary review. For the following reasons, we affirm the judge's decision.

The facts in this proceeding are not in dispute. On September 18, 1986, Charles Pogue, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a regular inspection at USSM's Cumberland Mine, an underground coal mine located in Greene County, Pennsylvania. Inspector Pogue observed that although the trailing cable plugs at the 8 Butt East Section's power center were plainly marked and identified with the names of the equipment that they powered (e.g., "S.C. 2" for shuttle car No. 2), the power center receptacles into which the plugs were inserted were not so marked. Instead, each trailing cable receptacle was labeled to identify the specific circuit breaker that controlled that receptacle. (Thus, the receptacles and circuit breakers were labelled "CKT 1" through "CKT 6.")

Inspector Pogue believed that USSM's identification system for power center components did not comply with section 75.601. After questioning management about USSM's marking system, which represented a departure from its prior labelling system, the inspector left the mine without issuing a citation. He returned to the MSHA Field Office in Waynesburg, Pennsylvania, in order to consult with his supervisor. Inspector Pogue returned to the Cumberland Mine on September 18, 1986, and issued a citation to USSM pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a "significant and substantial" violation of section 75.601. The citation states in relevant part:

As observed on September 18, 1986, at 9:30 a.m. the trailing cable receptacles were not properly identified or labeled so as to identify the electrical equipment plugged into the power center receptacles for the feeder, roof drill, welder, shuttle car no. 2, fan no. 2, scoop charger, ram car no. 2. Charger and continuous mining machine in the 8 Butt East [section].

The citation was terminated when USSM installed labels on the trailing cable receptacles to specifically identify the equipment plugged into each receptacle.

In finding a violation of section 75.601, Judge Merlin credited the testimony of the Secretary's expert witness, Willis E. Cupp, an MSHA electrical specialist, that a "plug and a receptacle [are] one thing" (Tr. 107), and concluded that both electrical components together constitute a disconnecting device for purposes of section 75.601. 9 FMSHRC at 1774-75. The judge stated, "[o]nly when one is separated

from the other does a disconnection occur. Therefore, they both together should be viewed as a unit for purposes of the mandatory standard." 9 FMSHRC at 1775. In reaching this conclusion, the judge also found that the Secretary's consistent interpretation of section 75.601 requirements since 1979 merited weight and should be accorded deference. 9 FMSHRC at 1776. 2/ Accordingly, he concluded that USSM had violated the standard as alleged. Finally, applying the Commission's Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981) and Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984) tests, he determined that the violation was of a significant and substantial nature. 9 FMSHRC at 1777-78.

On review, USSM contends that only the plug end of a trailing cable is a "disconnecting device" within the meaning of section 75.601 and that, therefore, the receptacle into which the trailing cable is plugged need not be "marked and identified" to correspond with that cable plug.

We conclude that the testimony of the MSHA witnesses in this case

2/ With regard to the Secretary's interpretative position, the MSHA Coal Mine Health and Safety Inspection Manual for Underground Coal Mines (March 9, 1978) provides, relative to section 75.601, that:

A visual means of disconnecting power from trailing cables shall be provided so that a miner can readily determine whether the cable is de-energized. Plugs and receptacles located at the circuit breaker are acceptable as visible means of disconnecting the power. These devices shall be plainly marked. For example, the loading machine cable disconnecting device shall be plainly marked (LOADER), the shuttle car cable disconnecting device shall be plainly marked (S.C. No. 1 or S.C. No. 2) or the disconnecting devices shall be readily identifiable by other equally effective means.

Similarly, the MSHA Coal Mine Safety Electrical Inspection Manual, Underground Coal Mines (June 1, 1983) states with reference to section 75.601 that:

Plugs and receptacles located at the circuit breaker ... are acceptable as visual means of disconnecting the power.

These devices shall be plainly marked for identification to lessen the chance of energizing a cable while repairs are being made on the cable. For example, the loading machine cable plug shall be plainly marked "LOADER," the shuttle car cable plug shall be plainly marked "S.C. No. 1" or S.C. No. 2."

Exhibits GX-2, GX-3.

affords substantial evidentiary support for the judge's finding that a trailing cable plug and receptacle are, in essence, an integrated disconnecting device for purposes of this standard. Although the term "disconnecting device" is not defined in the Act or the Secretary's regulations, the pertinent language of section 75.601 does not refer merely to such devices in a general sense, but rather focuses on devices "used to disconnect power from trailing cables." De-energization of equipment powered by a trailing cable is achieved, as relevant here, by disconnecting the trailing cable plug from a receptacle. The plug and receptacle are designed to be used together as a means of connecting or disconnecting power.

The Secretary's position requiring that particular trailing cable plugs and receptacles be labelled identically is a reasonable construction of section 75.601. ^{3/} Since a trailing cable plug and receptacle are used together to effect a disconnection and since the purpose of the identification requirement is to provide a ready means of ascertaining trailing cable power status, it is an appropriate reading of the standard to require that a particular receptacle be marked to correspond to a particular trailing cable plug.

As recognized by the judge, the Secretary's position regarding the marking of trailing cable receptacles has been applied consistently for a number of years. Indeed, the evidence shows that the labelling system argued for by the Secretary was used at the subject mine from 1979 until 1986. USSM first adopted and utilized the system in January 1979 after a fatal electrical accident involving power center equipment at the Cumberland Mine. Also, in 1984, we affirmed a "significant and substantial" finding with respect to a violation of the cited standard at the Cumberland Mine in 1982, where the trailing cable plugs on certain power center equipment were not identified to correspond to the receptacles that powered them. U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). Thus, it is apparent from the record that USSM has had longstanding notice of MSHA's interpretation of the requirements of section 75.601.

On review, USSM has presented no compelling reason why the Commission should disagree with the Secretary's interpretation. We reject USSM's contention that MSHA's internal policy statements in the manuals (note 2 supra) are inconsistent. Both refer to plugs and receptacles together as acceptable means of disconnecting power. We also reject USSM's argument that the Secretary's position with regard to

^{3/} While we have stated that secretarial interpretations or policy statements contained in such relatively informal publications as inspectors' manuals are not binding, we have also indicated that the expertise, soundness, and reasonableness of such interpretive matter may justify judicial deference in appropriate cases. See generally, e.g., King Knob Coal Co., 3 FMSHRC 1417, 1420-21 (June 1981). This is not a case where the Secretary has gone beyond the appropriate bounds of interpretation and attempted to revise or amend a mandatory standard outside the notice and comment publication requirements imposed by section 101 of the Mine Act. 30 U.S.C. § 811. Cf. King Knob, supra.

section 75.601 is inconsistent with requirements imposed by electrical safety standards at 30 C.F.R. §§ 75.511 and 75.903. As Judge Merlin noted, USSM's own witness admitted that receptacles, as well as plugs, are capable of being locked out and tagged before electrical repairs are performed pursuant to section 75.511. 9 FMSHRC at 1775. Similarly, MSHA Electrical Supervisor Gerald Davis testified that although section 75.903 is interpreted by MSHA to refer to plugs, that standard does not specifically address trailing cable disconnecting devices, the focus of this proceeding. See 9 FMSHRC at 1775. In any event, the present case requires us to construe only section 75.601, and we reserve construction of other standards addressing other concerns to cases raising such issues.

Finally, we reject USSM's argument that a finding of violation is precluded here because the cited system of power circuitry identification at the Cumberland Mine has been utilized in other USSM mines with MSHA approval. The Secretary's witnesses uniformly testified and the judge found that, with the isolated exception of USSM's Maple Creek Mine, MSHA has consistently enforced its interpretation of section 75.601 requirements at all mines. Tr. 87-88, 139-43; 9 FMSHRC at 1776. Although USSM's disputed circuitry identification system was also employed at USSM's Maple Creek Mine, MSHA Electrical Supervisor Davis testified that the use of that system resulted from temporary acquiescence by MSHA in circuit breaker identification requirements imposed by the Commonwealth of Pennsylvania. (MSHA's enforcement of its usual interpretation of section 75.601 at the Maple Creek Mine has been held in abeyance pending disposition of the present proceeding. Tr. 139-44.) The evidence thus reflects consistent enforcement of section 75.601 by MSHA over an extended period. Further, an inconsistent enforcement pattern alone does not estop the Secretary from proceeding under the interpretation of a standard it concludes is correct. See, e.g., King Knob, supra, 3 FMSHRC at 1421-22.

Thus, we conclude that the judge's finding of a violation of section 75.601 is supported by substantial evidence and is legally correct. We turn to the judge's additional finding that the violation was of a significant and substantial nature.

The Commission has held that a violation is properly designated as being of a significant and substantial nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., supra, 3 FMSHRC at 825. In Mathies Coal Co., supra, the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will

result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4. The Commission subsequently stated that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984).

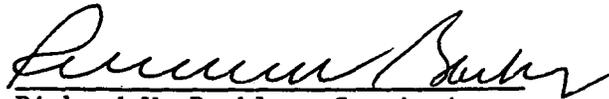
USSM primarily contests the judge's findings with respect to the third element of the National Gypsum test. The judge determined that "it was reasonably likely that the wrong piece of equipment would be energized or that delay would occur in de-energizing the correct piece of equipment which would cause serious injury to [a] miner." 9 FMSHRC at 1777. We conclude that substantial evidence supports these findings.

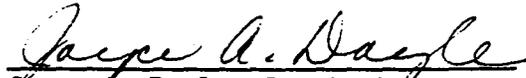
MSHA Electrical Supervisor Davis testified without rebuttal that, "[w]hen it comes to working with cables, they are [the] most dangerous area in the mine." Tr. 165. MSHA Electrical Specialist Cupp testified that there is a strong potential for electrical accidents when several pieces of equipment are being worked on simultaneously, and it can be difficult to distinguish which trailing cable powers what equipment because the cables "sometimes resemble spaghetti, the way they are all wrapped around one another." Tr. 115-16. Without the required identification of the receptacles serving as an additional visual cue to alert the miner as to which cable is energized, a miner "may energize the wrong trailing cable, and that would be [connected to] the piece of equipment that is now being worked on, and an accident could occur...." Tr. 116. Further, there was also evidence that identification tags sometimes become dislodged from plugs. Tr. 47, 53, 56, 231-33. Under MSHA's system, however, labelling the receptacles serves as a backup to labelling the plugs and reinforces easy recognition of energization status. Tr. 56-57, 114, 150-52. In light of the evidence of record, we agree with the judge that the failure to label receptacles to identify the equipment each powers contributes to a discrete safety hazard of misidentification of power center circuitry, reasonably likely to result in electrical shock or electrocution to miners working with or repairing electrical equipment.

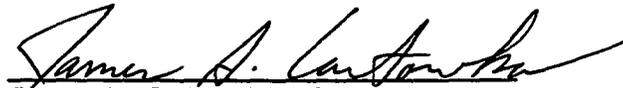
USSM does not dispute that any injury resulting from accidental energization or de-energization of a trailing cable would be of a reasonably serious nature. It argues, however, that the existence of the emergency stop ("crash") button at the power center eliminates any hazard of electrical shock created by misidentification of circuitry due to a violation of section 75.601. Assuming arguendo that miners used the crash button in the event of an incident, the de-energization of the power center circuitry would not serve the purpose of the labelling requirement, to prevent accidental energization of equipment in the first instance. We accordingly conclude that substantial evidence supports the judge's finding that USSM's violation of section 75.601 was of a significant and substantial nature. Accord, U.S. Steel Mining Co., supra, 6 FMSHRC at 1836-38 (failure to label shuttle car trailing cable plug constituted significant and substantial violation).

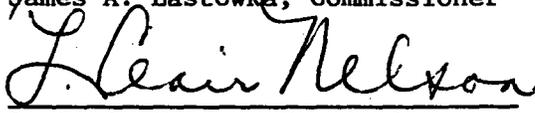
For the foregoing reasons, the judge's decision is affirmed.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

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Chief Administrative Law Judge Paul Merlin

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 26, 1988

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
on behalf of BOBBY G. KEENE :

v. :

Docket No. VA 86-34-D

S&M COAL COMPANY, INC., :
TOLBERT P. MULLINS, and :
PRESTIGE COAL COMPANY, INC. :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY: Ford, Backley, Doyle and Nelson

This proceeding involves a discrimination complaint brought by the Secretary of Labor on behalf of Bobby G. Keene against S&M Coal Company, Inc. ("S&M"), Tolbert P. Mullins, and Prestige Coal Company, Inc. ("Prestige"), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"). Following a hearing on the merits, Commission Administrative Law Judge Gary Melick concluded that S&M had discriminated against Keene in violation of section 105(c)(1) of the Mine Act by discharging him for engaging in a protected work refusal, 30 U.S.C. § 815(c)(1) 1/; that Prestige, as the successor-

1/ Section 105(c)(1) provides in pertinent part:

Discrimination or interference prohibited;
complaint; investigation; determination; hearing

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

in-interest to S&M, is jointly and severally liable for the consequences of this discriminatory discharge; and that subsequent to S&M's discriminatory discharge of Keene, Mullins personally discriminated against Keene in violation of section 105(c)(1) by refusing to reemploy Keene except under illegal and hazardous conditions. 9 FMSHRC 401 (March 1987) (ALJ). We granted the petition for discretionary review filed collectively by S&M, Prestige, and Mullins ("the operators"). For the reasons that follow, we conclude that the judge's finding that S&M discriminatorily discharged Keene for engaging in a protected refusal to work is supported by substantial evidence, but that the judge erred in finding that Prestige was a successor-in-interest to S&M and in finding that Mullins, as an individual, discriminated against Keene. Accordingly, we affirm in part and reverse in part.

I.

From September 1985 through February 13, 1986, Keene was employed by S&M at its No. 4 underground mine in Tookland, Virginia, as a certified electrical repairman and maintenance foreman. Keene's duties included maintaining the electrical equipment in the mine and keeping the electrical examination books for federal and state regulatory purposes. 2/ Prior to his arrival at S&M, Keene held a similar position at Mullins Coal Company until Tolbert Mullins, the president of Mullins Coal as well as S&M, requested that Keene transfer to S&M.

Keene testified that during his employment at S&M he became concerned that "there was too much bridging going on." Dec. 2 Tr. 38. 3/ ("Bridging" or "bridging-out" is the practice of rewiring electrical equipment in order to bypass the equipment's disconnecting devices, usually the circuit breaker, thus rendering the safety features ineffective. Dec. 2 Tr. 38, 164.) According to Keene, two or three weeks prior to February 13, 1986, Mine Superintendent Monroe Nichols asked him on two separate occasions to bridge-out the ground fault monitor systems on the transformer and the continuous mining machine ("continuous miner"). 4/ Keene testified that he refused to bridge-out

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....

30 U.S.C. § 815(c)(1).

2/ 30 C.F.R. § 75.1804 provides that results of required examinations of electrical equipment be recorded in a book titled "Examination of Electrical Equipment."

3/ The hearing in this matter took place on December 2 and 3, 1986. Since the transcripts for each day are separately paginated, transcript references are by date and page number.

4/ According to Larry Brown, an electrical inspector for the Department of Labor's Mine Safety and Health Administration ("MSHA"),

the ground fault monitor systems on both occasions and made safety complaints about the use of the procedure to Nichols and Jerry Looney, the section foreman.

At the beginning of the day shift on February 13, 1986, Keene again voiced his concerns about the practice of bridging, this time to the other crew members accompanying him into the mine. He told the miners that the "bridging was going to have to be stopped." Dec. 2 Tr. 44, 116, 140. (One of the miners to whom Keene spoke, Darrell Matney, testified that prior to February 13 he had heard Keene make similar safety complaints and tell Nichols that if the bridging were not stopped "somebody's going to get killed." Dec. 2 Tr. 138-40.) Around 10:30 a.m., after the crew had started to work, the circuit breaker of a continuous miner tripped, thereby rendering the equipment inoperative. Keene repaired the cable leading to the continuous miner and mining was resumed. Shortly thereafter, the circuit breaker at the transformer tripped and the continuous miner again was rendered inoperative. Keene twice attempted to reset the circuit breaker, but to no avail. Keene tested the cables and plugs with a voltmeter and, after determining that the cause of the short circuit was in the cable between a splice and the continuous miner, he informed Looney of his conclusion. According to Keene and Matney, Looney then instructed Keene to bridge-out the ground fault monitor system at the transformer. When Keene refused for safety reasons and insisted on repairing the cable, Looney told Keene to "get [his] bucket and go to the house." Dec. 3 Tr. 11-12; Dec. 2 Tr. 53, 144. Understanding this to be a discharge, Keene left the section. ^{5/} However, before leaving, Keene told Looney that he planned to report the incident to MSHA. Dec. 3 Tr. 12.

On his way out of the section, Keene met Mine Superintendent Nichols and told him that Looney had fired him for refusing to bridge-out the ground fault monitor system on the continuous miner. According to Keene, Nichols "laughed the matter off" and inquired as to whether Keene was certain there was a problem. Dec. 2 Tr. 55. Keene assured Nichols that there was a problem with the cable and informed him that he would report the matter to MSHA.

The next day, February 14, 1986, Keene filed a complaint with MSHA alleging that he was discriminatorily discharged by S&M in violation of

the ground fault monitor system is a small closed circuit that monitors the ground wire and is intended to protect miners from contacting electrical current. If a break in the ground occurs, the system interrupts current to the cable and the electrical equipment. Bridging-out the ground fault monitor system renders it useless as a protective device and potentially subjects anyone coming into contact with the equipment to a fatal electrical shock. Dec. 2 Tr. 162-64; see also id. at 57-58.

^{5/} Both the Commission and the Sixth Circuit Court of Appeals agree that this language is synonymous with a discharge in the mining industry. See, e.g., Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1479 (August 1982), aff'd sub nom. Whitley Development Corp. v. FMSHRC, No. 84-3375, slip op. at 2 (6th Cir. July 31, 1985).

section 105(c)(1) of the Mine Act. MSHA initiated an investigation of the complaint. Prior to a conclusion by MSHA regarding the merits of the complaint and at the suggestion of MSHA's investigator, Keene telephoned Mullins on February 26, 1986, to discuss a possible resolution of the complaint. After discussing a monetary settlement, Keene and Mullins discussed Keene's returning to work at S&M. Mullins requested that Keene return to work at his previous position as a certified electrical repairman and maintenance foreman. Keene testified that, in response, he explained that he would not return to his old position because he did not want to be "responsible for the electrical [examination] books and conditions that everybody was bridging-out inside the mines." Dec. 2 Tr. 61. Keene further testified that when he requested a second shift job operating a shuttle car, Mullins replied that only Keene's original job as electrician on the day shift was available and that he could not pay electrician's wages to someone not doing an electrician's job. Keene testified that Mullins said that Keene would not have to record everything he saw or found in the examinations books. Keene summed up the conversation as follows: "[Mullins] told me that I would have to come back to my original job under the original circumstances I was working under. ... I told [him] ... that it was too big a hazard for me to come back as electrician on day shift." Dec. 2 Tr. 62-63. Therefore, Keene refused to return to work at S&M under the existing conditions. In May 1986, S&M was shut down due to economic conditions.

Prestige, a surface coal mining operation, commenced mining on November 1, 1986, "in the same hollow, about a mile and a half up [from S&M] ... on the top of the mountain." Dec. 2 Tr. 196-97, 202-03. According to Mullins' testimony, he and his wife own all of S&M and about 55% of Prestige, with the remaining interest being owned by three other unrelated individuals. Prestige had been incorporated for more than a year, awaiting its strip mining permit, before it commenced operations. Dec. 3 Tr. 196. Prestige does not mine on the same lease as that mined by S&M, nor does it utilize any of S&M's equipment. Dec. 3 Tr. 39. All of the equipment at Prestige's operation is diesel, rather than electrical, and a certified electrician is neither required nor employed. Dec. 3 Tr. 36. Of its eight employees, only two were previously employed at S&M. Dec. 3 Tr. 204.

Subsequent to S&M's shutdown, MSHA concluded its investigation of Keene's complaint and determined that Keene had been unlawfully fired by S&M on February 13, 1986. Accordingly, the Secretary filed an action against S&M on Keene's behalf alleging that he was discharged by S&M for refusing to continue the illegal and unsafe practice of rendering safety features inoperative on electrical equipment. Subsequently, the Secretary moved, on August 4, 1986, for leave to file an amended complaint naming Tolbert Mullins, his wife, Shirley Mullins, and Jewell Smokeless Coal Corporation ("Jewell Smokeless") as additional respondents, alleging that they were liable for damages arising from the February 13, 1986, act of discrimination. The motion was granted but before the hearing Jewell Smokeless reached a settlement with Keene whereby it agreed to require any subsequent operator of the mine where Keene had worked to rehire him. Jewell Smokeless was dismissed from the proceeding.

After a hearing, the administrative law judge concluded that Keene was improperly discharged in violation of the Act when he was given the choice of performing the illegal bridging-out procedure or leaving the section. 9 FMSHRC at 405. The judge found that Keene had a good faith, reasonable belief that the procedure was hazardous and that its inherent dangers "were obvious and admittedly known to both Looney and Nichols," thereby obviating any need for Keene "to further 'communicate' the nature of the hazard to mine management." Id.

The judge also found that Mullins, as a "person" within section 105(c)(1), individually discriminated against Keene when Mullins "refus[ed] to reemploy Keene except under illegal and dangerous conditions." 9 FMSHRC at 405-06.

Finally, the judge found that, within the framework of the criteria set forth by the Commission in Munsey v. Smitty Baker Coal Co., Inc., 2 FMSHRC 3463 (1980), aff'd sub nom. Munsey v. FMSHRC, 595 F.2d 735 (D.C. Cir. 1978), 701 F.2d 976 (D.C. Cir. 1983), cert. denied 464 U.S. 857 (1983), Prestige, which had been added as an additional respondent at the beginning of the hearing, was a successor-in-interest to S&M and was thus jointly and severally liable for S&M's discriminatory actions. 9 FMSHRC at 406.

To remedy the unlawful discrimination, the judge ordered S&M and Prestige, jointly and severally, to pay Keene costs and backpay with interest. The judge also ordered Mullins, jointly and severally with S&M and Prestige, to pay costs and backpay dating from Mullins' subsequent act of discrimination on February 26, 1986. The judge further ordered Prestige to hire Keene in a capacity commensurate with his skills and at no less pay than he was receiving at the time of his discharge. S&M, Prestige, and Mullins, jointly and severally, were ordered to pay a civil penalty of \$1,000. 9 FMSHRC at 407.

II.

The principal issues presented on review are whether Keene engaged in a protected work refusal on February 13, 1986, for which he was unlawfully discharged, whether Prestige is a successor-in-interest to S&M and is thereby jointly and severally liable for S&M's obligations to Keene arising from any such discriminatory actions, and whether Mullins, as an individual, discriminated against Keene. On review, the operators assert that the evidence is insufficient to support a finding that S&M and Mullins discriminated against Keene or that Prestige is a successor-in-interest to S&M.

The Commission's role in reviewing a judge's decision is to determine whether his factual findings are supported by substantial evidence and whether the judge correctly applied the law. 30 U.S.C. § 823(d)(2)(A)(ii). See also Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Thurman v. Queen Anne Coal Company, 10 FMSHRC 131, 133 (February 1988). The initial question is whether S&M discriminated against Keene by discharging him on February 13, 1986. The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination

under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 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 protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th 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 motivation for Keene's discharge is not disputed. All of the parties agree that Keene refused to perform the bridging-out procedure on February 13, 1986, and was discharged by the section foreman because of that refusal. The primary issue presented, therefore, is whether Keene's work refusal was protected under the Mine Act. If the work refusal was protected, the discharge was unlawful. See, e.g., Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 229-30 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 472-73 (11th Cir. 1985); Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 132-33 (February 1982); Smith v. Reco, Inc., 9 FMSHRC 992, 994-95 (June 1987).

A miner has the right under section 105(c) of the Mine Act to refuse to work if the miner has a good faith, reasonable belief that continued work involves a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12. See also, e.g., Metric Constructors, supra. Where reasonably possible, a miner refusing to work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that a hazardous condition exists. Reco, supra, 9 FMSHRC at 995; Dunmire & Estle, supra, 4 FMSHRC at 133-35. See also Miller v. Consolidation Coal Co., 687 F.2d 194, 195-97 (7th Cir. 1982)(approving Dunmire & Estle communication requirement).

Keene testified that he was concerned about the continued practice of bridging-out electrical equipment because anyone touching bridged-out equipment could be electrocuted. MSHA's electrical inspector, Larry Brown, confirmed that individuals who contact bridged-out electrical equipment risk fatal electrical shock. Brown testified without dispute that bridging-out is violative of two mandatory safety standards,

30 C.F.R. § 75.900 and § 75.902. ^{6/} There is no suggestion in the record that Keene's fear of bridging-out electrical equipment was not real. Given Keene's testimony about his safety concerns, and the inspector's confirmation that the practice of bridging-out electrical equipment can have serious, even fatal, consequences for miners, we hold that substantial evidence supports the judge's conclusion that Keene "entertained a good faith and reasonable belief that the procedure of 'bridging' was hazardous to himself or to anyone coming into contact with the 'bridged-out' miner." 9 FMSHRC at 405.

We also conclude that Keene met the Act's communication requirement. The judge found that the dangers inherent in bridging-out electrical equipment were obvious and admittedly known to the management of S&M and concluded that under these circumstances there was no need for Keene to "further 'communicate' the nature of the hazard to S&M." 9 FMSHRC at 405. Substantial evidence supports this finding. The testimony of Section Foreman Looney and Mine Superintendent Nichols reveals that mine management had sanctioned a practice it knew to be hazardous and violative of mandatory safety standards. Dec. 3 Tr. 12; Dec. 2 Tr. 227-28. In addition, Keene had previously expressed, but to no avail, his safety concerns regarding the practice. The Mine Act does not require a miner refusing work to communicate his belief in the health or safety hazard at issue if such communication would be futile. Dunmire & Estle, supra, 4 FMSHRC at 133. Thus, we agree with the judge that in the face of such an obvious and admittedly known safety hazard, there was no requirement that Keene further communicate his safety concerns to the operator on February 13, 1986.

We conclude, therefore, that there is substantial evidence to support the judge's finding that Keene had a good faith, reasonable belief in a hazardous condition and that he communicated his safety concerns to S&M. As a result, Keene engaged in a protected work

^{6/} 30 C.F.R. § 75.900, which restates 30 U.S.C. § 869(a), provides:

Low- and medium-voltage power circuits serving three-phase alternating current equipment shall be protected by suitable circuit breakers of adequate interrupting capacity which are properly tested and maintained as prescribed by the Secretary. Such breakers shall be equipped with devices to provide protection against undervoltage, grounded phase, short circuit, and overcurrent.

30 C.F.R. § 75.902, which restates 30 U.S.C. § 869(c), provides in pertinent part:

[L]ow- and medium-voltage resistance grounded systems shall include a fail-safe ground check circuit to monitor continuously the grounding circuit to assure continuity which ground check circuit shall cause the circuit breaker to open when either the ground or pilot check wire is broken....

refusal. See also Secretary on behalf of Cameron v. Consolidation Coal Co., 7 FMSHRC 319, 321 (March 1985), aff'd sub nom. Consolidation Coal Co. v. FMSHRC, 795 F.2d 364, 367-68 (4th Cir. 1986)(Mine Act extends protection against discrimination to miner who refuses to perform an assigned task because such performance would endanger the health or safety of another miner). Therefore, we hold that Keene was discriminatorily discharged by S&M on February 13, 1986.

III.

The next question is whether the judge properly found Prestige to be jointly and severally liable for S&M's unlawful act of discrimination as a successor-in-interest to S&M. The Commission has recognized that in certain cases the imposition of liability on a successor is appropriate. Munsey, supra; Secretary on behalf of Corbin v. Sugartree Corp., 9 FMSHRC 394 (March 1987), aff'd sub nom. Terco v. FMSHRC, 839 F.2d 236 (6th Cir. 1987).

However, before the appropriateness of imposing liability can be resolved, it is necessary in the first instance to determine whether Prestige is even a successor. In the cases in which the Commission and the courts have found successorship liability there has been some type of transaction (a "transactional element") with respect to the business between the predecessor and the entity against which liability is being asserted and/or there has been a continuation of activity at the predecessor's site. In Munsey, supra, for example, the company that was held liable as a successor had acquired leases and mining equipment from the former employer, substantially replacing the predecessor's operation. Similarly, in Terco, supra, successorship liability attached because there was substantial continuity of business interests at the same site.

Assumption of the predecessor's position by the successor underlies the successorship cases. For example, in Wiley & Sons v. Livingston, 376 U.S. 543 (1964), successorship was found where the predecessor company was merged into the acquiring company, a process that also involved the wholesale transfer of the predecessor's employees to the successor. The Court observed that for an employer to be considered a successor, there must be a substantial continuity in the identity of the business enterprise before and after a change, Wiley, supra, 376 U.S. at 551. Another example of the acquisition element underlying these cases can be found in Golden State Bottling Co. v. NLRB, 414 U.S. 168, (1973) which involved a bona fide purchase of a company that had committed an unfair labor practice. Issuance of a reinstatement and back-pay order was upheld against the acquiring company, which occupied the site where the unfair practice had occurred.

In this case there has been no transactional element nor has there been a continuation of activity at the same site. Rather, Prestige is a pre-existing company that commenced mining some months later at a different site on a lease owned by a different, unrelated company, using equipment that was not acquired from, nor previously used by, S&M. Thus, Prestige cannot be considered to be a successor and it cannot properly be assessed with successorship liability.

However, even if Prestige had occupied the status of a successor, we would still conclude that it should not be held liable for the consequences of S&M's act of discrimination. In determining whether a successor should be liable to remedy the unlawful discrimination of its predecessor, the Commission has followed the courts and has approved consideration of nine specific factors:

- (1) whether the successor company had notice of the charge,
- (2) the ability of the predecessor to provide relief,
- (3) whether there has been a substantial continuity of business operations,
- (4) whether the new employer uses the same plant,
- (5) whether he uses the same or substantially the same work force,
- (6) whether he uses the same or substantially the same supervisory personnel,
- (7) whether the same jobs exist under substantially the same working conditions,
- (8) whether he uses the same machinery, equipment and methods of production and
- (9) whether he produces the same products.

2 FMSHRC at 3465-66 (restating factors set forth in EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1094 (6th Cir. 1974)); see also Terco, supra, 839 F.2d at 238-39. These similar factors have been applied under both the Civil Rights Act of 1964 (e.g., MacMillan Bloedel, supra) and the National Labor Relations Act (e.g., NLRB v. Winco Petroleum Co., 668 F.2d 973, 976-78 (8th Cir. 1982)).

As pointed out in Munsey, supra, 2 FMSHRC at 3467, and Sugartree, supra, 9 FMSHRC at 398, the key factor for determining successorship liability is whether there is a substantial continuity of business operations. This question is fact intensive and must be resolved on a case-by-case basis. Howard Johnson, Inc. v. Detroit Local Joint Executive Board, 417 U.S. 249, 256 (1974). In Sugartree, 9 FMSHRC at 398, the Commission emphasized that factors (3) through (9) provide the framework for analyzing whether there is a continuity of business operations and work force between the successor and its predecessor. Reviewing these factors in the context of this case, we conclude that substantial evidence does not support a finding that a substantial continuity of business operations exists between S&M and Prestige.

Prestige is a surface mining operation whereas S&M was an underground operation. Prestige's mine is located a mile and a half from S&M's mine and Prestige mines under a different coal lease. Moreover, the judge found that only two of Prestige's eight employees were employed previously by S&M. 9 FMSHRC at 406. (While the judge also found that Monroe Nichols, the supervisor at S&M, is the supervisor at Prestige, the record does not support such a finding. 7/) Therefore, not only do S&M and Prestige have different physical operations, Prestige does not use the same or substantially the same work force or

7/ There was no testimony as to Nichols' actual job at Prestige. Tolbert Mullins testified that another individual holds the position of supervisor. Dec. 2 Tr. 215.

supervisory personnel as S&M. Furthermore, the judge found that the machinery, equipment, and mining methods of Prestige and S&M are not the same and that the specific jobs differ between the two mining operations. 9 FMSHRC at 406. In spite of this finding, and, in spite of the uncontradicted testimony that a certified electrician was neither required nor employed, the judge concluded that "many of the [job] skills are transferable." Id. The record contains no evidentiary support for this conclusion. 8/

As previously noted, there has been no purchase or any other transaction or activity between Prestige and S&M with respect to S&M's business operations, assets, or stock as is frequently the situation in successorship cases. See, e.g., Howard Johnson, supra (successor was bona fide purchaser of assets of a restaurant and motor lodge); Wiley, supra (predecessor disappeared through a merger); Sugartree, supra (predecessor's leases were acquired). The doctrine of successorship liability was not intended to encompass a situation such as in this case where the record establishes that the alleged successor does not share with the predecessor the same physical plant, substantially the same work force, the same machinery, equipment, or methods of production, the same jobs and job skills, or the same business operations. While our dissenting colleague emphasizes the control that Mullins exercises over both S&M and Prestige and the interrelationship between the two corporations, those factors go not to the issue of successorship but rather to an alter-ego theory of liability in which the corporate veil is pierced in order to reach the controlling shareholder. The Secretary withdrew that theory of liability at the hearing (Dec. 3 Tr. 71), the judge made no finding of fact with respect to it, and it is not before us on review. Accordingly, we reverse the judge's finding that Prestige is a successor-in-interest to S&M and is jointly and severally liable for remedying S&M's illegal act of discrimination.

IV.

The final issue is whether Mullins is individually liable for discriminating against Keene in violation of section 105(c)(1) of the Act. The judge accepted Keene's testimony that during the telephone conversation of February 26, 1986, initiated by Keene at MSHA's suggestion, Mullins told Keene that he could return to work as an electrician and that Keene would not have to report instances of bridged-out electrical equipment in the electrical examination books. 9 FMSHRC at 406. On this basis, the judge found that Mullins, as an individual, was a "person" discriminating against Keene by "refus[ing] to reemploy Keene except under illegal and dangerous conditions." Id. 9/ We hold that substantial evidence does not support the judge's

8/ Although Prestige, through Mullins, had notice of the charge of discrimination, and although S&M and Prestige both mine coal, these factors along with S&M's inability to provide relief do not counterbalance a determination that there exists no continuity of business operations between S&M and Prestige.

9/ During closing arguments, in a colloquy concerning the Secretary's

finding that Mullins as a "person" unlawfully discriminated against Keene.

According to Keene, he had, at MSHA's suggestion, approached Mullins to discuss a possible settlement of his discrimination complaint against S&M. When a monetary solution of the complaint could not be reached, the subject of Keene's possible return to work was discussed. Keene's testimony reveals a request by him for a second shift job and a response by Mullins that no second shift jobs were available. Mullins then offered Keene his old job back under the same circumstances and suggested to him that he would not have to record everything that he found. While this offer did not resolve Keene's safety concerns, neither did it suggest any additional adverse action against Keene by Mullins, either in his role as president of S&M or outside of that role. We find no evidence that would cause the conversation to be characterized as anything other than an attempt by Keene and Mullins, in his role as president of S&M, to settle the original discrimination complaint. That their negotiations were unsuccessful does not change their character as settlement negotiations between Keene and S&M. Thus, we view this conversation as an outgrowth of the original illegal discharge by S&M and not as a separate act of unlawful discrimination by Mullins individually. Under these circumstances, we hold that Keene's testimony regarding the crucial aspects of the conversation does not support a finding by the judge of a separate act of discrimination by Mullins individually.

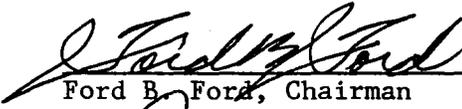
For the reasons stated above, we conclude that Keene was discriminatorily discharged by S&M for engaging in a protected work refusal on February 13, 1986. We also hold that Prestige is not a successor-in-interest to S&M and is not jointly or severally liable for the consequences of S&M's discriminatory discharge. Finally, we conclude that the judge erred in holding that Mullins personally discriminated against Keene during the telephone conversation of February 26, 1986.

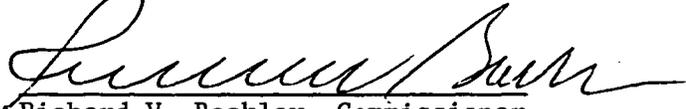
We recognize that our conclusion requires Keene to seek his remedy solely against S&M, which discontinued operations and is without liquid assets. The fact that Mullins, individually, and Prestige may be better able to provide relief does not justify a finding of individual liability against Mullins, where it is not supported by substantial evidence, nor a finding of successorship liability against Prestige where no substantial continuity of business operations exists.

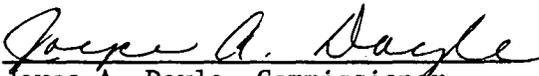
Accordingly, the judge's decision is affirmed in part and reversed in part. That portion of the judge's order requiring Prestige and Mullins to pay costs, backpay, interest, and a civil penalty for the

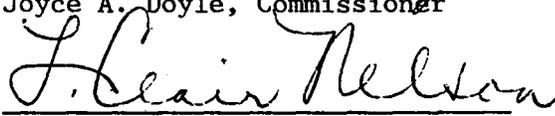
theories of liability, the judge suggested to the Secretary's counsel that the telephone conversation between Mullins and Keene provided a basis for establishing Mullins' personal liability apart from S&M's prior discriminatory actions. Dec. 3 Tr. 64-65. It was during this same colloquy that the Secretary's counsel stated that she was abandoning the claim that Mullins was liable for S&M's discriminatory acts on an alter-ego theory. Dec. 3 Tr. 70.

violation of section 105(c) is vacated, as is that portion requiring
Prestige to hire Keene.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

Lastowka, Commissioner, concurring in part and dissenting in part:

I agree with the majority that substantial evidence supports the factual findings underlying the judge's conclusion that Bobby G. Keene was illegally discharged for engaging in a work refusal protected by the Mine Act. In fact, the evidence in this record concerning the illegal and dangerous practice of bridging out electrical equipment at the S&M Mine is overwhelming. 1/ In refusing to carry out this unsafe and illegal act, Keene acted in a manner consistent with the dictates of the Mine Act. As a consequence, however, he lost his job.

Although the majority upholds the judge's finding of illegal discrimination, Keene's victory proves purely pyrrhic. By vacating the judge's findings that Tolbert Mullins personally discriminated against Keene and that Prestige Coal Company is a successor to S&M, the majority effectively denies Keene any remedy for the wrong they agree he has suffered. In doing so the majority not only usurps the fact-finding role of the administrative law judge, but also adopts a far too restrictive view of the reach of the Mine Act's anti-discrimination provision and the remedies available thereunder. Accordingly, I dissent from those parts of the majority decision reversing the decision of the administrative law judge.

I.

The Individual Liability of Tolbert Mullins

In their analysis of the issues presented by this case the majority first resolves a question of remedy, i.e., successorship, before determining the extent of the illegal discrimination suffered by Keene. Before the question of "who owes what" to Keene can be determined, however, it must first be determined "who did what" to him. Therefore, I will first

1/ The judge accurately described the serious nature of the violation as follows:

I find the acts of discrimination by S&M and Tolbert Mullins to be particularly serious in this case because of the direct impact they had on the safety of miners. Here the practice of bridging-out safety features on electrical equipment continued unabated after the discharge of Mr. Keene and after his discharge it was highly unlikely that anyone else would have protested the dangerous practice. In addition Mr. Mullins and the other S&M officials knew that they were requiring Keene to perform illegal and dangerous acts. Their discharge (and refusal to take back) Keene for refusing to perform such tasks was therefore willful.

9 FMSHRC at 407.

address the question of Mullins' personal liability for a separate act of discrimination against Keene. On this issue the judge stated:

The Complainant in this case also alleges that Tolbert Mullins is individually liable as a "person" unlawfully discriminating against him under section 105(c)(1).... According to Keene, on February 26, 1986, he telephoned Mr. Mullins at the request of the MSHA investigator in efforts to settle the case. Keene says that during the course of this conversation Mullins told him that he could have his job back but only as an electrician. Moreover in response to Keene's concerns about the illegal practice at S&M of "bridging-out" electrical equipment Mullins purportedly responded that Keene would not have to report the practice in the electrical inspection books. */ This conversational exchange is not disputed and accordingly I accept Keene's testimony in this regard. This evidence clearly supports a finding that Mullins, as an individual, was a "person" discriminating against Keene in violation of the Act in his refusal to reemploy Keene except under illegal and dangerous conditions. See Munsey v. Smitty Baker Coal Company, Inc., et al, 2 FMSHRC 3463 (1980).

*/ It is undisputed that Keene as a certified electrician would be legally required to report such violative conditions in the electrical inspection books.

9 FMSHRC at 405-406.

The only challenge to this portion of the judge's decision raised by Mullins in his petition for discretionary review is that Keene's version of the telephone conversation was, in fact, disputed. Testimony by Mullins concerning the telephone conversation is cited as creating a dispute as to its contents. Petition for Review at 3. In his brief on review Mullins simply reiterates this bare-bones factual challenge. Brief at 5.

Thus, Mullins has argued only on the factual basis that, contrary to the judge's finding, the content of the conversation was not as Keene had related. The judge, however, resolved this factual question in favor of Keene. Under the Mine Act credibility determinations are the province of the trier of fact (e.g., Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1629-30 (November 1986)), and we are bound by a substantial evidence standard of review. 30 U.S.C. § 823(d)(2)(A)(ii)(I). Donovan on behalf of Chacon v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). Measured against these standards, Mullins has presented no compelling argument for overturning the factual findings of the judge concerning the telephone conversation.

The majority goes further, however, and bases their reversal of the judge's finding that Mullins personally discriminated against Keene on the fact that Mullins' act of discrimination occurred during an attempt to settle Keene's complaint. The majority characterizes Mullins' act as a mere "outgrowth of the original illegal discharge by S&M and not as a separate act of unlawful discrimination by Mullins individually." Slip op. at 11.

Because this argument was never raised by Mullins, the issue is not properly before the Commission. The Mine Act expressly limits the Commission's authority in reviewing administrative law judges' decisions to only those questions raised by a party in its petition for review (30 U.S.C. §§ 823(d)(2)(A)(iii)) unless the Commission itself expressly identifies additional issues for review in accordance with the procedures set forth in 30 U.S.C. § 823(d)(2)(B). Donovan on behalf of Chacon v. Phelps Dodge Corp., supra, 709 F.2d 86, at 90-92. The Commission did not direct review sua sponte of any additional issues. Therefore, the majority errs in basing their reversal of the judge on an issue not raised by the parties and appearing as an issue for the first time in their decision.

In any event, I cannot agree with their view that because an act of illegal discrimination was committed while Keene was attempting to resolve his safety complaint short of litigation, it falls outside the reach of section 105(c). Given the administrative law judge's supported finding that Keene's return to work was conditioned by Mullins on Keene's not reporting hazardous conditions or illegal activities, surely Mullins' act contravenes section 105(c)'s mandate that "[n]o person shall ... interfere with the exercise of the statutory rights of any miner ... or applicant for employment...." 30 U.S.C. § 815(c). The legislative history underlying section 105(c) emphasizes that the section "is to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the "[Mine Act]" and that it was Congress' intent "to protect miners against not only the common forms of discrimination ... but also against the more subtle forms of interference...." S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978)(emphasis added). Congress further "emphasized that the prohibition against discrimination applies not only to the operator but to any person directly or indirectly involved." Id. (emphasis added). Thus, in view of the intended broad reach of section 105(c), the fact that Mullins' illegal act occurred during the course of a discussion to determine whether a prior illegal act could be remedied out of court can in no way serve as a shield protecting Mullins from the application of section 105(c). Such a result not only controverts section 105(c), but also perverts the Act's settlement process and flies in the face of sound public policy. 2/

In sum, the majority errs in sua sponte interjecting an issue not properly before the Commission and then incorrectly resolving the issue raised. In the end, the question of Mullins' personal liability for his violation of section 105(c) boils down to nothing more than a substantial evidence question. The judge's conclusion crediting Keene's version of the conversation over Mullins' has support in the record and rests on credibility grounds. The majority therefore errs in substituting its judgment for that of the trier of fact. Donovan on behalf of Chacon v. Phelps Dodge Corp., supra, 709 F.2d at 94.

2/ Concluding that an illegal act committed during a settlement discussion can form the basis for a separate cause of action does not, as the majority may feel, "chill" the settlement process. Proper settlements can not be conditioned on illegal terms. The practical impact, if any, of refusing to except settlement discussions from the reach of section 105(c) is that proper settlements will go forward, improper settlements will not. That is as it should be.

Prestige Coal Company's Liability

The administrative law judge held Prestige Coal Company jointly and severally liable to Keene for costs, damages and reinstatement as a successor-in-interest to S&M. In reaching this conclusion the judge followed the framework for analysis of successorship issues set forth by the Commission in Munsey v. Smitty Baker Coal Co., 2 FMSHRC 3463 (1980), aff'd in relevant part sub nom. Munsey v. FMSHRC, 701 F.2d 976 (D.C. Cir. 1981), and Secretary on behalf of Corbin v. Sugartree Corp., 9 FMSHRC 394 (1987), aff'd sub nom. Terco v. FMSHRC, 839 F.2d 236 (6th Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3770 (U.S. April 5, 1988) (No. 87-1808). Specifically, the judge applied the nine-factor successorship test set forth in EEOC v. MacMillan Bloedel Containers, 503 F.2d 1086 (6th Cir. 1974), which the Commission adopted in Munsey and followed in Sugartree and found based on the evidence that Prestige was liable as S&M's successor.

As previously discussed, in reviewing an administrative law judge's findings of fact the Mine Act imposes on the Commission a substantial evidence standard of review. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The question of whether Prestige is a successor to S&M is a question of fact subject to review under the substantial evidence standard. See Fall River Dyeing & Finishing Corp. v. NLRB, _____ U.S. _____, 107 S. Ct. 2225, 2235, 96 L.Ed. 2d 22, 37 (1987); Terco v. FMSHRC, 839 F.2d at 240. Therefore, the Commission's "task is to determine whether the record contains 'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" Mid-Continent Resources, 6 FMSHRC 1132, 1137 (May 1984), quoting Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); see also, Donovan on behalf of Chacon v. Phelps Dodge Corp., supra. Measured against this standard, the judge's finding that Prestige was a successor to S&M is supported by substantial evidence and must be affirmed.

The nine-factor test guiding resolution of successorship issues includes consideration of the following: (1) whether the successor company had notice of the charge; (2) the ability of the predecessor to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the new employer uses the same plant; (5) whether it uses the same or substantially the same work force; (6) whether it uses the same or substantially the same supervisory personnel; (7) whether the same jobs exist under substantially the same working conditions; (8) whether it uses the same machinery, equipment, and methods of production; and (9) whether it produces the same products. Sugartree, supra, 9 FMSHRC at 397-398.

In the present case the administrative law judge evaluated the evidence, applied this test, and concluded that Prestige should be held liable as a successor to S&M. Specifically, the judge found:

In this case there is no dispute that Prestige continues to produce the same product as S&M i.e., coal. It is also apparent from the record that Tolbert Mullins as president and part owner of both S&M and Prestige (and

therefore as agent for both companies) was in a position to have notice on behalf of Prestige of the charges by the Complainant in this case. It is also established that S&M is not able to provide adequate relief to the Complainant in this case. It is no longer in business and has no liquid assets. Moreover its only unpledged assets consist of old mining equipment having but little value as parts and scrap metal and having limited marketability.

Of the eight employees presently working at Prestige only two formerly worked for S&M. However one of the two employees, Monroe Nichols, was a supervisor at S&M and is a supervisor at Prestige. The Prestige mine is a surface mine and S&M was an underground mine. Accordingly the machinery, equipment and methods of production differ. The specific jobs at Prestige are also different but many of the skills are transferable. Within this framework, I find on balance that indeed Prestige is a successor-in-interest to S&M and accordingly is jointly and severally liable for costs, damages, reinstatement and civil penalties.

9 FMSHRC at 406.

The grounds advanced by the majority for reversing the judge's findings for the most part constitute nothing more than an unvarnished reweighing of the evidence. Slip op. at 9-10. Perhaps if the Commission possessed de novo fact finding authority, a finding of nonsuccessorship on these facts could also be justified. In our review capacity, however, we are bound by the narrow substantial evidence standard and the majority's substitution of its findings for those of the judge is erroneous. Donovan v. Phelps Dodge Corp., supra, 709 F.2d at 92.

The majority also expresses concern that there was no direct business transaction transferring the assets or operations of S&M to Prestige. Slip op. at 10. The majority must be aware, however, that in Sugartree the Commission expressly rejected the need for a purchase of assets or stock in successorship situations and that in affirming the Commission the Sixth Circuit stated that "[i]n fact ... the lack of a sale may actually indicate that the predecessor and successor corporations are so closely linked that arms length dealings as usually occur during a sale never occur nor are they necessary." Terco, 839 F.2d at 239-240; Sugartree, 9 FMSHRC at 399. As detailed below, the lack of any need for arms length dealings between S&M and Prestige is apparent from the present record.

The record makes clear that Tolbert Mullins controls, in fact and in practice, both S&M and Prestige. Mullins is president of both S&M and Prestige. Vol. I Tr. 190, 196. He is the only director of Prestige. Vol. I Tr. at 200. His wife, Shirley Mullins is secretary-treasurer of both S&M and Prestige. Vol. I Tr. 196. They were the sole officers of both companies. Vol. I Tr. 21, 22. Mullins owns 90 percent of the stock of S&M. Vol. I Tr. 190. Shirley Mullins owns the remaining 10 percent. Vol. I Tr. 21. Under questioning, Tolbert Mullins' estimates of

the amount of his stock ownership of Prestige progressively increased from 40 percent, to 45 percent, and appears to have settled at 50 percent. Vol. I Tr. 197, 202. In addition, Shirley Mullins owns 10 percent of Prestige. Vol. I Tr. 199, 206. Mullins' daughter did the payroll for Prestige. Vol. I Tr. 205. At the hearing, when the administrative law judge granted the Secretary's motion to join Prestige as a respondent and suggested that a continuance might be in order, the Mullins, on behalf of Prestige, authorized the hearing to proceed and authorized the attorney representing S&M to also represent Prestige. Vol. I Tr. 23-24.

In Sugartree the Commission observed that "successorship transactions may assume many forms and liability may obtain in a number of business contexts." 9 FMSHRC at 399. Given the degree of Mullins' control of both S&M and Prestige, and the fact that both companies engage in coal mining in very close proximity to each other, the present situation is a strikingly appropriate context for a successorship finding. ^{3/} Although in most successorship situations a successor succeeds to a predecessor's operation at the same locus, no different result need obtain here where the mine sites are a mile and a half apart. Unlike a manufacturing plant which produces goods or a business which provides services, a mine extracts minerals from an ore body that is present at a specific location in a finite supply. Thus, as a matter of course, mines are projected to open and close as the mining cycle is completed and the ore body is exhausted. As a consequence, the mere fact that Prestige began mining operations at a mining site located a mile and a half from the site where the discriminatory act occurred should not bar a successorship finding.

Courts have emphasized that the successorship test is not meant to be a rigid formula resulting in a preordained result once information concerning each of the variables is plugged in. Rather, the test is intended as an aid for evaluating the facts and circumstances of each case and for balancing the competing interests present in a variety of contexts. Different elements of the test may be more important in different situations, but the primary concern always is to find a fair way for fulfilling a national policy. Successorship principles were developed to address issues arising under the National Labor Relations Act such as whether a successor who was not involved in its predecessor's unfair labor practice should nevertheless be required to provide a remedy. See e.g., Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973). There the Court balanced factors such as the federal policy of avoiding labor strife, the prevention of the chilling of the exercise of protected rights, and the protection of victimized employees against the costs sought to be imposed on the successor. See also Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974); NLRB v. Burns International Security Services, 406 U.S. 272 (1972). When these basic concepts were later extended to other contexts,

^{3/} Contrary to the majority's suggestion, my recounting of the degree of Mullins' control over both S&M and Prestige is not directed at the alter ego theory of liability abandoned by the Secretary. See slip op. at 10. Rather, my quite distinct purpose is to demonstrate that the part of the successorship balancing test that is directed at determining the fairness of the obligation sought to be imposed on an "innocent" successor weighs heavily against Mullins, who himself discriminated against Keene and, by virtue of his control, is in a position to provide full relief through employment at Prestige.

such as employment discrimination cases, the courts have built upon, extended and modified these basic principles to adapt them to the particular circumstances and goals of other national policies. See e.g., Musikiwamba v. ESSI, Inc., 760 F.2d 740, 750 (7th Cir. 1985) (Civil Rights Act of 1866, 42 U.S.C. § 1981); EEOC v. MacMillan Bloedel Containers, 503 F.2d 1086 (6th Cir. 1974) (Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq.). Thus, the principle of successorship can and should be tailored as needed to advance the goals of the Mine Act, particularly where, as here, an individual's use of "hip-pocket" corporations, not an uncommon occurrence in the coal mining industry, would otherwise allow effective evasion of the Mine Act's regulatory and remedial requirements.

In the end our task in the successorship context is to review the facts and to balance the national policy of protecting the health and safety of miners, the individual interests of the injured miner, and the harm done to and the costs imposed on the successor employer. Here, a blatant violation of the anti-discrimination provision of the Mine Act occurred and no relief is available through the responsible corporate entity. Full relief is available, however, through a company controlled by the same individual, engaged in the same business, in the same locale. Most importantly, Tolbert Mullins comes before us, not as an innocent party, but as a person who himself committed an act of illegal discrimination. In these circumstances, the balancing process can only tilt in favor of a finding of successorship liability.

Finally, assuming for the sake of argument that Prestige were found not to be a successor, a more fundamental basis is available for ordering Prestige to remedy the section 105(c) violation in this case. Section 105(c)(2) of the Mine Act requires a violator of section 105(c) to "take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest." 30 U.S.C. 815(c)(2) (emphasis added). In explaining this broad grant of authority Congress stated:

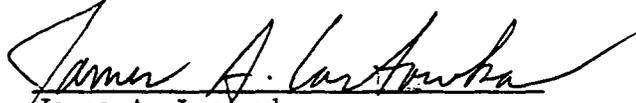
It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative.

Legis. Hist, supra, at 625.

In exercising our authority to fashion appropriate relief, the Commission has stated that "remedies in discrimination cases should be suited to the individual facts of each case and designed to eliminate the effects of illegal discrimination." Munsey, supra, 2 FMSHRC at 3464. In Munsey, the Commission ordered the discriminatee, Glenn Munsey, to be reinstated at a mine different from the mine at which he had been working when he was illegally discharged. The Commission ordered reinstatement at the new mine not on the theory that the mining company was a successor to Munsey's previous employer, but rather because the new mine was owned and operated by an individual who, in his

capacity as general manager at the former mining operation, had illegally discriminated against Munsey. The Commission determined that reinstatement of Munsey at a different mine was "an appropriate remedy [under section 105(c)] in order to fully compensate Munsey for the effects of the illegal discrimination he suffered." 2 FMSHRC 3464. The same rationale for ordering Prestige to provide remedial relief to Keene is available and appropriate here.

For these reasons, I dissent from the majority's decision reversing the judge's findings that Tolbert Mullins is liable for a separate act of discrimination and that Prestige Coal Company is jointly and severally liable for the damages and relief due Bobby G. Keene.


James A. Lastowka
Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 27, 1988

KAISER COAL CORPORATION :
 :
 v. : Docket No. WEST 88-131-R
 :
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA) :
 :
 and :
 :
 UNITED MINE WORKERS OF AMERICA :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

The controlling question presented in this matter is whether the Commission has jurisdiction to entertain an application for declaratory relief independent of any of the enforcement or contest proceedings or other forms of action authorized under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) (the "Mine Act" or "Act"). Commission Administrative Law Judge Gary Melick concluded that he had jurisdiction to consider Kaiser Coal Corporation's ("Kaiser") application pursuant to section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1982) ("APA"), and section 113(d)(1) of the Mine Act. 1/ The judge denied Kaiser's application, however, on the

1/ Section 5(d) of the APA states: "The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e) (1982).

Section 113(d)(1) of the Mine Act states:

An administrative law judge appointed by the Commission to hear matters under this [Act] shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in

grounds that the circumstances surrounding the application rendered an award of declaratory relief inappropriate. 10 FMSHRC 578 (April 1988) (ALJ). For the reasons that follow, we hold that the judge erred in concluding that he had jurisdiction to consider and rule upon the application for declaratory relief.

Kaiser's application for declaratory relief arose in connection with a dispute between the Department of Labor's Mine Safety and Health Administration ("MSHA") and Kaiser regarding the application of 30 C.F.R. § 75.326, a mandatory underground coal mine safety standard, at Kaiser's Sunnyside No. 1, No. 2 and No. 3 mines ("Sunnyside" or "the mines") located in Carbon County, Utah. 2/ These underground coal mines

connection therewith, assigned to such administrative law judge by the chief administrative law judge of the Commission or by the Commission, and shall make a decision which constitutes his final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2). An administrative law judge shall not be assigned to prepare a recommended decision under this [Act].

30 U.S.C. § 823(d)(1).

2/ Section 75.326 essentially restates section 303(y)(1) of the Mine Act, 30 U.S.C. § 863(y)(1), and provides:

In any coal mine opened after March 30, 1970, the entries used as intake and return air courses shall be separated from belt haulage entries, and each operator of such mine shall limit the velocity of the air coursed through belt haulage entries to the amount necessary to provide an adequate supply of oxygen in such entries, and to insure that the air therein shall contain less than 1.0 volume per centum of methane, and such air shall not be used to ventilate active working places. Whenever an authorized representative of the Secretary finds, in the case of any coal mine opened on or prior to March 30, 1970, which has been developed with more than two entries, that the conditions in the entries, other than belt haulage entries, are such as to permit adequately the coursing of intake or return air through such entries, (a) the belt haulage entries shall not be used to ventilate, unless such entries are necessary to ventilate, active working places, and (b) when the belt haulage entries are not necessary to ventilate the active working places, the operator of such mine shall

were opened in 1896. Prior to 1960 they were developed with more than two entries. Kaiser asserts that in 1960, it began using a longwall system of development and determined that only two gateroad entries should be developed along the sides of each block of coal to be mined in order to achieve more stable rib, roof, and floor conditions at the mines. Under the two-entry longwall system, the belt haulage entry also serves as either the intake or return air entry. Consequently, the belt haulage entry is used to course intake or return air to and from the active workings.

Until September 1985, MSHA approved and Kaiser adopted roof control plans and ventilation system and methane and dust control plans ("ventilation plans") incorporating the two-entry longwall system of development. ^{3/} However, on September 11, 1985, MSHA advised Kaiser by letter that it no longer approved the ventilation plan for the Sunnyside mines. MSHA explained that it was "re-examining certain of its policies and practices regarding operators' use of belt haulage entries as ventilation entries, and particularly the application of section 75.326 to mines opened prior to March 30, 1970." MSHA further stated:

[I]n the context of section 75.326, [Sunnyside] has been developed with "more than two entries." Also, the conditions in these entries, other than belt haulage entries, are adequate to properly course the mine's intake and return air.... In addition, MSHA has determined that in all future mining areas sufficient entries can be developed such as to permit adequately the coursing of intake and return air through such entries without utilization of the belt entry.

K. Br. to ALJ, Attachment B at 2-3. MSHA's letter also stated that Kaiser could no longer use the two-entry longwall system to implement new development at Sunnyside unless the Secretary were to grant a petition filed by Kaiser pursuant to section 101(c) of the Mine Act seeking modification of section 75.326 as applied to Sunnyside. ^{4/}

limit the velocity of the air coursed through the belt haulage entries to the amount necessary to provide an adequate supply of oxygen in such entries, and to insure that the air therein shall contain less than 1.0 volume per centum of methane.

^{3/} Pursuant to 30 C.F.R. § 75.200 and 30 C.F.R. § 75.316, an operator is required to adopt a roof control plan and a ventilation plan suitable to the conditions and mining system of the mine. The plans must be reviewed and approved by the Secretary at least every six months.

^{4/} Section 101(c) of the Mine Act, 30 U.S.C. § 811(c), provides that the Secretary may modify the application of any mandatory safety standard to a mine. Modification may be granted in those instances where the Secretary determines either that an alternative means of achieving the results of the standard exists that will at all times guarantee no less than the same measure of protection afforded by the

Thereafter, Kaiser filed with the Secretary a petition for modification of section 75.326, but continued to use the two-entry longwall system in developing the Sunnyside mines. On March 27, 1987, an MSHA inspector issued to Kaiser an order of withdrawal pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), alleging that Kaiser's use of the two-entry longwall system (without an approved modification of section 75.326) violated section 75.326. Kaiser contested the order and the case was assigned to Commission Administrative Law Judge Gary Melick. Kaiser Coal Corp., Docket No. WEST 87-116-R.

Prior to a hearing on the merits in Docket No. WEST 87-116-R, Kaiser and MSHA agreed to settle the case. MSHA consented to Kaiser's completion of its current two-entry longwall development section and agreed to vacate the section 104(d)(1) order of withdrawal, provided Kaiser complied with certain conditions during that development. Kaiser agreed to comply with MSHA's conditions and to withdraw its contest of the order. The settlement agreement by its terms applied only to the order of withdrawal at issue in that proceeding. On April 24, 1987, Kaiser moved the judge to withdraw its contest of the order and to dismiss the case, and on April 29, 1987, Judge Melick dismissed the contest proceeding.

In the meantime, MSHA, on behalf of the Secretary, was processing Kaiser's petition for modification. On October 27, 1987, the Administrator of MSHA granted the petition subject to certain conditions. Thereafter, the United Mine Workers of America ("UMWA") filed a request for a hearing before a Department of Labor administrative law judge. The judge scheduled a hearing for June 1988, but, upon the motion of the UMWA and without objection from Kaiser, the modification proceeding has been continued indefinitely.

On February 25, 1988, Kaiser initiated this proceeding by filing with the Commission an application for declaratory relief. The matter was assigned to Judge Melick. Following oral argument and briefs on the application, the judge denied Kaiser's request for declaratory relief.

In his decision, the judge concluded that Commission jurisdiction to grant declaratory relief existed under 5 U.S.C. § 554(e) and that

standard, or that application of the standard will result in a diminution of safety to the miners in the mine. The operator is required to petition the Secretary for relief from the application of the standard. The Secretary has adopted regulations governing the processing of such petitions. 30 C.F.R. Part 44. Upon receipt of a petition, MSHA gives notice, conducts an investigation and issues a proposed decision granting or denying the relief sought. This proposed decision is made by an Administrator of MSHA, which becomes the final decision of the Secretary unless a request for a hearing is filed. If requested, a hearing is held before an administrative law judge of the Department of Labor. An appeal may be made to the Assistant Secretary of Labor. Only a decision of the Assistant Secretary is deemed final agency action for purposes of judicial review.

specific authority for these proceedings to be heard before a Commission Administrative Law Judge is granted under section 113(d)(1) of the Mine Act. 10 FMSHRC at 579. The judge noted, however, that 5 U.S.C. § 554(e) empowers an agency to "issue a declaratory order to terminate a controversy or remove uncertainty," and reasoned that a declaratory order should be denied when it will not accomplish these goals. 10 FMSHRC at 580. The judge concluded that even if he were to hold section 75.326 inapplicable to Sunnyside, the controversy at issue would not be terminated because Kaiser would still find it necessary to obtain the Secretary's approval in its roof control and ventilation plans for two-entry longwall mining development. Therefore, the judge found declaratory relief was inappropriate, and he denied the application. 10 FMSHRC at 580-82.

We granted Kaiser's petition for discretionary review. We also directed for review, sua sponte, the question of whether the judge had jurisdiction to rule upon Kaiser's application. Because we conclude that the judge did not have jurisdiction to hear and decide Kaiser's application, we do not reach the question of whether declaratory relief would have been appropriate.

We begin with the fundamental principle that, as an administrative agency created by statute, we cannot exceed the jurisdictional authority granted to us by Congress. See, e.g., Civil Aeronautics Board v. Delta Airlines, 367 U.S. 316, 322 (1961); Lehigh & New England R.R. v. ICC, 540 F.2d 71, 78 (3rd Cir. 1976); National Petroleum Refiners Assoc. v. FTC, 482 F.2d 672, 674 (D.C. Cir. 1973). The Commission is an independent adjudicative agency created by section 113 of the Mine Act, 30 U.S.C. § 823, to provide trial-type proceedings and administrative appellate review in cases arising under the Act. Several provisions of the Mine Act grant subject matter jurisdiction to the Commission by establishing specific enforcement and contest proceedings and other forms of action over which the Commission judicially presides: e.g., section 105(d), 30 U.S.C. § 815(d), provides for the contest of citations or orders, or the contest of civil penalties proposed for such violations; section 105(b)(2), 30 U.S.C. § 815(b)(2), provides for applications for temporary relief from orders issued pursuant to section 104; section 107(e), 30 U.S.C. § 817(e), provides for contests of imminent danger orders of withdrawal; section 105(c), 30 U.S.C. § 815(c), provides for complaints of discrimination; and section 111, 30 U.S.C. § 821, provides for complaints for compensation. Specific provisions, such as these, delineate the scope of the Commission's jurisdiction.

In contrast to the Act's provisions conferring jurisdiction, section 113(d)(1) is procedural in nature. It creates no specific right of action or proceeding over which the Commission may preside. Section 113 establishes the Commission and sets forth the procedures for hearing, deciding, and reviewing matters arising under the Act. Although section 113(d)(1) states that Commission administrative law judges "appointed ... to hear matters under this Act shall hear, and make a determination upon, any proceeding instituted before the Commission," this language describes the scope of the judge's authority to hear and decide matters in those proceedings otherwise properly filed

pursuant to the Act. In short, section 113(d)(1) does not constitute an independent grant of subject matter jurisdiction. 5/

Kaiser's argument that the language of section 113(d)(1) contains a broad grant of jurisdiction giving Commission judges the authority to decide "any proceeding" is rejected. This language must be read in the proper statutory context discussed above, and is not an invitation from Congress to legislate for ourselves virtually unlimited jurisdiction over "any proceeding." Indeed, the Commission has consistently refrained from inferring jurisdiction in the face of Congress' failure to provide it. In refusing to hold that miners or their representatives have authority under the Act to initiate review of citations through a notice of contest where the Act does not specifically provide that right, the Commission stated: "The statute contains no express provision for the asserted right.... It is not the prerogative of this Commission to confer [a] right in the absence of statutory provision." United Mine Workers of America v. Secretary of Labor, 5 FMSHRC 807, 815 (May 1983), aff'd mem., 725 F.2d 126 (D.C. Cir. 1983)(table). See also, United Mine Workers of America v. Secretary of Labor, 5 FMSHRC 1519, 1521 (September 1983) (rejecting contention that section 105(d) of the Mine Act, 30 U.S.C. § 815(d), grants miners the right to contest Secretary's vacation of order issued pursuant to section 104 of the Act, 30 U.S.C. § 814). This reasoning is equally applicable here.

Reliance upon 5 U.S.C. § 554(e) is also misplaced in the context of this proceeding. The APA is not a jurisdictional statute and "does not afford an implied grant of subject matter jurisdiction...." Califano v. Sanders, 430 U.S. 99, 107 (1977). See also American Air Parcel Forwarding Co. v. United States, 718 F.2d 1546, 1552 (Fed. Cir. 1983), cert. den., 466 U.S. 937 (1984). Rather, agencies must look to their enabling statutes for the boundaries of their jurisdiction. Thus, while section 554(e) provides that an agency may issue a declaratory order to terminate a controversy or remove uncertainty, this authority is available only where jurisdiction is already conferred upon the agency by its statute. Cf. Illinois Terminal R.R. v. ICC, 671 F.2d 1214, 1216 (8th Cir. 1982).

The Commission has previously recognized that it may grant declaratory relief in appropriate proceedings where jurisdiction

5/ The procedural nature of section 113(d)(1) is emphasized in the legislative history. The provision is described in the Senate committee report on the bill that largely became the Mine Act in a section of the report entitled "Procedures." The joint explanatory statement of the committee of conference summarized this section as requiring that "Administrative Law Judges hear and decide any matter assigned and make a decision which would constitute a final disposition of the proceeding." Nothing in the legislative history indicates that Congress viewed section 113(d)(1) as jurisdictional. S. Rep. No. 181, 95th Cong., 1st Sess. 78 (1977) and S. Rep. No. 461, 95th Cong., 1st Sess. 60 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 636 and 1338 (1978).

otherwise exists. Climax Molybdenum Co., 2 FMSHRC 2748, 2751-52 (October 1980), aff'd sub nom. Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447, 452 (10th Cir. 1983); Youghioghney & Ohio Coal Co., 7 FMSHRC 200, 203 (February 1985)("Y&O"). Both Climax and Y&O were enforcement proceedings properly brought before the Commission pursuant to section 105(d) of the Act and therefore within Commission jurisdiction. Further, authority to grant declaratory relief in a section 105(d) enforcement proceeding is implicit in section 105(d), which authorizes the Commission to affirm, modify, or vacate the contested citation, order, or proposed penalty or direct "other appropriate relief." See Climax, 2 FMSHRC at 2751 n.5. 6/

Here, Kaiser chose to settle and to withdraw the prior section 105(d) contest proceeding in which the applicability of 75.326 at Sunnyside was at issue. Afterward, absent any extant enforcement action by the Secretary, Kaiser filed the present independent application for declaratory relief. Although the Commission had unquestioned jurisdiction over the prior contest proceeding, it is without jurisdiction over this application for declaratory relief.

6/ Section 105(d) states in part:

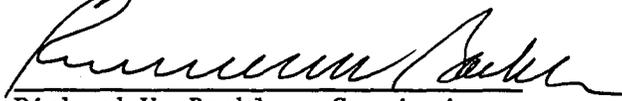
If ... an operator of a ... mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section [104] of this [Act], or citation or notification of proposed assessment of a penalty ..., the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with [5 U.S.C. § 554] ...), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. ...

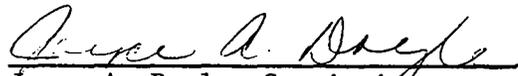
30 U.S.C. § 815(d)(emphasis added).

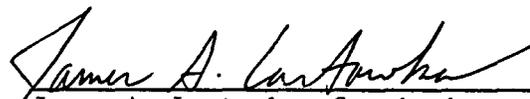
In affirming the Commission in Climax, the Tenth Circuit also emphasized that declaratory relief is part of the "other appropriate relief" the Commission may afford when a case properly arises under section 105(d) of the Act. Climax, supra, 703 F.2d at 452 n.4.

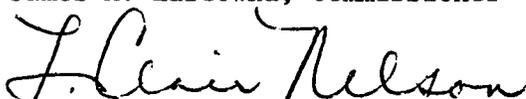
Accordingly, the judge's decision is reversed to the extent he concluded that he had jurisdiction to hear and decide Kaiser's application for declaratory relief. The judge's denial of the application for declaratory relief is affirmed on the ground that the Commission lacks jurisdiction in this proceeding.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 29, 1988

WILFRED BRYANT :
 :
 v. : Docket No. WEVA 85-43-D
 :
 DINGESS MINE SERVICE, :
 WINCHESTER COALS, INC., :
 MULLINS COAL COMPANY, :
 JOE DINGESS and JOHNNY DINGESS :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY: Ford, Backley, Lastowka and Nelson

This proceeding involves a discrimination complaint brought by Wilfred Bryant against Dingess Mine Service ("Dingess"), Mullins Coal Co. ("Mullins"), Winchester Coals, Inc. ("Winchester"), Joe Dingess, and Johnny Dingess pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"). Following a hearing on the merits, Commission Administrative Law Judge James A. Broderick concluded that Dingess had discriminated against Bryant in violation of section 105(c)(1) of the Mine Act by discharging him for engaging in a protected work refusal, 30 U.S.C. § 815(c)(1) 1/; that Mullins and

1/ Section 105(c)(1) provides in pertinent part:

Discrimination or interference prohibited; complaint; investigation; determination; hearing

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

Winchester were not liable under section 105(c)(1) for Dingess' discriminatory action; and that the adverse activity complained of was terminated when Bryant refused an offer of reemployment and resigned from his job. 9 FMSHRC 336 (February 1987)(ALJ). After the judge issued a supplemental decision granting Bryant back pay with interest and attorneys' fees (9 FMSHRC 940 (May 1987)(ALJ)), we granted Bryant's petition for discretionary review and heard oral argument. Bryant asserts on review that the judge erred: (1) in finding that Mullins and Winchester are not liable for Dingess' discriminatory act, and (2) in finding that Dingess' adverse action was terminated as a result of Bryant's refusal of reemployment and resignation. For the reasons that follow, we agree that the judge erred in not holding Mullins and Winchester liable under section 105(c)(1) for Dingess' discriminatory act, but we conclude that substantial evidence supports the judge's finding regarding the termination of the adverse action. Accordingly, we reverse in part and affirm in part.

I.

This case arises out of events occurring at an underground coal mine located in Logan County, West Virginia. On July 20, 1982, Mullins, the lessee of the coal at the mine, entered into a renewable one-year contract with Dingess Mine Service, a company solely owned by Joe Dingess and Johnny Dingess ("Dingess brothers"), whereby Dingess agreed to mine coal and deliver it to Mullins for a specified sum per ton. Prior to this agreement, Dingess had not operated an underground coal mine. Mullins' decision to contract with the Dingess brothers was influenced by their satisfactory performance of electrical work in 1981-82 pursuant to a contract with Mullins' sister corporation, Winchester. 2/ (While doing work for Winchester, the Dingess brothers had operated under the name of Dingess Line Service.)

The contract to operate the mine provided that Dingess would be responsible for the hiring, employment, and working conditions of its employees and that the work force would be under the jurisdiction of the United Mine Workers of America ("UMWA") and governed by the current UMWA wage agreement (the "Wage Agreement"). The contract further provided that Dingess would "keep and maintain all mining equipment in good working order, condition and repair...." R. Ex. 5 at 2. Dingess also agreed to comply with all applicable federal, state, and local laws and regulations. For its part, Mullins reserved the right to enter and inspect the mine for the "purpose of assuring Owner that Contractor is performing all of its covenants and agreements hereunder." R. Ex. 5 at 12. Mullins also retained the right to approve mining plans

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

30 U.S.C. § 815(c)(1).

2/ Both Mullins and Winchester are wholly-owned subsidiaries of Imperial Pacific Investments. Donald Cooper, the president of both Mullins and Winchester, is Mullins' only employee.

developed by Dingess.

Concurrently with its contract with Mullins to operate the mine, Dingess entered into an agreement with Winchester by which Dingess leased the mining equipment and machinery necessary to operate the mine. Dingess also agreed "to keep all of the [equipment] in good order and repair." R. Ex. 6 at 2.

In the latter part of 1983 and early 1984, management for Mullins and Winchester became aware that Joe Dingess was drinking liquor at the mine and that Dingess was not making payments as required under the contract, including UMWA royalties, federal and state taxes, and worker's compensation fund payments. Tr. 96, 205-06. Following the issuance of a number of citations by West Virginia's Department of Natural Resources for Dingess' failure to comply with surface drainage requirements at the mine, it was necessary for Mullins to take direct action to correct surface drainage problems in order to protect its mining permit. Tr. 206-07.

Commensurate with its operational problems with Dingess, Mullins deducted rental payments due Winchester under the equipment lease from amounts which Mullins owed Dingess under the mining contract. In addition, money was advanced to Dingess against coal produced by Dingess but not yet delivered to Mullins, and Winchester made payments on Dingess' behalf to cover debt obligations to third parties, such as suppliers, trucking companies, and repair companies. Further, Mullins worked with Dingess in other ways in order to help Dingess meet its production requirements. Specifically, in the summer of 1984, Mullins suggested that Dingess develop a second mining section at the mine and Winchester assisted Dingess in its development. Winchester also leased additional equipment to Dingess to mine the new section. Tr. 210-12.

The individual chiefly responsible for monitoring Dingess' performance under its contract with Mullins was Winchester's mine manager, Roger Cook. Tr. 86-88. Cook testified that he inspected the mine by going underground two or three times each week in order to ensure that mining plans were being followed and to check on production. Tr. 97a. On occasion he also took responsibility for dust control and correcting surface drainage problems. Tr. 97b-97c, 117. In conjunction with an employee of Winchester, Cook developed the plans for opening the second section at the mine and saw to it that the plans were carried out. Tr. 99. Cook also testified that no one at Dingess consulted with him about the hiring or laying-off of employees, nor did any of Dingess' employees complain to him about any of the equipment being unsafe. Tr. 109-10.

On October 22, 1984, Mullins terminated its mining contract with Dingess on various grounds, including the failure of Dingess to pay its employees and to comply with the Mine Act and its regulations. R. Ex. 7. Also, Winchester's equipment lease with Dingess was terminated in February 1985, for the latter's failure to make the required minimum payments. Id.

Some six months prior to the termination of the contract between

Mullins and Dingess, on April 23, 1984, the complainant, Wilfred Bryant, had been hired by the mine foreman, Aaron Browning, to work as a shuttle car driver on the second shift. Bryant testified that the shuttle car that he was assigned to operate was hard to steer and was covered with mud and debris. In addition, it had defective brakes on one side, no lights, and a defective tram mechanism. When Bryant pointed out these mechanical problems to Browning and Kevin Atkins, the section foreman, Bryant was told to do the best he could with the car. Tr. 27.

Bryant testified that by his third day at the mine, his arms were so stiff from steering the shuttle car that he refused to operate it further. The next day, after informing Atkins that he would not operate the shuttle car, Browning assigned him to other work. On the following day, Friday, April 27, 1984, Browning called Bryant at home and told him that the entire second shift was being laid off due to flooding in the mine. Bryant went to the mine to obtain a lay-off slip, only to learn that the mine was not flooded and that miners with less seniority were in fact working at the mine. Browning refused to issue a lay-off slip and told Bryant that he no longer had a job. Tr. 25-26, 32-34.

Bryant responded to the discharge by filing a grievance with the local UMW office. The grievance did not allege a safety violation by the operator, but focused on Bryant's lay-off and Browning's continued employment of men less senior to Bryant. Following the union representatives' negotiations on Bryant's behalf, Browning agreed to put Bryant on a panel for recall. ^{3/} Bryant refused the proposed settlement because he did not believe Browning and because Browning did not agree to fix the shuttle car. Tr. 51, 67, 308-09. Stanley Wells, the mine's safety committeeman and one of those representing Bryant, was present during the negotiations. Wells, in his testimony, confirmed that Browning offered to put Bryant on a panel. He testified that a union representative subsequently discussed the offer with Bryant and encouraged Bryant to accept it. He stated that Bryant did not agree because "he felt he was done wrong." Tr. 165.

Mine Foreman Browning testified that he was never employed by Mullins or Winchester and that he received all his instructions for directing the operation of the mine from the Dingess brothers. Tr. 270-71, 274. At the time he hired Bryant as a shuttle car driver on the second shift, he did not confer with anyone at Mullins or Winchester. Tr. 275. Browning stated that he decided to lay off Bryant because of an oral safety complaint from the loading machine operator about Bryant's operation of the shuttle car. Browning did not consult with anyone at Mullins or Winchester about his decision. Tr. 291, 294-95. Browning testified that he intended to call Bryant back after a couple of days, but not as a shuttle car driver. Tr. 278-79.

On May 1, 1984, Bryant filed a discrimination complaint with the

^{3/} A recall panel is a procedure under the Wage Agreement whereby the name of a miner who has been laid off is placed on a list by the operator for recall to work as positions become available. Miners are listed in order of seniority. See Tr. 52-54, 164, 308-09.

Department of Labor's Mine Safety and Health Administration ("MSHA"). On May 9, 1984, following negotiations regarding his grievance and rejection of Browning's offer, Bryant formally terminated his employment with Dingess. After investigating the complaint, MSHA determined that a violation of the Mine Act had not occurred and declined to file a complaint on Bryant's behalf. 30 U.S.C. § 815(c)(2) & (3). Bryant then filed a complaint on his own behalf before this independent Commission pursuant to section 105(c)(3) of the Act. 30 U.S.C. § 815(c)(3). According to the judge, a default judgment was entered against Dingess and the Dingess brothers for failure to show cause why an appearance had not been entered or an answer filed. The judgment was not conclusive on the issue of discrimination as against Mullins, Winchester, or any successor employer.

Following a two-day evidentiary hearing, the judge issued his decision concluding that Bryant had engaged in a protected activity when he refused to operate the shuttle car and that his reason for refusing was communicated to the operator. 9 FMSHRC at 342. The judge found that Bryant "was 'laid off' on April 27, 1984, following his refusal," and he characterized this lay-off as an adverse action. *Id.* However, because Bryant refused the offer by the mine superintendent to be put on a recall panel, the judge concluded "that he was not discharged and that the adverse action terminated when he refused the offer to be called back and resigned his job." *Id.*

The judge characterized Dingess as the "production-operator under a contract with the owner of the coal." 9 FMSHRC at 344. He found that Mullins and Winchester had a "continuing presence" at the mine and knew or should have known of Dingess' increasing incompetence to operate the mine at the time of Bryant's employment. 9 FMSHRC at 343. He inferred from Roger Cook's regular presence at the mine that Mullins and Winchester were aware of the shuttle car's defective condition. The judge also found that Mullins and Winchester were "involved in overseeing Dingess' work ... [and] actually performed some of the work involved in the production of coal (engineering projections, installation of overcasts)." 9 FMSHRC at 344. However, because Mullins and Winchester were not involved in hiring Bryant, did not direct his work activity, and were not involved in the decision to fire him, the judge concluded that Mullins and Winchester were not liable for discrimination under section 105(c)(1) of the Mine Act. 9 FMSHRC at 343-44.

The judge dismissed Bryant's complaint with respect to Mullins and Winchester, but ordered Dingess to pay Bryant back pay with interest from April 27, 1984 (the date of the lay-off) to May 9, 1984 (the date of Bryant's resignation) with interest thereon and to reimburse him for attorney's fees and costs. ^{4/} 9 FMSHRC 940, 942-43 (May 1987)(ALJ).

^{4/} During the course of the hearing, Bryant moved the judge to add New River Fuels to the complaint as a successor-in-interest to Dingess. (The license to operate the mine had been transferred to New River Fuels after it was recovered from Dingess. *See* 9 FMSHRC at 339.) Because the judge concluded that the adverse action complained of terminated on

II.

On review Bryant first argues that the judge erroneously concluded that Winchester and Mullins were not liable for his wrongful discharge. Bryant relies on theories of strict liability and agency to assert error because, as the judge concluded, Mullins and Winchester were "interchangeable" (9 FMSHRC at 339) and had a "continuing presence at the mine." Id. at 343. Bryant asserts that by permitting Dingess to operate the mine after becoming aware of its incompetence, Mullins and Winchester contributed to the unlawful discrimination.

In determining that Mullins and Winchester should not be held liable under section 105(c)(1) of the Mine Act, the judge viewed Dingess as an independent contractor and concluded that Mullins and Winchester as the mine owners were not liable without regard to fault for Dingess' discriminatory act. We find, however, that given the facts of this case, Dingess actually functioned as a manager and supervisor on behalf of the operators, Mullins and Winchester, rather than as an independent contractor responsible for the operation of the mine. We conclude that Dingess was acting as a supervisory agent in a working environment where the operation of the mine was effectively controlled and directed by Mullins and Winchester and, consequently, that Mullins and Winchester are liable for Dingess' discriminatory act. 5/

Our disposition turns upon an examination of the true nature of the relationship existing between the parties. Although the contract between Mullins and Winchester designated Dingess as an "independent contractor," it is the conduct of the parties and not the terminology of the contract which determines the nature of the relationship. See, e.g., Board of Trade of Chicago v. Hammond Elevator Co., 198 U.S. 424 (1904); Burris v. Texaco, Inc., 361 F.2d 169 (4th Cir. 1966). Due to Mullins' and Winchester's substantial control over the most significant aspects of the operation of the mine, the relationship between the parties in this instance was that of principal and agent similar to the typical arrangement where a mine operator employs supervisory personnel to assist in the operation of a mine. See 30 U.S.C. § 802(e) (defining "agent" as "any person charged with the responsibility for the operation of all or part of a coal or other mine or the supervision of the miners...").

Bryant's resignation and before the license was recovered from Dingess, the judge denied the motion. 9 FMSHRC at 344. On appeal, Bryant requested permission to put on evidence concerning the successor liability of New River Fuels in the event the Commission determined that his backpay should not have terminated at the time he rejected the offer to be placed on the recall panel. In light of our decision affirming the judge's disposition of the backpay issue, the question of New River's successorship liability need not be pursued.

5/ In light of our agreement with Bryant's theory of liability based on agency principles, we do not reach his alternative argument based on strict liability in the context of section 105(c).

Although the judge did not expressly find that Dingess was acting as an agent, the factual findings that he did make lead inevitably to this conclusion. Although in its contract with Mullins, Dingess was charged with being wholly responsible for the work force and the operation of the mine, in fact, neither Joe Dingess nor Johnny Dingess had ever operated an underground mine. 9 FMSHRC at 337. Thus, Mullins should have been aware at the outset that Dingess did not have the technical expertise that must be expected of an independent contractor operating a mine. Other findings relate to Mullins' and Winchester's close supervision of the manner in which mining was carried out. The contract provided that Mullins would retain the right to approve mining plans as developed by Dingess and, as the judge found, Mullins participated in the actual development of plans by hiring an engineering firm to prepare maps and to perform ventilation calculations. 9 FMSHRC at 338. Roger Cook, Winchester's mine manager, testified without dispute that he and Winchester's mine foreman were instrumental in having Dingess develop a second mining section at the mine. Tr. 99. This testimony is consistent with the judge's finding that Mullins and Winchester were involved not only in overseeing Dingess' work, but also in actually performing some of the work involved in the production of coal. 9 FMSHRC at 344.

Further, as the judge stated, Mullins and Winchester had a "continuing presence at the mine." 9 FMSHRC at 343. Cook inspected the mine on a regular basis by going underground two or three times a week. During the course of these inspections, Cook's primary duty was to ensure that Dingess complied with the means and methods of production generally set forth in the mining plans prepared at Mullins' and Winchester's behest. Cook described this duty as "[m]aking sure [Dingess] was following our procedures we set up on retreat mining, or projections that we set forth for them, to make sure that they wouldn't destroy the reserves." Tr. 97. In this regard, he inspected the ventilation and the roof, had problems corrected, and was involved with surface drainage and underground dust control. Tr. 97a-97b. He also stated that he had to "get on" the Dingess brothers to correct problems with surface dust control. Tr. 97b. When Dingess did not correct such a problem, Cook sent Winchester's employees to correct it. Tr. 97b, 117. On several occasions, Cook instructed Dingess on how to comply with state environmental requirements. Tr. 118. Since he was concerned with the amount of coal produced, he reminded Dingess every few days to increase production.

The judge also detailed Mullins' and Winchester's handling of numerous financial transactions involving Dingess' debt payments including payments on Dingess' behalf to suppliers, trucking companies, and repair companies, and cash advances by Mullins and Winchester to Dingess. 9 FMSHRC at 338.

Considered together, these findings establish that Mullins and Winchester were in actual control of the mine at which Bryant worked. 6/

6/ Although the evidence indicates that Dingess exercised control over the hiring, discharging, and laying off of employees at the mine,

As a result, this case is not unlike the more typical situation where a mine foreman or supervisor is endowed with a certain degree of responsibility in the operation of a mine, but whose sphere of control is always subject to the operator's ultimate right to direct the supervisor's work performance in order to ensure compliance with the requirements of the Mine Act. Within this latter framework, it has been consistently held that mine operators are liable for the discriminatory acts of their agents under section 105(c)(1) of the Act. See, e.g., Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 776 F.2d 469 (11th Cir. 1985) (mine construction subcontractor held liable for superintendent's illegal discharge of employees following their protected work refusal); Moses v. Whitley Development Corp., 4 FMSHRC 1475 (1982) aff'd sub nom. Whitley Development Corp. v. FMSHRC, 770 F.2d 168 (6th Cir. 1985) (operator held liable for foreman's illegal discharge of miner); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981) (operator held liable for mine superintendent's illegal discharge of miners engaged in protected work refusal).

Under these circumstances, we hold that the record establishes that Dingess' status as an independent contractor was in name only and that in fact the nature of its relationship with Mullins and Winchester was akin to its being an on-site, supervisory agent for Mullins and Winchester. Therefore, Mullins and Winchester, as operators of the mine at issue, are liable under section 105(c)(1) of the Mine Act for Dingess' discriminatory acts.

III.

The final issue is whether the judge erred in concluding that Bryant's refusal to be placed on the recall panel and his subsequent resignation tolled Bryant's right to back pay. The judge found that following Bryant's discriminatory lay-off on April 27, 1984, Aaron Browning offered to place Bryant on a panel for recall to work "in a couple of days at most" (Tr. 278), and that on May 9, 1984, Bryant refused Browning's offer by resigning. 9 FMSHRC at 342. The judge concluded that "the adverse action terminated when [Bryant] refused the offer to be called back" and, therefore, that Bryant was only entitled to back pay with interest for the period of April 27 to May 9. 9 FMSHRC at 342, 344. Bryant argues that Browning's offer of reemployment was insufficient to cut off Mullins' and Winchester's liability for back pay and interest.

Generally, when a discriminatee is unconditionally and in a bona fide fashion offered reinstatement, the running of back pay is tolled. B. Schiel and P. Grossman, Employment Discrimination Law, at 1432 2d ed. (1983); at 279-80 (2d ed. 1983-84 Supp. 1985); see Munsey v. Smitty Baker Coal Company, Inc., 2 FMSHRC 3463, 3464 (December 1984) (suitable job offer tolls back pay due discriminatee). The Supreme Court has

such control of personnel decisions is not inconsistent with Dingess' status as an agent, but rather describes the degree of authority granted to Dingess in this particular area of responsibility.

emphasized that only in "exceptional" circumstances will a discriminatee's rejection of an unqualified job offer not end the back pay period. Ford Motor Co. v. EEOC, 458 U.S. 219, 238-39 n.27 (1982). In light of these principles, we hold that the judge did not err in determining the period for which Bryant is entitled to back pay and interest.

The undisputed testimony of Browning and of Stanley Wells, the union's safety committeeman and Bryant's representative in negotiations with Browning, is that the offer to place Bryant on the recall panel was made without restrictions. Thus, the question is whether the offer was in fact a bona fide offer of reemployment. The contract between Dingess and Mullins specified that the procedure for returning laid off miners to work was through the recall panel process. The bargaining between Browning and Bryant, during which Browning offered to place Bryant on the recall panel, was part of Bryant's contractual grievance negotiations, but Bryant's discrimination complaint and Bryant's grievance arose out of the same circumstances.

Browning testified that once Bryant was on the panel, Browning intended to recall Bryant to work as a helper or a laborer. Bryant does not argue that these jobs were not comparable with his former position as a shuttle car driver. Rather, he argues that Browning's job offer was nothing more than an empty promise. Bryant relies on the fact that when the offer was made, a recall panel did not exist and, in fact, never had been used at the mine. However, the record contains no evidence of events that would have given rise to the creation of a panel prior to this time. Further, the testimony of Wells establishes that Bryant had assurances that the panel procedure would be instituted and that he would be recalled to a job within a matter of days. Wells stated that Browning told him and the union representative that Bryant would be given a "place on the panel" and that Browning "guaranteed ... that he would have Bryant back to work within two or three days." Tr. 165, 167. When asked if he had communicated these assurances to Bryant, Wells replied that he had. Id. 7/

The judge credited Wells' testimony that Browning had "guaranteed" that Bryant would be called back to work within two or three days and that Bryant knew this when he refused the offer. 9 FMSHRC at 340. Credibility is an issue for the judge to decide. As the Commission often has stated, a judge's credibility resolutions cannot be overturned lightly (e.g., Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1629 (November 1986)) and we discern nothing in the present record that would justify us taking this extraordinary step. Therefore, we conclude that substantial evidence supports the judge's finding that Browning agreed to place Bryant on a recall panel and that Browning guaranteed that Bryant would be called back to work within two or three days. Given

7/ While Bryant testified that nothing was communicated to him about a job offer, he admitted that he knew that the union had agreed on his behalf to settle the grievance by having him placed on a recall panel and that he knew at the time of his resignation that Browning had offered to put him on a recall panel. Tr. 308, 311.

these findings, we hold that Browning's offer, which Bryant refused, was more than a "mere promise" of a job.

The judge did not explicitly find that Bryant's rejection of Browning's offer was unreasonable, but his conclusion that Bryant's refusal of the offer and his resignation terminated the back pay period implies that it was. The fact that a recall panel had not been previously implemented does not mean that one would not be instituted in an effort to resolve the present dispute. Indeed, Bryant's representatives who had negotiated directly with Browning believed that Browning intended to do as he promised and the record supports the judge's finding that this belief was conveyed to Bryant. We especially note that at the time he rejected the offer and resigned Bryant had little to lose by accepting the offer. Had Bryant agreed he would have been put on a recall panel, with Browning's guarantee that he would have been reemployed. Thereafter, if Browning had failed to recall Bryant to work, Bryant would have had a clear basis for further relief. 8/

IV.

Accordingly, we hold that Mullins and Winchester are liable under section 105(c)(1) of the Mine Act for the discriminatory act of their agent, Dingess. Furthermore, we hold that Bryant's refusal to accept the offer to be placed on the recall panel and his subsequent resignation terminated his right to back pay beyond May 9, 1984. Therefore, the decision of the judge is reversed in part and affirmed in part. The judge, however, reduced the amount of attorneys' fees awarded to Bryant's attorneys by one-third, concluding in part that they had spent a large portion of their time attempting to establish the liability of Mullins and Winchester, a theory which he had rejected. 9 FMSHRC at 942. The judge also noted that the damages recovered were limited to nine days backpay without reinstatement. The judge did not specify to what extent these two separate considerations individually contributed to his one-third reduction in the attorneys' fees awarded. In view of our reversal of the judge on the issue of the liability of Mullins and Winchester, and our affirmance on the issue of backpay, we therefore find it necessary to remand this proceeding to the judge for a redetermination of the attorneys' fees award.

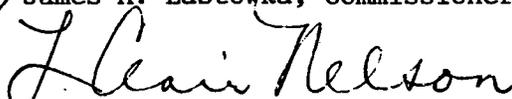
8/ Bryant alleges that during the discussions with Browning no mention was made regarding the correction of safety hazards on the shuttle car. Tr. 309. Bryant argues that accepting the job offer without an agreement to correct the safety hazards of which he complained would allow Dingess to avoid compliance with mine safety standards. PDR 26. This argument misses the mark. Bryant was not to be recalled as a shuttle car operator. Also, should Bryant have returned to work and have found working conditions that he, in good faith, believed to be hazardous, he had the right, to request an inspection by MSHA or to engage in another protected work refusal. 30 U.S.C. § 813(g).

Accordingly, the judge's decision is affirmed in part, reversed in part and remanded for further proceedings consistent with this decision.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

Doyle, Commissioner, concurring in part and dissenting in part:

I concur with the majority that substantial evidence supports the judge's decision that the adverse action against Bryant terminated when Bryant refused reemployment and resigned. I respectfully dissent, however, from the majority's legal determination that Mullins and Winchester exerted substantial control over the most significant aspects of the mine's operation and that, thus, Dingess was their agent. Based on this determination, the majority found that Mullins and Winchester were liable for Dingess' discriminatory action against Bryant. I disagree.

While acknowledging that the judge did not find that Dingess was an agent, the majority bases its decision that Dingess was not an independent contractor on four specific fact determinations made by the administrative law judge, which, they believe, lead to the conclusion that Dingess was, in fact, an agent.

The first fact on which the majority relies is that Dingess never previously operated an underground mine. While there is no dispute that the Dingess brothers had not themselves previously operated a mine, Mullins had "direct knowledge of the work history of Joe and Johnny Dingess in deep mine operations, to the extent that [they] felt comfortable that they were familiar with coal mining operations." Tr. 197. See also Tr. 93-94. Mullins' decision to hire Dingess was also based on its eight months experience with the Dingess brothers during which they served as an electrical contractor for Mullins/Winchester. They were found to be hard working, diligent, straightforward, knowledgeable and reputable and they had delivered quality work, on schedule, within budget. Tr. 199. Whether it was reasonable or unreasonable, wise or unwise, for Mullins to hire Dingess as an underground mining contractor is a question of fact and could turn on other factors, such as the technical expertise of those Dingess planned to hire, of which we have no evidence of record. But whatever those factors might show, they have no bearing on the issue of control, which the majority observes is determinative in deciding whether Dingess was an independent contractor or the agent of Mullins.

The second factor on which the majority relies is what they characterize as "close supervision" of the manner in which mining was carried out. Mullins retained the right to approve Dingess' mining plans and the judge found that Mullins hired an engineering firm to prepare mine maps and to perform some ventilation calculations, and were instrumental in having Dingess develop a second section. I do not find any of these actions to be indicative of the type of control that differentiates an independent contractor from an agent. Retaining the right to approve mining plans is standard in the coal mining industry, required by owners, lessors and production operators alike in order to assure that the reserves are not robbed by an operator seeking to mine what can be

obtained quickly and cheaply and leaving what is difficult and expensive. Neither the preparation of maps to reflect the mine plans nor the performance of ventilation calculations reflect control or anything more than assistance in performing specific tasks required to fulfill an operator's obligations under the Mine Act. In addition, it is unrealistic to think that, whatever the relationship between production operator and contract miner, a second section would be developed without consultation and negotiation between them, if only to assure that the additional coal could be processed and sold.

The third finding of fact on which the majority relies in concluding that an agency relationship exists, is that Mullins and Winchester had a "continuing presence at the mine." There is no dispute that Cook inspected the mine frequently to insure compliance with mine plans, to inspect roof and dust control and to monitor surface drainage. Tr. 97a-97b. He had to "get on" Dingess about surface dust control and he instructed them on compliance with state environmental requirements. Tr. 97b. In essence, Cook tried to assure that Dingess obeyed federal and state laws and regulations.

As the U.S. Court of Appeals for the D.C. Circuit noted in Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862, 875: "Government regulations constitute supervision not by the employer but by the state." The court went on to state:

Thus, to the extent that the government regulation of a particular occupation is more extensive, the control by a putative employer becomes less extensive because the employer cannot evade the law either and in requiring compliance with the law he is not controlling the [independent contractor]. It is the law that controls the [independent contractor]. Thus requiring [independent contractors] to obey the law is no more control by the lessor than would be a routine insistence upon the lawfulness of the conduct of those persons with whom one does business.

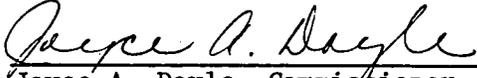
603 F.2d 875. The court found this to be a far cry from the restrictions alluded to in the Restatement (Second) of Agency, §220, in which a person's physical activities and his time are surrendered to the control of a master. I find the behavior here of Cook in attempting to assure Dingess' compliance with laws, regulations and permit restrictions, even if done only to protect Mullins/Winchester from citations, penalties and permit revocations on account of Dingess' behavior, to be simply that, and not evidence that Mullins/Winchester were exerting substantial control over Dingess. See also Moushey v. United States Steel Corporation, 374 F.2d 561, 568 (3rd Cir. 1967).

The last fact on which the majority relies is Mullins' and Winchester's handling of numerous financial transactions on behalf of Dingess regarding its debt payments and their making cash advances to Dingess. While I do not see that cash advances bear at all on the issue of control, the other transactions may, in fact, indicate an element of control, depending to some extent on whether Dingess authorized the procedure, agreed to it, or merely acquiesced in it, which the record does not make clear. They should be weighed along with any other record evidence of those factors that actually reflect on an agency versus independent contractor relationship.

Although "[a]ll of the circumstances" are to be examined in determining whether one is an employee or an independent contractor, Frito-Lay, Inc. v. NLRB, 385 F.2d 180, 187 (7th Cir. 1967); NLRB v. A.S. Abell Co., 327 F.2d 1, 4 (4th Cir. 1964), the most important element is the extent of the actual supervision exercised by the putative employer over the "means and manner" of the worker's performance. Lodge 1858 v. Webb U.S. D.C., 188 U.S. App. D.C. 233, 241-245, 580 F.2d at 504-508 (1978); Independent Owners-Operators, Inc. v. NLRB, 407 F.2d 1383, 1385 (9th Cir. 1969). While the majority concludes that "Dingess was acting as a supervisory agent in a working environment where the operation of the mine was effectively controlled and directed by Mullins and Winchester" (Slip op. at 6), the record reflects otherwise. Complainant's own witness, Stanley Wells, testified that Roger Cook never told him to do anything in the mine, that he wouldn't have done it anyway, and that he (Cook) "didn't have nothing to do with the mines." Tr. 151, 152. He testified further that he never observed Cook directing any of the other miners. Tr. 152. Donnie Adams never saw Roger Cook or any other Winchester employee at the mines. Tr. 133. Browning hired Bryant without checking with anyone else. Tr. 46-47. He told him to shoot coal rather than run the shuttle car when Bryant complained about its condition. Tr. 25. He settled Bryant's union grievance, Tr. 36. Reed Peyton was hired by Joe Dingess and told to report to Browning. Tr. 81. Donnie Adams was hired by Aaron Browning, and considered him to be the boss. Tr. 126, 130. In addition, the judge specifically found that no miner complained to Cook about unsafe equipment and that Dingess, and not Mullins/Winchester, hired Bryant, directed his work activity and laid him off. 9 FMSHRC 339, 343. He further found that Mullins/Winchester were in no way involved in the adverse action against Bryant. 9 FMSHRC 343.

It is also clear from the record that Mullins/Winchester did not control the Dingess brothers. Mullins/Winchester had to follow up and do things that Dingess failed to do. Tr. 97(c), Tr. 117. Joe and Johnny Dingess were never around the mines, nobody knew where they were. Tr. 111, 112. The Dingesses failed to comply with DNR requirements even though urged to do so by Mullins/Winchester, they simply didn't do it. Tr. 118. Sometimes Roger Cook would notify Dingess about rock dusting and "sometimes they would do it and sometimes they wouldn't." Tr. 143.

I find nothing in either the judge's findings of fact or in the record which, on balance, leads me to conclude that Dingess was the agent of Mullins/Winchester rather than an independent contractor. Rather, I find that the record shows the contrary. Mullins/Winchester hired a contractor that they thought was competent. As time went on, Dingess' performance deteriorated in terms of both coal production and in performance of its obligations under their contract and under federal and state mining laws and regulations. Mullins/Winchester did not stand idly by in the face of Dingess' deteriorating performance and the majority concludes that these efforts, many of them aimed toward compliance with the Mine Act, destroyed Dingess' status as an independent contractor. I disagree. I do not believe that Mullins/Winchester's actions exhibited the type or degree of control necessary to destroy the independent status of Dingess. Further, I am of the opinion that owners should be encouraged to monitor compliance by their contractors rather than discouraged from doing so. Accordingly, I would find that Mullins/Winchester were not liable under section 105(c)(1) of the Mine Act for Dingess' discriminatory acts under the Complainant's agency theory. Thus, in my opinion, Mullins/Winchester's liability or lack thereof would turn on the Complainant's strict liability theory, a matter not reached by the majority.


Joyce A. Doyle, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SEP 1 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 87-251
Petitioner : A.C. No. 36-00906-3651
v. :
: Gateway Mine
GATEWAY COAL COMPANY, :
Respondent :

DECISION

Appearances: Therese I. Salus, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Secretary of Labor;
David Saunders, Safety Director, Gateway Coal Co.,
Prosperity, Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary of Labor (Secretary) seeks a civil penalty for the violation of 30 C.F.R. § 75.329 alleged in a citation issued October 10, 1986, in connection with an imminent danger withdrawal order issued the same day. Respondent did not contest or seek review of the withdrawal order and, although both parties have submitted argument as to whether it was properly issued, it is not before me in this penalty proceeding. The citation charged that Respondent permitted an excessive concentration of methane to exist in a travelable portion of the 5-butt, 7-face longwall bleeder system in the number 45 crosscut of the tailgate entry of the subject mine. Respondent contends that the inspector took the methane reading in the wrong area of the bleeder system. Pursuant to notice, the case was heard in Washington, Pennsylvania, on June 8, 1988. Joseph F. Reid and Alex O'Rourke testified on behalf of the Secretary. Gary Hajdu and Robert W. Hauser testified on behalf of Respondent. Both parties have filed post hearing briefs. I have considered the entire record and the contentions of the parties, on the basis of which I make this decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the owner and operator of an underground coal mine in Greene County, Pennsylvania known as the Gateway Mine.

2. Respondent produced approximately 689,000 tons of coal annually.

3. No evidence was submitted concerning Respondent's history of prior violations. I conclude that the history was favorable, and not such that a penalty otherwise appropriate should be increased because of it.

4. On October 10, 1986, Federal mine inspector Joseph Reid, an MSHA ventilation specialist, was assisting a regular MSHA inspector on an inspection of the subject mine. They proceeded first to the 5-butt, 7-face longwall. Coal was not being mined at that time.

5. The inspectors walked out of the mine through the return escapeway, examining the various bleeders on the way out. Inspector Reid took methane readings in approximately 20 areas in the bleeder system. This was an area from which pillars had been extracted.

6. At the end of the tailgate entry of the bleeder system, approximately 3 feet from the gob area, Inspector Reid took readings showing 4.8 to 5.2 percent methane, at a point 12 inches from the roof. The readings were taken with a hand held methane detector. The area was well supported with cribs. The inspector was standing between 2 cribs when he took the readings. Inspector Reid orally informed Respondent that he was issuing an imminent danger withdrawal order. The inspector then took three bottle samples from the same area. He took an air reading at the location where the air was crossing the gob and found 2397.5 cubic feet per minute.

7. The bottle samples were sent to the MSHA laboratory in Mt. Hope, West Virginia. Analyses showed methane concentrations of 4.23 percent, 7.13 percent and 7.81 percent.

8. Inspector Reid issued withdrawal Order No. 2681195 under section 107(a) of the Act, and citation 2681196 under section 104(a) charging a violation of 30 C.F.R. § 75.301. The citation was modified July 1, 1987, to charge a violation of 30 C.F.R. § 75.329.

9. The bleeder entries are required to be examined weekly by a certified person. A date board indicating such examinations

was maintained in the area of the citation, approximately ten feet further from the gob than the point where the inspector took his readings.

10. Although coal was not being mined, there were approximately five people working in the longwall area when the order and citation were issued. The inspector decided not to order these men withdrawn but to permit the mine foreman to attempt to correct the situation.

11. The condition was abated, the order lifted, and the citation terminated the same day when a stopping was opened to introduce additional ventilation into the area. Readings were then taken in the area involved showing 1.4 percent to 1.5 percent methane.

12. During the initial inspection, the inspector took additional methane readings at the regulator and at the mixing point in the bleeder entry in question and found 17 percent methane.

13. Respondent's assistant mine foreman, Gary Hajdu accompanied Inspector Reid on October 10, 1986. He took readings with a methane detector at a point approximately 10 to 15 feet from the crib where the Inspector had found the excessive methane. Foreman Hajdu's readings showed from 2.7 to 3 percent methane. He also took readings at the outby side of the crib and found 4.3 to 5 percent methane. He took further readings at the regulator and found 1.3 to 1.7 percent methane. The regulator was approximately 150 feet from the gob.

REGULATION

30 C.F.R. § 75.329 provides in part:

. . . all areas from which pillars have been . . . extracted . . . shall be ventilated by bleeder entries or by bleeder systems. . . . When ventilation of such areas is required, such ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases. Air coursed through the underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split . . .

ISSUES

1. Whether the methane readings found by Inspector Reid on October 10, 1986, constituted a violation of 30 C.F.R. § 75.329?

2. If a violation is found, was it significant and substantial?

3. If a violation is found, what is the appropriate penalty?

CONCLUSIONS OF LAW

IMMINENT DANGER

As I noted above, the inspector issued the citation charging the violation with which we are here concerned, in connection with an imminent danger withdrawal order under section 107(a). Both parties have introduced evidence concerning the existence vel non of an imminent danger and have argued the question in their post hearing briefs. However, Respondent did not file a contest or an application for review of the order with the Commission. The propriety of the issuance of the order cannot be challenged in a penalty proceeding. The issues before me are whether the alleged violation took place and, if so, the appropriate penalty. I make no finding as to whether an imminent danger existed.

WHERE WERE THE READINGS AND SAMPLES TAKEN

There is some dispute as to where Inspector Reid took his methane detector readings and his bottle samples. Reid testified that he took them at a point about three feet from the gob area and twelve inches from the roof while standing between two cribs. Respondent's witness intimated that he took them while reaching into the gob. I accept Inspector Reid's testimony which is consistent with his contemporaneous notes (Government's Exhibit 6).

REQUIREMENTS OF 30 C.F.R. § 75.329

The regulatory standard has two distinct mandates: (1) ventilation in bleeder entries required where pillars have been extracted shall be maintained so as to dilute, render harmless and carry away methane within such areas and to protect the active workings of the mine; (2) air from such areas which enters another split of air shall not contain more than two percent methane. Itmann Coal Company v. Secretary, 2 FMSHRC 1986 (1980). Active workings is defined in the regulations as "any place in a coal mine where miners are normally required to work or travel."

30 C.F.R. § 75.2(g)(4). Respondent is charged with failing to ventilate the area of its bleeder system so as to dilute, render harmless and carry away methane within such areas. It is not charged with permitting excessive methane concentrations at the regulator or mixing points.

VIOLATION

There is no dispute that the readings and bottle samples taken by Inspector Reid showed methane in a potentially explosive concentration. Methane is explosive when its concentration is between 5 and 15 percent. I have found that the readings and samples were taken in a travelable portion of the bleeder system. In fact they were taken within ten feet from the date board maintained by the mine examiner. Therefore, this was an area where miners are normally required to travel. It constituted active workings of the mine. Since Respondent failed to dilute and render harmless methane within such areas, a violation of 30 C.F.R. § 75.329 has been established. Respondent cited the case of Secretary v. Greenwich Collieries, 8 FMSHRC 1390 (1986), but that case involved a second requirement of § 75.329: methane concentrations at bleeder evaluation points in excess of two percent. It did not involve a charge of methane in an explosive concentration. It is not applicable to this case.

SIGNIFICANT AND SUBSTANTIAL

A violation is properly termed significant and substantial if it contributes to a safety hazard reasonably likely to result in serious injury. Mathies Coal Co., 6 FMSHRC 1 (1984). Methane will explode if it exists in the 5 to 15 percent range in the presence of any ignition. An ignition may be created by a roof fall which causes a spark. Roof falls in or at a gob area are reasonably likely to occur. A methane explosion in an active workings of a coal mine is likely to result in serious injury. I conclude that the violation was significant and substantial.

OTHER CRITERIA

There is no evidence as to how long the violative condition had existed. The area was examined weekly. I am not able on this record to conclude that the condition resulted from Respondent's negligence. The condition was abated promptly by introducing additional ventilation to the area.

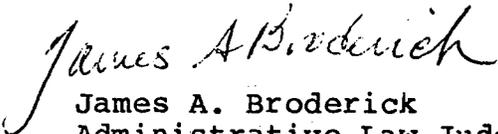
PENALTY

Considering all the evidence in the light of the criteria in section 110(i) of the Act, I conclude that a civil penalty of \$500 is appropriate for the violation found.

ORDER

Based on the above findings of fact and conclusions of law,
IT IS ORDERED:

1. Citation 2681196 issued October 10, 1986, charging a violation of 30 C.F.R. § 75.329 is AFFIRMED including its findings that the violation was significant and substantial.
2. Respondent shall within 30 days of the date of this order pay a civil penalty in the amount of \$500 for the violation found herein.


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 8 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 87-147
Petitioner : A.C. No. 15-12672-03506
v. :
: Docket No. KENT 87-151
RIVCO DREDGING CORPORATION, : A.C. No. 15-12672-03505
Respondent :
: Docket No. KENT 87-158
: A.C. No. 15-12672-03507
:
: Docket No. KENT 88-35
: A.C. No. 15-12672-03508
:
: River Dredge Mine

DECISION

Appearances: G. Elaine Smith, Esq., Office of the
Solicitor, U.S. Department of Labor, Nashville,
Tennessee, on behalf of the Petitioner;
Gene A. Wilson, Esq., President, Rivco Dredging
Corporation, Louisa, Kentucky, appearing on his
own behalf.

Before: Judge Maurer

STATEMENT OF THE CASE

These proceedings were filed by the Secretary of Labor,
Mine Safety and Health Administration (MSHA), under section
110(a) of the Federal Mine Safety and Health Act of 1977,
30 U.S.C. § 820(a) (hereinafter the Act), to assess civil
penalties against the Rivco Dredging Corporation (Rivco).

Pursuant to notice, these matters were heard on
April 27, 1988 in Huntington, West Virginia. Both parties
appeared, introduced evidence and submitted post-hearing
arguments which I have considered in making this decision.

With regard to the history of previous violations by
Rivco, I find the number of violations in the two years
previous to the inspections at issue to be few and that the
size of Rivco can be considered small. Furthermore, in the

absence of any specific evidence to the contrary, I find that the proposed penalties, if they are assessed, will not effect the ability of Rivco to continue in business.

I. Docket No. KENT 87-147

Citation No. 2776057

The inspector alleged in the citation that:

The tail roller of the stacking belt at the dredge screening plant is not adequately guarded in that the entire back of the roller is exposed and the sides approx. 50% exposed whereby a worker engaged in maintenance or cleanup can contact such roller thereby incurring a serious injury.

30 C.F.R. § 77.400(a) provides that: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

Inspector Hatter, a mine inspector employed by MSHA for approximately thirteen years, had occasion to issue the above citation on October 8, 1986. He testified that the tail roller of the stacking belt at the dredge screening plant wasn't provided with an adequate and proper guard in the tail area. He considered this to be a violation because the tail roller was supposed to be guarded in accordance with 30 C.F.R. § 77.400(a).

Inspector Hatter allowed thirty days for abatement of this citation, but when he returned on February 18, 1987, he found that the tail roller had been only partially guarded and was still in non-compliance with the mandatory standard. The inspector thereupon issued section 104(b) Order No. 2769993 for failure to abate the subject citation. The condition was abated on or before the inspector's next visit to the site on March 23, 1987.

Rivco does not dispute these facts, but states that the conveyor had been completely disassembled for moving to a new dredging location and was not in a condition for inspection when Inspector Hatter appeared while this was in progress and wrote the citation. In any event, Rivco disputes that this

is a significant and substantial ("S&S") violation as marked by the inspector.

Inspector Hatter testified that where rollers are not properly guarded, persons working in the area may get a piece of clothing caught in one or might get a tool caught in one, resulting in a personal injury type accident. He assessed the risk of the occurrence of this condition and such an injury as reasonably likely if a proper guard wasn't provided. I find Hatter's testimony to be credible concerning both the fact of violation and "S&S", assess the negligence of the operator to be moderate and the gravity as serious. Furthermore, I credit Hatter's testimony that the operator was producing coal on the morning the citation was written.

Accordingly, Citation No. 2776057 is affirmed as issued and I find an appropriate civil penalty to be \$150, as proposed.

Citation No. 2776060

The inspector alleged in the citation that:

A sign warning against smoking and use of open flame is not posted at the diesel fuel storage tank outby the screening plant. The sign thereon is so weathered as to be illegible.

30 C.F.R. § 77.1102 provides that: "Signs warning against smoking and open flames shall be posted so they can be readily seen in areas or places where fire or explosion hazards exist."

The respondent essentially admits the violation, stating that the sign was "not very legible". However, the respondent also introduced evidence to the effect that the tank in question is actually owned by the Ashland Oil Company. The tank is brought into them by Ashland and they do not always get the same fuel tank. Mr. Wilson testified that some of them are well-marked and others are not so well-marked. This particular one was not so well-marked and therefore was in violation of the cited standard. However, under the circumstances I find only slight negligence on the part of the operator. Accordingly, I am going to affirm the non "S&S" citation, but assess a civil penalty of only \$50, vice the \$122 proposed.

Citation No. 2784423

The inspector alleged in the citation that:

Safe access is not provided on the deck or walkway on each side of the dredge where workers are required to travel from and to the dredge itself as well as the engine and control rooms and various locations for examination and maintenance. The dredge deck is of more or less smooth metal construction which can become slick in inclement weather or frost. No hand rail, safety chain or cable is provided for prevention of a worker falling or falling overboard.

30 C.F.R. § 77.205(a) provides that: "Safe means of access shall be provided and maintained to all working places."

It is undisputed that there was no handrail, safety chain or cable provided to prevent a worker from slipping and falling off the dredge. However, the respondent disputes the need for any such safety devices. I concur with the inspector that some means is necessary to assure safe access to the dredge, at least in inclement weather. I take administrative notice that smooth sheet metal would become slick in wet conditions such as rain, sleet or snow. I also find that the violation is "S&S" because in such weather conditions, it is reasonably likely that someone would slip and fall and sustain a serious injury, without some sort of handrail to hold onto.

I accordingly affirm Citation No. 2784423 as an "S&S" violation but reduce the operator's negligence to "low" from "moderate" because I feel the operator genuinely felt that any sort of handrail was unnecessary and they have operated in that configuration for seven years with no one previously suggesting otherwise. Therefore, I find that a civil penalty of \$110 vice the \$150 proposed is more appropriate.

Citation No. 2784425

The inspector alleged in the citation that a violation of 30 C.F.R. § 77.400(a) had occurred and the condition or practice was alleged to be:

The back portion and the LT.(inby) side of the plant feed belt tail roller is not adequately guarded in that the back is guarded only by X-bracing of the plant feeder hopper structure and the LT. side is exposed just inside the feeder base structure whereby a worker can contact such roller and incur a serious injury during maintenance or cleanup.

The respondent, through Mr. Wilson, admitted that the tail roller did not have a wire mesh guard on the one side, but argued that it was unnecessary as it would be difficult for someone to get into this area. Inspector Hatter, on the other hand, testified that a person could reach in there with a tool to contact the roller and thereby incur injury. I find a non "S&S" violation herein and moderate negligence on the part of the operator. As in all the citations issued in this case, a \$104(b) order subsequently had to be issued to persuade Rivco to abate the citation. Accordingly, I find that a civil penalty of \$122, as proposed, is appropriate.

Citation No. 2784426

The inspector alleged in the citation that a violation of 30 C.F.R. § 77.400(a) had occurred and the condition or practice was alleged to be:

A guard is not provided for the v-belts and pulleys of the coal elevator where a person is required for examination and maintenance. Such v-belts and pulleys are located immediately adjacent to the catwalk where personal contact therewith can cause a serious injury.

The record establishes a violation of the cited standard. However, because this unguarded pulley is in a very remote area of the plant where no one goes except for the foreman to grease on occasion and the electrical inspector to inspect, and they only when the plant is not in operation, I find that the probability is very slight, i.e., unlikely that a worker would be injured in the area where the belt is exposed. Therefore, I affirm Citation No. 2784426, only as a non "S&S" citation. Also, because of the remoteness of this particular violation and its foreseeable consequences, I find only slight operator negligence. Accordingly, I will reduce the proposed civil penalty of \$195 to \$75.

Citation No. 2784427

The inspector alleged in the citation that a violation of 30 C.F.R. § 77.205(a) had occurred and the condition or practice was alleged to be:

Safe access is not provided to the coal elevator drive in that a worker is required to climb over a handrail adjacent to the upper shaker catwalk to gain access to the travelway leading to the elevator, which can result in a slip or fall and serious injury.

Although this is not a regular work area, workers must use this travelway for the monthly electrical inspection or on an as needed basis to perform other tasks such as to repair belt breakage or to service the head drive. The record establishes a violation of the cited standard and I agree with the inspector that a slip and fall hazard existed. I likewise assess the operator's negligence as moderate and find the proposed civil penalty of \$122 to be appropriate to the offense.

Citation No. 2784428

The inspector alleged in the citation that a violation of 30 C.F.R. § 77.205(a) had occurred and the condition or practice was alleged to be:

Two holes exist in the main plant floor about 16' wide x 26" long x 5" deep, of which approx. 8' of each hole is covered by wire mesh screen, the remainder being left open where a worker can step into either hole and fall resulting in serious injury.

The cognizant standard only requires that a safe means of access shall be provided to all working places. I find the respondent's evidence to be credible to the extent that these two drainage holes in the floor are in an area completely outside the normal flow of foot traffic and usual access to any working place. A usable, safe walkway is provided through, or rather around and over the cited area. There is no reason apparent to me that a worker would be in the area of the drain holes cited by Inspector Hatter. Accordingly, Citation No. 2784428 will be vacated.

II. Docket No. KENT 87-151

Citation No. 2776055

Inspector Hatter alleged in this citation that:

The dredge engine and pump access travelway where a worker is required to travel for maintenance and/or repair, is not kept free of extraneous material whereby a worker can trip-stumble and fall, thereby incurring a serious injury in that a length of approx. 3/8" chain, a length of water hose and a 5 gal lube bucket lying on its side are found therein.

30 C.F.R. § 77.205(b) provides that: "Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards."

The inspector testified consistently with his written allegation, including his "S&S" special finding. The respondent doesn't dispute the fact that this clutter existed, but rather its purported defense is that they were still in the process of setting up, they were not producing coal at the time and basically were not ready for an inspection. That is in reality no defense at all. Accordingly, Citation No. 2776055 will be affirmed and a civil penalty of \$50, as proposed, assessed.

Citation No. 2776056

The inspector alleged in the citation, as modified, that:

Flammable liquid is not being stored in a safety can in that approx. 3/4 gal. of gasoline for fueling the bilge pump on the dredge, located in the engine room, is found in a "lawn mower" type can with no spring closing lid or spout cover.

30 C.F.R. § 77.1103(a) provides that: "Flammable liquids shall be stored in accordance with standards of the National Fire Protection Association. Small quantities of flammable liquids drawn from storage shall be kept in properly identified safety cans."

Again, the respondent does not deny the gas can was on the dredge but avers that it was only on the dredge temporarily for transportation and would have been unloaded off the dredge in due time. It was not intended to be left aboard. I find a violation of the cited standard and assess a civil penalty of \$20, as proposed.

Citation No. 2776059

The inspector alleged in the citation that:

No type of fire extinguisher is provided at the above ground diesel fuel storage tank located outby the screening plant.

30 C.F.R. § 77.1109(e)(1) provides that: "Two portable fire extinguishers, or the equivalent, shall be provided at each of the following combustible liquid storage installations: (1) Near each above ground or unburied combustible liquid storage station."

Mr. Wilson testified that there were probably six fire extinguishers being transported on the dredge and they were only approximately 150 feet away from the fuel storage tank. A fire extinguisher could have been taken over there in a "couple of minutes" per Mr. Wilson. I find that that is not "near" enough to comply with the standard and accordingly, I find a violation of the cited standard, affirm the citation and assess a civil penalty of \$20, as proposed.

Citation No. 2784421

The inspector alleged in the citation that:

The Clark/Michigan 125B Loader being used for loading coal is not provided with adequate brakes in that the parking brake falls to hold repeatedly on a slight grade.

30 C.F.R. § 77.1605(b) provides that: "Mobile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes".

Equipped with parking brakes implies that those parking brakes be capable of holding the equipment, even on a grade. The parking brakes at issue admittedly would not do that. Therefore, I find the record herein establishes a violation

of the cited standard. I affirm the citation, as issued, and assess a civil penalty of \$20, as proposed.

Citation No. 2784422

The inspector alleged in the citation that:

The Clark/Michigan 125B loader, being used for coal loading at the screening plant is not provided with a fire extinguisher continuously maintained in a usable condition in that the extinguisher provided thereon is discharged.

30 C.F.R. § 77.1109(c)(1) provides that: "Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher."

The regulation that the respondent is actually charged with being in violation of in this instance, 30 C.F.R. § 77.1110, provides: "Firefighting equipment shall be continuously maintained in a usable and operative condition. Fire extinguishers shall be examined at least once every 6 months and the date of such examination shall be recorded on a permanent tag attached to the extinguisher."

The fire extinguisher the inspector found on the subject loader was discharged. Respondent did not contest this fact, but explained that this would have been found by them and exchanged for a charged one if they had been given the opportunity to do so. This is not a viable defense.

I find the Secretary has sustained her burden of proving the existence of the instant violation and I affirm the citation and assess a civil penalty of \$20, as proposed.

Citation No. 2784429

The inspector alleged in the citation that a violation of 30 C.F.R. § 77.205(a) had occurred and the condition or practice was alleged to be:

The RT.(inby) side catwalk adjacent and providing access to the upper shaker screen at the plant is punctured with the expanded metal loose in an area approx. 30" long x 18" wide whereby a worker

engaged in examination or maintenance can step through the screen and incur a serious injury.

Rivco essentially admits the violation, but asserts that there were two other means of access to the same area and that the only person that goes up there anyway is the foreman. Nevertheless, I concur with the inspector that a violation of the cited standard occurred, and there was a reasonable likelihood that an injury accident could have happened. Furthermore, I find that a civil penalty of \$50, as proposed, is appropriate under the circumstances.

Citation No. 2784430

Inspector Hatter alleged in this citation that yet another violation of 30 C.F.R. § 77.205(a) had occurred in basically the same location and the condition or practice was alleged to be:

Safe access is not maintained to the picking belt on the RT. (outby) side in that to gain access thereto, a worker must traverse (1) the upper shaker catwalk which has a hole about 30 x 18" therein, (2) or use an unanchored crossover with no steps on the Rt. (outby) side which causes a worker to climb up about 52" and swing around the shaker catwalk ladder to get to the crossover and go down the LT. (outby) side about 48" with only a 3" wide metal plate to step on. A worker is on each side of the belt picking rock and trash from coal.

Respondent raised the issue at hearing of duplicitous pleading concerning this citation and the previous one (No. 2784429). I agree. Abatement of Citation Nos. 2784429 and 2784430 required exactly identical action. The hole in the right side of the upper shaker catwalk was repaired. These two citations charge exactly the same violation. I have already affirmed Citation No. 2784429. Therefore, I will vacate Citation No. 2784430 as pleading a multiplicitous violation, for which a civil penalty has already been assessed.

III. Docket No. KENT 87-158

Citation No. 2784424

The inspector alleged in the citation dated October 9, 1986 that a violation of 30 C.F.R. § 77.400(a) had occurred and the condition or practice was alleged to be:

A guard is not provided for (5) five troughing rollers on the plant feed belt where a worker is observed picking rock and trash from coal and contact with such rollers can cause a serious injury. The condition exists on either side of such belt and no stop cord is provided.

Subsequently, on November 21, 1986, section 104(b) Order No. 2775975 was issued for failure to abate the instant citation. At a close out conference on November 25, 1986, agreement was had to terminate the order and citation on the basis that this particular area was no longer a work area, and that there was no foreseeable use for this area again. Mr. Wilson purportedly stated that if there ever was a need for this work area again, that guards would be installed before the work began. He also supposedly has instructed his work force not to work in this area.

Respondent admits a worker was picking rock off a moving belt in close proximity to unguarded rollers, but nonetheless argues that there was no violation of the mandatory standard at 30 C.F.R. § 77.400(a) because it was not a "regular" work area. The cited standard, however, does not differentiate between regular work areas and irregular work areas. It merely requires moving machine parts which may be contacted and thereby cause injury to be guarded. Therefore, I find that a violation of section 77.400 (a) has been established.

The record further establishes that the violation was a "significant and substantial" one. It doesn't take much imagination to follow Inspector Hatter's theory that if this worker was inattentive or slipped while reaching for a heavy piece of rock moving on this beltline, that she could catch her clothing or her arm in one of these unguarded rollers. I believe that this is a reasonably likely occurrence and if it in fact occurred would be reasonably likely to result in a serious injury to her.

Applying the statutory criteria to the facts and circumstances at hand, I find that the \$150 civil penalty proposed by the Secretary is appropriate.

IV. Docket No. KENT 88-35

Citation No. 2985265

The inspector alleged in the citation that a violation of 30 C.F.R. § 77.400(a) had occurred on September 14, 1987 and the condition or practice was alleged to be:

A guard is not provided for the v-belt and pulleys at the head drive of the plant discharge belt where a worker engaged in examination or maintenance can contact such components with a serious injury resulting or if on the platform below, be struck by a broken belt fragment.

The testimony of Hatter and Cantrell as well as the photograph marked and received in evidence as Government Exhibit No. 13 establish a violation of the cited mandatory standard. However, I accept as more credible the respondent's evidence as to the remoteness of the site of the unguarded belt and therefore find it unlikely that any worker would be injured by it.

Therefore, I am going to modify the instant citation and affirm it as a non "S&S" citation and reduce the proposed civil penalty of \$42 to \$20.

Citation No. 2985267

The inspector alleged in the citation that a violation of 30 C.F.R. § 77.205(a) had occurred on September 14, 1987 and the condition or practice was alleged to be:

A safe means of access is not maintained on the LT. shaker catwalk adjacent to the shaker drive in that lack of support for the catwalk flooring metal allows the flooring to sag under a workers weight such that a foot will go under the flywheel guard and can contact the moving drive belt with serious injury. A worker is required to be in this area for cleaning and maintenance.

Government Exhibit No. 14 illustrates that the flooring in the cited area sagged to the extent that a worker's foot could come into contact with the drive belt. Therefore, I find a violation of the cited mandatory standard. However, I regard the likelihood of this actually occurring as slight and the operator's negligence to be slight as well.

Accordingly, I will reduce the civil penalty from the amount proposed, \$42, to \$20, and affirm the citation only as a non "S&S" citation.

The "Jurisdictional" Issue

Periodically while these cases have been on my docket Mr. Wilson has raised, subsequently abandoned and then raised again an issue loosely described as "jurisdictional".

Respondent concedes that his coal processing plant does process coal and is therefore a "coal mine" within the meaning of the Act. However, Mr. Wilson contends that dredging coal is not a "coal mine", and while he concedes MSHA has jurisdiction under the Act to inspect his dredging operation, he believes that he should be inspected by the Sand and Gravel Division and not the Coal Division of MSHA. The reason for all of this being his belief that Inspector Hatter, who is a coal mine inspector, doesn't know anything about dredging operations or dredges and this lack of knowledge has caused Hatter to issue the instant flood of citations. Mr. Wilson points out that before Hatter and after Hatter, there were very few citations issued to the Rivco Dredging Corporation and in fact, several of the Hatter citations were subsequently vacated as "issued in error" before they came before this Commission. I note that several more have been vacated since, some of them by this decision.

Be that as it may, I have no authority to order any particular MSHA division or office or any specific inspector to inspect or not inspect the respondent's facilities. That is a matter strictly within MSHA's purview. What I can and do decide herein is that the respondent's sand and coal extraction and processing operations are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 and this Commission plainly has jurisdiction over this proceeding.

Civil Penalty Assessments

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of civil penalties is warranted as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>	<u>Penalty</u>
2776057	10/8/86	77.400(a)	\$150
2776060	10/8/86	77.1102	50
2784423	10/9/86	77.205(a)	110
2784425	10/9/86	77.400(a)	122
2784426	10/9/86	77.400(a)	75
2784427	10/9/86	77.205(a)	122
2776055	10/8/86	77.205(b)	50
2776056	10/8/86	77.1103(a)	20
2776059	10/8/86	77.1109(e)(1)	20
2784421	10/8/86	77.1605(b)	20
2784422	10/8/86	77.1110	20
2784429	10/9/86	77.205(a)	50
2784424	10/9/86	77.400(a)	150
2985265	9/14/87	77.400(a)	20
2985267	9/14/87	77.205(a)	20

ORDER

Accordingly, IT IS ORDERED that Citation Nos. 2784426, 2985265 and 2985267 be, and hereby are, MODIFIED to delete the issuing inspector's findings that the cited violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

IT IS FURTHER ORDERED that Citation Nos. 2784428 and 2784430 be, and hereby are, VACATED.

Respondent IS ORDERED TO PAY civil penalties totaling \$999 within 30 days of the date of this decision.


 Roy J. Maurer
 Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 8 1988

WESTMORELAND COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. VA 87-31-R
v.	:	Citation No. 2753219;8/12/87
	:	
SECRETARY OF LABOR,	:	Central Machine Shop
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 88-14
Petitioner	:	A.C. No. 44-03108-03507
	:	
v.	:	Central Machine Shop
	:	ID No. 44-03108
	:	
WESTMORELAND COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: F. Thomas Rubenstein, Esq., Westmoreland Coal Company, Big Stone Gap, VA, for Respondent; James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for Petitioner.

Before: Judge Fauver

In these consolidated proceedings Westmoreland Coal Company seeks to vacate Citation No. 2753219 under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., and the Secretary of Labor seeks a civil penalty under § 110(i) of the Act for the violation cited.

Based upon the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable and probative evidence establishes the following:

FINDINGS OF FACT

1. Westmoreland owns and operates a surface facility near Stonega, Virginia, which includes (1) a building housing a

central warehouse and a central machine shop and (2) a fuel depot that includes gasoline and diesel storage tanks and fuel pumps to service Westmoreland's vehicles.

2. The warehouse and machine shop are in the same building, but are separated by a wall and a security "airlock" room. They are managed by separate departments and personnel and their employees are not interchanged.

3. The warehouse stores and distributes parts, supplies, and equipment used by a number of Westmoreland's coal mines, the nearest one being 2.5 miles away, and the machine shop repairs and maintains equipment used in those mines.

4. The fuel depot, which is on the same property and about 200 to 300 feet from the warehouse/machine shop building, includes four 6,000 gallon storage tanks, fuel pumping filler pipes and fuel pumps to service vehicles. Only authorized Westmoreland vehicles may use the fuel pumps; these include vehicles that regularly transport employees, mining supplies, parts, and equipment to and from Westmoreland's coal mines.

5. On August 12, 1987, MSHA Inspector Daniel S. Graybeal issued Citation No. 2753219 charging a violation of 30 C.F.R. § 77.1103(d) based upon the following alleged condition:

The 2400 gallon fuel storage depot was not kept free of combustible weeds and dry grass for a distance of 25 ft. as described below: vegetation ranging up to 18 inch[es] high had grown up to within 10 ft. of the four tanks on 3 sides and within 5 ft. of the fuel pumping filler pipes. The vegetations consist of weeds and dry grass. The fuel tanks were capable of containing 12000 gal. of gasoline and the same amount of diesel fuel.

6. The factual allegations in the citation were proved by substantial and convincing evidence and are incorporated as findings of fact.

DISCUSSION WITH FURTHER FINDINGS

Section 3(h)(1) of the Act defines a "mine" broadly, as follows:

(h)(1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in

liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. * * *

In U.S. Steel Mining Company, Inc., 10 FMSHRC 146 (1988), the Commission considered whether the Act applied to a mine operator's repair shop that repaired equipment used in its nearby coal mines. The Commission found it unnecessary to decide whether the repair shop was a "surface installation" of a coal mine and held, instead, that the "shop itself is a separate surface 'coal mine' within the meaning of the Act"

In W.F.Saunders & Sons, 1 FMSHRC 2130 (Decision of ALJ, 1979), Judge Melick held that a storeroom owned by a mine operator was subject to the Act because parts and equipment stored there were regularly used in the operator's work of extracting coal.

The Secretary contends that Westmoreland's fuel depot is a separate surface coal mine and, alternatively, that it is a functional part of the machine shop, which is acknowledged to be a covered mine. Westmoreland contends that the fuel depot is not a separate coal mine, but is a functional part of the central warehouse, not the machine shop, and therefore is not subject to the Act.

I hold that the fuel depot is itself a separate surface coal mine within the meaning 3(h)(1) of the Act. The fuel depot is used only by Westmoreland's vehicles, including vehicles used on a regular and substantial basis to transport personnel, parts, supplies and equipment used in the work of extracting coal from Westmoreland's mines.

The standard cited in Citation No. 2753219 (30 C.F.R. § 77.1103(d)) requires that:

(d) Areas surrounding flammable liquid storage tanks and electric substations and transformers shall be kept free from grass (dry), weeds, underbrush,

and other combustible materials, such as trash, rubbish, leaves and paper, for at least 25 feet in all directions.

The Secretary proved a violation of this standard by a preponderance of the evidence. Considering the criteria for a civil penalty in § 110(i) of the Act, I find that the Secretary's proposed penalty of \$78 is appropriate.

CONCLUSIONS OF LAW

WHEREFORE IT IS ORDERED that:

1. Citation No. 2753219 is AFFIRMED.
2. Westmoreland Coal Company shall pay the above civil penalty of \$78 within 30 days of this Decision.


William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 12 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 88-55-M
Petitioner : A.C. No. 41-01001-05506
v. :
: San Saba Plant
TEXAS ARCHITECTURAL :
AGGREGATES INCORPORATED, :
Respondent :

DECISION

Appearances: E. Jeffery Story, Esq., Office of the
Solicitor, U.S. Department of Labor, Dallas,
Texas, for the Petitioner;
David M. Williams, Esq., San Saba, Texas, for
the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Petitioner seeks a civil penalty assessment in the amount of \$91 for an alleged violation of mandatory safety standard 30 C.F.R. § 56.11001. The respondent filed a timely answer contesting the alleged violation, and a hearing was convened in San Antonio, Texas. The parties waived the filing of posthearing briefs, but I have considered the arguments made on the record during the course of the hearing in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitutes a violation of the cited mandatory health standard; (2) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty criteria found

in section 110(i) of the Act; and (3) whether the violation was "significant and substantial." Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

Stipulations

The parties stipulated to the following (Tr. 5):

1. The name of the respondent company is Texas Architectural Aggregate, Inc. with the place of business at San Saba, Texas.
2. Jurisdiction is conferred upon the Federal Mine Safety and Health Review Commission under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. The alleged violation of the Act took place in or involves the mine that has products which affect commerce.
3. The name of the mine is San Saba Plant and Quarry, identification number 41-0100. The mine is located at or near San Saba, Texas; San Saba county. The size of the company is 118,207 production tons or hours work per year, and the size of the mine is 83,300 production tons or hours work per year.
4. The total number of inspection days in the preceding 24 months is 22 days.
5. The total number of citations in the preceding 12 months is 46.

The parties also stipulated to the admissibility of an MSHA computer print-out concerning the respondent's prior history of violations, and several photographic exhibits (Tr. 6; exhibits P-2, P-3; R-1 through R-6).

Discussion

Section 104(a) "S&S" Citation No. 2868984, issued by MSHA Inspector Edward R. Lilly on July 27, 1987, cites an alleged violation of 30 C.F.R. § 56.11001, and the condition or practice is described as follows:

Safe access was not provided to the disconnect and starter boxes to the big and small cone crusher. Persons were required to crawl over conveyor belt and steel "I" beam of the jaw crusher. The V-belt drive unit was located beside electrical boxes exposing person to moving machine parts and pinch points.

Petitioner's Testimony and Evidence

MSHA Inspector Edward R. Lilly testified that he issued the citation because safe access was not provided to the electrical switch boxes in question, in that a person would have to climb across a conveyor belt, step over an I beam, and across a V-belt drive unit to gain access to the switch boxes to deenergize the power in the event of an emergency. Mr. Lilly confirmed that the boxes were located under the crusher building control booth where the crusher operator is located to run the equipment. The boxes were located on a platform 7 or 8 feet off the ground, and in order to reach that location, foreman Kenneth Crim advised him that the crusher operator would use a ladder located on the other side of the building, and Mr. Lilly stated that once one reached the ledge of the platform by means of the ladder, he would have to crawl across a conveyor belt and around the end of the V-belt pulleys to gain access to the boxes. In his opinion, in the event of an emergency, one would have too many problems in climbing over these obstacles to timely turn off the switches. Mr. Lilly identified a photograph he took on May 5, 1988, showing the area in question, and he confirmed that nothing had changed since the day he issued the citation, and he described what was in the photograph in response to several voire-dire questions by respondent's counsel (Tr. 14-19, exhibit P-3).

Mr. Lilly confirmed that the crusher operator was in the control booth at the time of his inspection, and when he asked the operator how he gained access to the switch boxes in order to turn off the power for repair work, the operator advised him that he had to climb over the conveyor belt and across the tail pulley to pull the switches and lock out the equipment. Mr. Lilly confirmed that a stop-start button was located

inside the booth to stop and start the equipment, but the main disconnect switch consisted of the cited boxes in question. Mr. Lilly further confirmed that the operator he interviewed was the person responsible for any maintenance work on the equipment, and that he would pull the main switches to kill the power when there was maintenance work to be done. The operator further advised him that he had on occasion pulled the main power switches in question, and when asked to describe the route that he took to accomplish this task, the operator advised him as follows (Tr. 24-25):

THE WITNESS: He told me that on occasion when the crusher was plugged up or they had to go into the crusher to get something out of it, that in order to make it safe, they would have to go pull the main power on this. And I asked him then how did he get over to pull the main power switch.

He said he crawled across the conveyor belt, stepped on the I-beam between the V-belt drive, and over the V-belt drive onto the platform where the switch box is located.

JUDGE KOUTRAS: Did he indicate to you whether or not all this equipment was operating or not operating? Or was that whole area shut down when he did this?

THE WITNESS: The whole area was shut down.

JUDGE KOUTRAS: Then he wasn't crawling over an operating conveyor belt?

THE WITNESS: No, sir. He pushed the button, just the start/stop button to shut that down. But in order to go inside of a piece of equipment, the switch has to be pulled and locked out. A lock physically put on the switch.

JUDGE KOUTRAS: But I am talking about crawling over -- the route he took to get to these junction boxes -- was he crawling over equipment that was energized and operating? Or was he working -- crawling over equipment that was shut down and locked out?

THE WITNESS: He was crawling over equipment that was shut down, not locked out because he

had to pull the power to lock it out. But that equipment -- if anyone had come up in the control booth, could push the button and start the equipment up. That is why we require it to be locked out.

Mr. Lilly confirmed that his inspection party gained access to the switch boxes in question by means of a ladder pointed out to them by Mr. Crim. Mr. Lilly stated that he climbed up the ladder and climbed over the conveyors to reach the switch boxes. He confirmed that the switch boxes would have been directly accessible from the ground by means of a ladder placed directly up to the location of the boxes from ground level, but that no ladder was present (Tr. 30-31).

Mr. Lilly stated that in order to abate the citation, he allowed the respondent to construct a ladder as a means of direct access to the switch boxes without the necessity of climbing over the conveyors. Once the ladder was used to gain access to the switches, it was to be removed and hung out of the way so that there was no access to the area for anyone except employees who had business there. The ladder was permitted as a temporary means of abatement so that the respondent would not have to guard all of the moving machine parts. Mr. Lilly stated that Mr. Williams advised him that he was in the process of building a new motor control center, and the switch boxes in question were to be eventually housed in a new building. Although some progress has been made to relocate the switch boxes, Mr. Lilly confirmed that they are still in the same location (Tr. 31-32).

Mr. Lilly agreed that the use of a ladder for direct access to the switches, without the necessity for climbing over unguarded conveyors, would have been compliance, but at the time of his inspection, no ladder was being used. He agreed to the use of a ladder after the citation was issued because the respondent advised him that in a few months the switch boxes would be relocated, and he did not wish to subject the respondent to the financial burden of guarding the conveyors since the boxes were going to be moved (Tr. 35).

On cross-examination, Mr. Lilly identified the crusher operator with whom he spoke on the day of his inspection as Phillip Brown, and he confirmed that Mr. Brown advised him that the route he took to reach the switch boxes was the one he described previously. Mr. Lilly could not recall asking Mr. Brown how long he had been employed at the mine (Tr. 36-37).

Mr. Lilly confirmed that he is not an electrician. He stated that he was told by Mr. Crim and Mr. Brown that the cited switch was the main switch, and he understood that the stop-start switches were in the control booth. Referring to respondent's photographic exhibit R-5, Mr. Lilly identified the large switch box with a handle on the right as a main disconnect, but did not believe it was the main disconnect for the entire plant because the switch boxes underneath fed through the large box in question. He identified the red and black switch buttons shown in photographic exhibit R-6 as the stop-start switches inside the booth, and that all of the equipment was started and stopped with these switch buttons. Mr. Lilly believed that the large switch shown in exhibit R-5 controls the primary crusher, and the cited switches controlled the large and small cone crushers, and he confirmed that this is how it was explained to him by Mr. Crim (Tr. 39-40).

Referring to photographic exhibits R-1 and R-2, Mr. Lilly confirmed that access to the cited switches could be made with no problem from under the open areas shown in the photographs by means of a ladder. Mr. Lilly stated that he observed no built-in ladders and that Mr. Crim advised him that he would have to build one. He also stated that while there was a ladder hooked to the side of a bin when he took the picture on June 27, 1988, he observed no ladders on the day of his inspection, and that he first observed a ladder when he returned to the mine 2 weeks or a month later to abate the citation. At that time, Mr. Crim showed him a ladder which he had constructed with two-by-fours (Tr. 41-43).

In response to further questions, and referring to photographic exhibits R-1 and P-3, Mr. Lilly identified the location of the cited switches on the platform area beneath the operator's control booth. He indicated that the operator would exit the door to the booth, and go down the stairs to the platform below, and across the conveyor belt and an I-beam to gain access to the switches in question (Tr. 50-53).

Mr. Lilly confirmed that both Mr. Crim and Mr. Brown told him that they had occasion to use the access route he described to reach the switch box locations, and Mr. Crim confirmed to him that this was the only available route. Mr. Lilly also confirmed that he was told that the switch boxes were required to be disengaged infrequently, or every 6-months, or twice a day or a week, depending on the scheduled change out of the jaw crushers, and the type of materials being processed (Tr. 58-59).

Respondent's Testimony and Evidence

Joe R. Williams, respondent's president and general manager, testified that he was familiar with the plant electrical system and helped design the original plant when it was built in 1960 and 1961. Referring to photographic exhibits R-1 through R-6, Mr. Williams explained the location and function of several switch boxes used in the operation of the equipment. He identified the switch box which concerned Inspector Lilly as the one located on the lower deck beneath the control booth as depicted in exhibit R-1 (Tr. 62-66).

Mr. Williams stated that the disconnect switches for the large and small cone crusher would be accessed in the event of a malfunction in the starter motor, and that Mr. Crim would need to access the switches in the event of a malfunction, but that the crusher operator generally does not need to be in the area. In the event of a malfunction, or the need to test the equipment, or to repair any heater circuits, an electrician would be called to do this work. This would occur once every year or two, and in the event of a cone malfunction, or the need to make electrical repairs, the entire plant operation would be shut down (Tr. 67-69).

Mr. Williams believed that access to the cited switch box could be made from the operator's work platform by sitting on the deck and "take your foot and shove the controls down. Cut off the breaker." One could also "belly down there and reach with your hand and shut it off and turn it on. It is awkward" (Tr. 70). Malfunctions in the disconnect box would include a blown fuse or circuit problems which would necessitate shutting down the entire plant in order to service the box (Tr. 70-71). Several years may pass before any such problems appear (Tr. 72).

Mr. Williams stated that an angle iron movable ladder is located at the crusher to climb up onto the work deck on the opposite side of the crusher, but it does not appear in any of the photographs, and when asked whether a ladder was present when Mr. Lilly issued the citation, Mr. Williams responded "probably we did" (Tr. 73). He confirmed that the crusher in question is operated by three people (Tr. 73). If an electrician were required to service the disconnect box in question, he would use a ladder to gain access to it (Tr. 75).

Mr. Williams confirmed that Mr. Brown had been employed at the plant for approximately 1 year at the time of the inspection and he was in training as a crusher operator. He also confirmed that the access route that Mr. Lilly stated was

described to him by Mr. Crim was a possible path of access to the cited boxes, and that the use of a ladder on the other side of the crusher was also a means of access. Regarding the route taken by Mr. Crim, as described by Mr. Lilly, Mr. Williams stated "it is not really all that damn difficult. You can step across the main conveyor, * * * you don't crawl under any conveyor because the return conveyor doesn't come out that far" (Tr. 77).

Mr. Williams identified the ladder he was referring to as the one shown in exhibit P-2 (Tr. 78). Counsel David Williams stated that the ladder is no longer there, and that access to the switch boxes would not normally be made by the ladder shown in the photograph, but rather by a ladder placed at another location (Tr. 90). Joe Williams was certain that a ladder was available for use as access to the cited boxes at the time the inspector issued the citation (Tr. 95). When asked why Mr. Crim would have told Mr. Lilly that no ladders were available on the premises, Mr. Williams responded "unless Mr. Crim couldn't think fast enough to find a ladder. And I think that is probably the whole circumstances" (Tr. 107). When asked whether he doubted that crusher operator Brown told the inspector about the route he took to the switch boxes, Mr. Williams stated that he probably and very possibly made the statement to the inspector (Tr. 95).

Inspector Lilly was recalled, and he confirmed that while he issued guarding citations during his inspection of July 27, 1987, none of these involved any of the conveyor equipment along the route described as an access to the cited switch boxes, and no danger of falling citations were issued (Tr. 101-102). Mr. Lilly reiterated that he spoke with Mr. Crim, and that they both looked for an available ladder, but could not find one. The metal angle iron ladder referred to by Mr. Williams could have been taken down, but this would have resulted in no ladder being available for access to the crusher building (Tr. 103).

Mr. Lilly confirmed that he told Mr. Crim that Mr. Brown told him that he accessed the switch boxes by the route previously described, and that Mr. Crim said "I have gone that way myself on occasions to pull the switch." Mr. Lilly confirmed that he and the other inspector inspected the switch boxes, and "if there is a ladder in that picture, it was because we placed one thereto get access to that platform--the electrician and I." Mr. Lilly confirmed that the ladder he used was the angle ladder described by Mr. Williams (Tr. 104). Mr. Lilly confirmed that had Mr. Brown shown him a ladder or advised him that he used a ladder as a means of access to the

cited switch boxes, he would not have issued the citation (Tr. 105).

Arguments Presented by the Parties

The parties agreed that Mr. Lilly issued the citation based on his conclusion that in the normal course of business, if someone had to go to disengage the cited disconnect boxes, the route of travel he would take to accomplish this would be to go down one level from the control booth and go over a conveyor and cross a steel beam to reach the boxes. They also agreed that Mr. Lilly's conclusion regarding the access route came from his conversations with the crusher operator and foreman, Mr. Brown and Mr. Crim (Tr. 81).

Petitioner's counsel asserted that the testimony of Inspector Lilly establishes that a safe means of access was not provided to the switch boxes in question, and that respondent's president Joe Williams agreed that the statements by Mr. Crim and Mr. Brown to the inspector were possibly correct. Under the circumstances, counsel asserted that Inspector Lilly acted reasonably in issuing the citation (Tr. 108).

With regard to the inspector's "significant and substantial" finding, petitioner's counsel asserted that notwithstanding Mr. Lilly's agreement that the plant would be shut down before any maintenance work was performed, and that no one would likely cross over any moving conveyor belts to reach the switch boxes, there was a potential for someone falling 7 or 8 feet to the ground, even if the belts were not running (Tr. 109). Counsel acknowledged that Mr. Lilly issued no citations for the failure to use a safety belt (Tr. 110).

Respondent's counsel took the position that since access to the cited switch boxes was not frequent, and occurred once a year or every other year, the location could hardly be considered a normal working place (Tr. 96). Respondent's counsel also indicated that when he first reviewed this case, he believed that Inspector Lilly had observed something that led him to believe that safe access was not provided to the cited switch boxes, and he had no information indicating that the crusher operator had spoken to Mr. Lilly and informed him about the route which he had taken to the switch boxes. Counsel stated further that since Mr. Lilly made reference to moving machine parts and pinch points, he found it difficult to believe that such a serious "significant and substantial" situation could be abated by simply putting up a ladder (Tr. 111).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 56.11001, for failure to provide a safe means of access to the disconnect and starter boxes used in conjunction with the big and small cone crushers. Section 56.11001, provides that "Safe means of access shall be provided and maintained to all working places." The phrase "working place" is defined by section 56.2, as "any place in or about the mine where work is being performed."

In Massey Sand and Rock Company, 4 FMSHRC 188 (February 1982), 2 MSHC 1722, a miner walked up a conveyor belt to reach a head pulley located 35 to 40 feet off the ground so that it could be greased. As he began to grease the head pulley, the conveyor started and threw him to the ground. Judge Morris affirmed a violation of the safe access requirements of section 56.11001, and found that the operator could have provided a variety of means and access, including a ladder.

In Mohave Concrete & Materials Company, 6 FMSHRC 1195, 1198 (June 1983), 3 MSHC 1040, the judge affirmed a violation of section 56.11001 in a situation where an inspector observed a crusher operator climb up a crusher feeder frame and stand on a beam to perform his work. The violation was abated after the operator provided a platform and ladder for access to the work station in question.

The respondent's suggestion that the location of the disconnect boxes may not be considered a "working place" because visits to that area were infrequent IS REJECTED. Regardless of the frequency of their visits to the switch box area, when Mr. Crim and Mr. Brown had occasion to go to the area they were there to pull the power for the purpose of facilitating maintenance or repair work on the equipment, the clearing of clogged materials, to check the circuit or blown fuses, or to change out the jaw crushers. Under the circumstances, the connector box location was clearly a place where work was being performed within the meaning of "working place" as defined by section 56.2.

With respect to the respondent's suggestion that a ladder was available for access to the cited boxes, I find no credible evidence to support this contention. The evidence clearly establishes that no ladder was used by Mr. Brown or Mr. Crim when they had a need to access the boxes. Further, although Inspector Lilly stated that he used a metal angle iron ladder

to access the platform where the boxes were located, the evidence of record suggests that this particular ladder was not used for normal access to the boxes and was located at another place. Further, I find no credible evidence to rebut Inspector Lilly's credible testimony that the respondent failed to establish that ladders were used as a normal and regular access route to and from the cited boxes in question.

Inspector Lilly's testimony, which I find credible, establishes that at least two individuals, Mr. Brown and Mr. Crim, gained access to the cited boxes in question by a means of travel that took them over a conveyor belt and across an I-beam to the location of the boxes. These individuals had occasion to go to the boxes by means of the route described by the inspector, and the fact that they may have gone their rather infrequently is no defense to the violation. Although the respondent raised some doubt as to whether or not Mr. Crim made the statements attributed to him by Mr. Lilly, respondent conceded that Mr. Brown probably made the statements. In any event, since the respondent did not call Mr. Brown or Mr. Crim to testify in this case, Mr. Lilly's unrebutted testimony supports his belief that the route of travel taken by these individuals exposed them to certain trip and fall hazards, as well as to potential hazards from the unguarded equipment and machine parts and pinch points described by the inspector. Under the circumstances, I conclude and find that the evidence establishes that the access route described by the individuals to the inspector was unsafe, and that a violation of section 56.11001 has been established. Accordingly, the citation IS AFFIRMED.

Significant and Substantial Violation

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

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

Mr. Lilly believed that there was a reasonable likelihood of an injury to an employee who had to cross the conveyors to reach the location of the switch boxes, and there was a possibility of tripping or falling if the conveyor were muddy or if a lot of dust was present (Tr. 23). He confirmed that a citation was also issued for not locking out the equipment, but he could not recall whether it involved the same safe access condition (Tr. 26). Mr. Lilly was also concerned about possible sprains or broken bones if anyone fell off an opening between the conveyor and I-beam, or while standing or stepping onto the platform from the I-beam (Tr. 27).

Mr. Lilly agreed that Mr. Crim and Mr. Brown would not be climbing over moving conveyors belts, and that the entire area was shut down when these individuals had a need to access the boxes. However, Mr. Lilly testified that crusher operator Brown informed him that even though he shut the equipment down by means of the stop-start switch in the control booth, he

still had to go to the location of the boxes to pull the main power in order to make the crusher area safe for anyone freeing plugged material from it. Mr. Lilly believed that anyone could have entered the control booth and activated the equipment by means of the start-stop buttons, and I believe that in the event this occurred before the main switch was disconnected, and while someone was on the conveyors or in the proximity of unguarded and moving machine parts, a potential hazard and injury would be present.

Even assuming that the equipment over which Mr. Crim and Mr. Brown had to climb was totally deenergized and locked out while they were climbing over it, Mr. Lilly was still concerned that slipping or tripping hazards would be presented by the route of travel taken by these individuals, particularly if the conveyor was wet, muddy, or dusty. They would also be exposed to a falling hazard from the I-beam over which they had to step to reach the platform where the boxes were located. Under all of these circumstances, I conclude and find that Mr. Lilly's "significant and substantial" finding was reasonable and proper, and IT IS AFFIRMED.

History of Prior Violations

The parties stipulated that during the preceding 24-month period, respondent was subjected to 22 inspection days, and was issued 46 citations during the preceding 12-month period. Petitioner submitted an unevaluated computer print-out listing the respondent's violation history for the period March, 1978 through June, 1988, which contains no information as to the civil penalties assessed for each of the violations listed, or any information as to which of the citations have been paid, and which have not (exhibit P-1). In any event, after review of this information, I conclude and find that for the immediate 24-month period prior to the issuance of the violation which has been affirmed in this case, the respondent had an average history of compliance at its San Saba plant and quarry. I further conclude and find that respondent's compliance record is not such as to warrant any additional increases in the civil penalty assessment for the violation in question.

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

Based on the stipulations of the parties, and the testimony of Mr. Williams concerning the San Saba quarry production and the number of employees operating the plant, (Tr. 72), I conclude and find that the respondent is a small mine operator. Absent any information to the contrary, I also conclude and

find that the payment of the civil penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business.

Gravity

I conclude and find that the violation was serious. The failure to provide safe access to the cited boxes in question presented a potential injury to the employees climbing over the conveyors and I-beam in question, and in the event of a slipping, tripping, or falling accident, injuries of a reasonably serious nature could be expected.

Negligence

I conclude and find that the violation was the result of ordinary negligence on the part of the respondent because of its failure to exercise reasonable care to insure that its employees used a safe access route for reaching the cited boxes. It seems to me that this could have been accomplished by simply providing a ladder in the immediate ground level area beneath the platform or crusher operator's booth, or at least having one readily available, with appropriate instructions as to its use by any employee or serviceman who may have had a need to access the boxes for maintenance, repair, or inspection.

Good Faith Compliance

The record establishes that the respondent took appropriate steps to timely abate the citation by providing a ladder as a safe means of access to the boxes in question. I conclude and find that the respondent demonstrated good faith compliance.

Civil Penalty Assessment

In view of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the petitioner's proposed civil penalty assessment of \$91 for the violation is reasonable and appropriate. Accordingly, IT IS AFFIRMED.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$91 for the section 104(a) "S&S" Citation No. 2868984, July 27, 1987, 30 C.F.R. § 56.11001.

Payment is to be made to MSHA within thirty (30) days of the date of this decision, and upon receipt of payment, this proceeding is dismissed.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280 1244 SPEER BOULEVARD
DENVER CO 80204

SEP 14 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 87-59-M
Petitioner : A.C. No. 41-02577-05507
v. :
Crusher No. 1 Mine
PRICE CONSTRUCTION, :
INCORPORATED, :
Respondent :

DECISION

Appearances: Brian L. Pudenz, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
Mr. Bob C. Price, Price Construction, Incorporated,
Big Spring, Texas, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent with violating two safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties a hearing on the merits was held in Big Spring, Texas on May 24, 1988.

The parties waived their right to file post-trial briefs and they submitted their cases on oral argument.

Summary of the Case

Citation No. 2869357 charges respondent with violating 30 C.F.R. 56.14001, which provides as follows:

§ 56.14001 Moving machine parts.

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

Citation No. 2869358 charges respondent with violating 30 C.F.R. 56.16005. The regulation requires that compressed and liquid gas cylinders be secured in a safe manner.

Stipulation

The parties stipulated as follows:

1. The name of the respondent company is Price Construction, Inc. with a place of business near Big Spring, Texas.

2. Jurisdiction is conferred upon the Federal Mine Safety and Health Review Commission under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. The alleged violation of the Act took place in or involves the mine that has products which affect commerce.

3. The name of the mine is Crusher No. 1, identification number 41-02577. The mine is located near Salt Flats, Texas in Culberson County. The size of the company is 32,723 production tons or hours worked per year and the size of the mine is 15,007 production tons or hours worked per year.

4. The imposition of any penalty in this case will not affect the operator's ability to continue in business.

5. The total number of inspection days in the preceding twenty-four months is three.

6. The total number of assessed violations (including single penalties timely paid) in the preceding twenty-four months is one.

7. On March 25, 1987, an inspection was conducted by Moises A. Lucero, an authorized representative of the Mine Safety and Health Administration.

8. Two Section 104(a) citations (numbers 2869357 and 2869358) were issued for violations of 30 C.F.R. 56.14001 and 30 C.F.R. 56.16005 respectively, on March 25, 1987.

9. An abatement date of March 25, 1987 was set for both citations. Both citations were abated immediately by respondent.

10. On May 21, 1987, respondent received its first proposed penalty.

11. On May 21, 1987, respondent requested a hearing on the above citations.

12. On July 13, 1987, petitioner filed a complaint proposing penalty.

13. Respondent agrees to withdraw its request for hearing on citation number 2869358 and the Secretary agrees to reduce the citation to a non-significant and substantial, and reduces the proposed penalty to \$38.00. This reduction is supported by the facts that the violation was immediately abated, the respondent was unaware of the violating condition, the condition was a single incident and the likelihood of injury or illness was low.

II

Agreed Statement of the Issues

1. Whether a violation as alleged in Citation Number 2869357 is a significant and substantial violation within the meaning of the Act.

2. Whether the equipment concerned in Citation Number 2869357 was guarded by its location.

3. Whether a violation of 30 C.F.R. 56.14001 as alleged in Citation Number 2869357 did in fact occur.

III

Respondent's Statement of an Additional Issue

1. Whether the equipment concerned in Citation No. 2869357 could be reasonably expected to be contacted by persons.

IV

A. Witness for Petitioner

1. Moises A. Lucero will testify as to the conditions at the mine.

B. Witnesses for Respondent

1. Wesley Coleman, Plant Superintendent for Price Construction, Inc.

2. Charles E. Price, retired MSHA Inspector.

V

Exhibits

The following is a list of petitioner's exhibits:

- P1: The complaint proposing penalty with attachments.
- P2: Citation Number 2869357 on MSHA Form 7000-3 and Form 7000-3(a).
- P3: Investigator field notes (if available).
- P4: Photograph of air-compressor equipment at its location.

The following is a list of respondent's proposed exhibits:

- R1: MSHA Form 7000-3, Citation Number 286
- R2: MSHA Citation Number 2869359 dated 4-1-87.
- R3: MSHA Form 7000-3A Citation Number 2869359-1 dated 4-8-87.
- R4: MSHA Form 70002 Citation Number 2869360 dated 4-1-87.
- R5: MSHA Form 7000-3(a) Citation Number 2869360 dated 4-3-87.
- R6: MSHA Form 7000-3 Citation Number 2869360 dated 4-1-87.
- R7: MSHA Form 7000-3(a) Citation Number 2869381-1.
- R8: Hand written note documenting telephone request of Mr. Sidney Kirk for C.A.V. inspection.
- R9: Telephone billing record dated 2-1-87.
- R10: MSHA Form 4000-51 CAV-Nonpenalty notices dated 1-8-87 - 15 pages.
- R11: MSHA Form 7000-3(a) CAV-Notice dated 5-7-87.
- R12: Form 7000-3(a) CAV-Notices dated 3-25-87 - 15 pages.
- R13: Plant site and equipment photos.

Summary of the Testimony

Moises Lucero, an MSHA inspector for ten years, testified for the Secretary.

Mr. Lucero presented an issue as to whether a V-belt was unguarded on an air compressor. He inspected the company and issued Citation Number 2869357 on March 25th for a violation of § 56.14001. The violation occurred because a V-belt on an air compressor next to a travelway was unguarded. Persons were exposed to the moving machine parts. (Tr. 16, 17; Ex. P1). The inspector took one photograph before he ran out of film (Tr. 18). The V-belt for a three H.P. drive was inside a trailer tool house used by four employees (Tr. 18, 19).

The inspector's photograph was taken from the doorway of the trailer. The compressor was at the entrance (Tr. 19). Along the side of the compressor is the walkway. Shelves are behind the compressor. The trailer wall is on the right side (Tr. 20). The inspector did not remember one way or the other if any object was in front of the compressor (Tr. 20, 21, 114). However, Exhibit R9 shows a box to the front of the compressor (Tr. 114).

The inspector evaluated the gravity of the violation and the likelihood of an injury (Tr. 21, 22, 24, 26).

A person walking by the V-belt would be within two feet of the exposed part (Tr. 27).

Wesley Ray Coleman, 29 years of age, testified for respondent. The witness has been a supervisor with respondent since 1985. During that time there have been three to four MSHA inspections and a courtesy inspection (Tr. 118, 119). Three different MSHA inspectors were involved.

Mr. Coleman was familiar with the air compressor located inside the doorway of the parts van (Tr. 120).

The compressor has always been bolted down. It is about eight feet back from the van door on the right hand side. The trailer is entered through two double doors on the back end of the van. Shelves are at the far end away from the door. The van wall is on the right side of the air compressor. A walkway is on the outside of the air compressor; the center of the walkway is approximately three and one-half feet from the compressor (Tr. 121, 122).

The moving parts of the compressor are between the air compressor and positioned next to the wall. There are no moving parts on the front side. The air hose itself goes down through a hole in the floor (Tr. 123). The hose does not cause a tripping hazard (Tr. 124).

There is no reasonable access to any of the moving parts from the aisle or from either end (Tr. 125). A person would not fall from the aisle way and encounter any moving parts (Tr. 126). This is because the electric motor guards the sheave on the motor. The head of the air compressor and the wall guards the pulley. The flywheel on the compressor is smaller than the air compressor body and the air compressor head.

The compressor is waist high and its moving parts could only be contacted by the deliberate act of reaching behind the compressor (Tr. 127). No clothing or body parts could be sucked into the intake valve (Tr. 128, 129).

None of the other three MSHA inspectors ever claimed this was a hazard (Tr. 129). The compressor was guarded after the citation was issued (Tr. 130).

The compressor's moving parts were guarded (by location) in this fashion: the rear side was guarded by the wood paneling, the aisle side by the oversized electric motor and compressor head, the front end by stored materials consisting of cases of grease (Tr. 131, 132, 145, 146, Ex. R 9, R 11).

The compressor has never been involved in any injury while the witness has worked there (Tr. 138).

In cross-examination the witness agreed it was possible to get a hand into the space on the compressor (Tr. 142).

Evaluation of the Evidence

The pivotal question here is whether the V-belt on the cited air compressor was guarded by location.

The evidence is essentially uncontroverted that the V-belt was guarded at the rear by the wood panel, at the aisle side by the motor, and on the inner side by the wall of the van. The controversy

thus focuses on whether or not the V-belt was guarded at the front. Respondent's witness Coleman indicated cases of grease were stored to the front of the compressor. As a supervisor he should know where his supplies were stored.

On the other hand, the inspector did not remember if there was any material stored to the front of the compressor. Further, his single photograph does not include that area (Exhibit P 2). But respondent's photograph clearly shows several boxes in front of the compressor blocking access to it (Exhibit R 9).

For these reasons I conclude that the V-belt was guarded by location. Further, the exposed moving parts could not be reasonably contacted by any person.

Respondent also raised the defense of collateral estoppel. Specifically, respondent argues and offers evidence to prove that other MSHA inspectors had inspected this area but had failed to issue any citations for this condition.

The doctrine of collateral estoppel does not apply in these circumstances. See Servtex Materials Company, 5 FMSHRC 1359 (1983) and King Knob Coal Co., Inc., 3 FMSHRC 1417 (1981).

For the reasons initially stated Citation 2869357 and all penalties therefor should be vacated.

Citation 2869358

In connection with this citation the parties stipulated that the citation could be reduced to a non-significant and substantial violation and the penalty reduced to \$38.00.

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. Citation 2869357 and all penalties therefor are vacated.
2. Citation 2869358 is affirmed as a non S&S violation and a penalty of \$38.00 is assessed.
3. Respondent is ordered to pay to the Secretary the sum of \$38.00 within 40 days of the date of this decision.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
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DENVER, CO 80204

SEP 14 1988

COLORADO WESTMORELAND, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 88-223-R
v.	:	Order No. 3226870; 5/6/88
	:	
SECRETARY OF LABOR,	:	Orchard Valley West Mine
MINE SAFETY AND HEALTH	:	Mine ID 05-04184
ADMINISTRATION (MSHA),	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Morris

The issues presented here arise under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., ("Act").

Contestant filed its notice of contest herein seeking a review of Safeguard number 3226870 issued May 6, 1988. Said safeguard recites that contestant failed to comply with 30 C.F.R. § 75.1403 but no enforcement action was issued based on the safeguard.

The safeguard provides as follows:

Dick Love (Utility Man) was operating a scoop in a forward motion while J.R. Davis (Section Foreman) was being transported inside the scoop bucket in the #3 entry of the 001-0 section.

Notice to provide safeguards.

All scoops, EIMCO or other types not equipped (sic) with locking devices to precluded (sic) any possibility of accidentally activation of the hydrolic (sic) control levers, shall not be used to transport crew members, while equipment is in a traveling motion.

For its relief contestant requests that the subject safeguard be vacated, or, in the alternative, that it be granted declaratory relief declaring that the subject nature to provide safeguards is an improper interpretation of 30 C.F.R. § 75.1403. 1/

1/ An imminent danger order that apparently preceded the issuance of the instant safeguard notice is pending before the undersigned judge in Colorado Westmoreland, WEST 88-222-R.

The Secretary has moved to dismiss the notice of contest. As a grounds therefor the Secretary states the contest herein fails to state a claim upon which relief can be granted.

Oral arguments were heard on the record on August 31, 1988 in Denver, Colorado.

Discussion

This is a case of first impression in that contestant seeks review of a safeguard notice issued under 30 C.F.R. § 75.1403 without any accompanying enforcement action under the Act. ²

The Act provides that an operator may contest an order of withdrawal issued under § 104, a citation or a penalty assessment issued pursuant to § 105(a) or 105(b), or the reasonableness of time fixed for abatement of a citation. However, there is no statutory authority for an independent review of a safeguard notice prior to the issuance of a citation. To like effect see Mettiki Coal Corporation, YORK 81-42-R (February 19, 1981), an unreported decision by Judge James A. Broderick.

Contestant asserts that Mettiki Coal Corporation is not controlling since declaratory relief was not requested in that case.

I recognize that the Commission can grant declaratory relief under appropriate circumstances Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447. However, declaratory relief cannot be a vehicle to enlarge jurisdiction.

Contestant also asserts that its options are either to comply with the safeguard notice or receive a citation for its knowing noncompliance.

2/ The Commission decisions in Southern Ohio Coal Company, WEVA 86-190-R (August 19, 1988); Jim Walter Resources, Inc., 7 FMSHRC 493 (April 1985) and Southern Ohio Coal Co., 7 FMSHRC 509 (1985) all involve safeguards followed by an enforcement action.

I disagree. Contestant may seek a modification from MSHA or proceed under Section 101(c) of the Act. [See Mid-Continent Resources, Inc., Docket No. 88-MSA-13, July 19, 1988, Brissenden. J (attached hereto)].

Finally, contestant asserts the doctrine of pendent jurisdiction is applicable citing United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 2d 219 (1966) and Jones v. Intermountain Power Project, 794 F.2d 546 (10th Cir. 1986)

I agree the federal courts have jurisdiction to exercise pendent jurisdiction. This power exists when there is a substantial federal claim and when both the state and federal claims derive from a common nucleus of facts so that plaintiff would "ordinarily be expected to try them all in one judicial proceeding," 794 F.2d at 549.

While the doctrine might be held applicable here the undersigned Judge does not consider it fairly within the Commission's statutory grant of authority.

For the foregoing reasons the Secretary's Motion to dismiss is GRANTED and the contest filed herein is DISMISSED.


John J. Morris
Administrative Law Judge

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MINE SAFETY,
AND HEALTH

CASE NO: 88-MSA-13

In the Matter of

MID-CONTINENT RESOURCES, INC.

RULING AND ORDER ON MOTION TO DISMISS

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (the "Act"). By notice dated December 6, 1976, the Mine Safety and Health Administration ("MSHA") applied a Section 314(b) safeguard (30 C.F.R. §75.1403-5(g)) to Petitioner/Appellant Mid-Continent Resources, Inc. ("MCR"). On February 3, 1987, MCR filed a Section 101(c) petition for modification of the safeguard. MSHA then amended the safeguard on June 11, 1987. On December 14, 1987, the Deputy Administrator for Coal Mine Safety and Health dismissed MCR's petition for modification. MCR then requested a hearing pursuant to 30 C.F.R. §44.14, and the Deputy Administrator referred this matter for hearing by this office on January 21, 1988.

On March 2, 1988, MSHA filed a motion to dismiss this matter for failure to state a claim upon which relief can be granted, contending that safeguards imposed under Section 314(b) are not subject to petitions for modification under Section 101(c). MSHA also contends that MCR's petition for modification did not allege either of the statutory grounds for modification. MCR filed a reply to the motion on March 23, and MSHA filed a response to MCR's reply on March 31, 1988.

Whether Section 314(b) Safeguards Are Subject to Section 101(c) Petitions:

Section 101(a) of the Act (30 U.S.C. §811(a)) provides that "[t]he Secretary shall by rule . . . develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines," and it sets forth various rulemaking procedures. The Section 101(a) standards apply to all mines. Section 101(c) (30 U.S.C. §811(c)) provides that "[u]pon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine . . .," and it sets forth grounds and procedures for such mine-specific modifications. (See also 30 C.F.R. Part 44.) Thus,

It is clear that mandatory standards promulgated through rulemaking under Section 101(a) may be modified either by further rulemaking applicable to all mines or through Section 101(c) petitions for modification by individual mine operators.

Section 314, 30 U.S.C. §874, is part of Title III of the Act, which covers "Interim Mandatory Safety Standards for Underground Coal Mines". (Section 314 was formerly Section 314 of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 787, P.L. 91-173 (1969)). Section 314 sets forth safety requirements for "hoisting and mantrips". In addition, Subsection (b) provides that "[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." Provisions for the promulgation of such safeguards by MSHA inspectors (authorized representatives of the Secretary) on a "mine-by-mine" basis are set forth at 30 C.F.R. §75.1403 et seq. It is clear that Section 314(b) safeguards may be modified by MSHA inspectors on their own initiative. I must determine whether the safeguards are also subject to Section 101(c) petitions for modification by mine operators like MCR.

MSHA's first argument in support of its motion to dismiss is that another procedure by which mine operators may challenge safeguards already exists. Citing Secretary of Labor (MSHA) v. Southern Ohio Coal Co., 7 FMSHRC 509, 3 MSHC (BNA) 1743 (1985), and Secretary of Labor (MSHA) v. Jim Walter Resources, Inc., 7 FMSHRC 493, 3 MSHC (BNA) 1739 (1985), MSHA points out that operators may challenge the application of safeguards in proceedings before the Federal Mine Safety and Health Commission (the "Commission"), which has jurisdiction over contested violations of standards and safeguards. MSHA argues that there is therefore no need also to permit Section 101(c) petitions. Further, permitting challenges to safeguards both through proceedings before the Commission and through Section 101(c) petition proceedings could cause duplicative efforts and conflicting rulings.

MSHA's second argument involves the purpose of Section 314(b) and regulations thereunder. MSHA notes that Section 314(b) safeguards may be imposed on individual mines and modified or withdrawn by MSHA inspectors without resort to rulemaking procedures such as those set forth in Section 101(a). Thus, according to MSHA, Congress intended to enable MSHA inspectors to respond flexibly and quickly to unsafe conditions at particular mines without the necessity of Section 101-type procedures. MSHA argues that permitting Section 101(c) petitions for modification of Section 314(b) safeguards would interfere with that flexibility.

In response to MSHA's first argument, MCR points out that Commission review of Section 314(b) safeguards is actually only available after a safeguard has been violated, and violation of a safeguard subjects an operator to potential civil and criminal penalties under Section 110 (30 U.S.C. §820). (See, e.g., U.S. Steel Corp., 3 FMSHRC 2540, 2 MSHC (BNA) 1583 (1981)). In other words, Commission review is not equivalent to Section 101(c)

petition procedures. In fact, in Southern Ohio Coal Co. and Jim Walter Resources, Inc., supra, the Commission actually interpreted a safeguard for the purpose of determining whether certain operators had violated the safeguard; the Commission did not permit the operators to challenge or request modification of the safeguard itself.

In response to MSHA's second argument, MCR contends that the unusually broad grant of power to MSHA inspectors to impose Section 314(b) safeguards without the necessity of rulemaking procedures actually means that the safeguards should be easier to challenge than Section 101(a) standards. (See Southern Ohio Coal Co., supra, at pp. 511-12.) According to MCR, the broader the grant of power, the more checks on that power should be provided. MCR also argues that by its wording, Section 101(c) applies to "any mandatory safety standard", and Section 314(b) safeguards are just as mandatory as standards promulgated under Section 101(a) because both are enforced in the same manner under Sections 104 and 110 (30 U.S.C. §§814, 820). (30 U.S.C. §846; See Southern Ohio Coal Co., supra, at p. 512.)

I find MCR's arguments persuasive. There is no doubt that the Commission (and administrative law judges under the Commission) has jurisdiction over contested violations of safety standards, while the Secretary (and this office) has jurisdiction over petitions for modification of those standards. (See Johnson, "The Split-Enforcement Model", 39 Adm.L.Rev. 315, 316, 319 n.13, 341 (Summer 1987)). MSHA has not shown that there is any basis for making an exception to the above jurisdictional scheme for Section 314(b) safeguards, which are a special type of safety standards. The Commission may have jurisdiction to interpret Section 314(b) safeguards that may have been violated, but unlike the Secretary, it does not have the power to modify inappropriate safeguards. Accordingly, I find that I have jurisdiction over MCR's petition for modification of the Section 314(b) safeguard at issue (30 C.F.R. §75.1403-5(g)), and MSHA's motion to dismiss on the basis of lack of jurisdiction is therefore denied.

Sufficiency of Pleadings:

As stated above, MSHA has also moved to dismiss on the basis of MCR's failure to allege either of the statutory grounds for modification in its petition. Pursuant to Section 101(c) and 30 C.F.R. §44.4, the grounds for modification are: 1) there exists an alternative method of achieving the result of the safety standard or safeguard at issue, or 2) the application of the standard at issue will result in a diminution of safety. My own examination of MCR's petition reveals that it alleged facts intended to support the second ground for modification at Paragraph 7 and the first ground at Paragraph 9. Accordingly, MSHA's motion to dismiss on the basis of the insufficiency of MCR's pleadings is denied.

ORDER

The motion to dismiss is denied.


ROBERT J. BRISSENDEN
Administrative Law Judge

Dated: JUL 19 1988

San Francisco, California

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 15 1988

ARTHUR BROWNING, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 88-132-D
: BARB CD 88-14
NALLY & HAMILTON ENTERPRISES, :
Respondent : Gray's Ridge Job

ORDER OF DISMISSAL

Before: Judge Maurer

The Complainant, by counsel, requests approval to withdraw his complaint in the captioned case on the grounds that the parties have reached a mutually agreeable settlement. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. The case is therefore dismissed, with prejudice, as requested by the parties; and the hearing set for September 16, 1988, in Lexington, Kentucky is cancelled.


Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 15 1988

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 86-108-D
ON BEHALF OF : BARB CD 86-31
GEORGE S. JOHNSON, :
LOUIS JOHNSON, JR., : No. 3 Mine
ARNOLD J. RASBERRY, :
BOOKER T. WARE, JR., :
Complainants :
v. :
JIM WALTER RESOURCES, INC., :
Respondent :

ORDER OF DISMISSAL

Before: Judge Maurer

The Stay Order dated December 5, 1986, as modified on August 7, 1987, is hereby lifted.

The pleaded facts involved in this case are essentially the same as those in Secretary of Labor, ex. rel. Beavers, et al. and UMWA v. Kitt Energy Corporation, 10 FMSHRC 861 (July 15, 1988). Therein, the Commission reversed my decision below and found that this set of facts did not violate section 105(c) of the Mine Act, 30 U.S.C. § 815(c). The Secretary has not taken an appeal from that decision.

The parties to this proceeding agree and I concur that on the facts of this case, its outcome is controlled by Kitt Energy Corporation, supra.

Accordingly, respondent's letter-motion of July 22, 1988, to dismiss this case is granted and this proceeding is dismissed in accord with controlling Commission precedent.


Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 16 1988

CONSOLIDATION COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 88-348-R
	:	Order No. 2946760; 8/12/87
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Shoemaker Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 88-74
Petitioner	:	A.C. No. 46-01436-03708
v.	:	
	:	Shoemaker Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: B. Anne Gwynn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary; Michael R. Peelish, Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Company (Consol)

Before: Judge Broderick

STATEMENT OF THE CASE

In the contest proceeding, Consol challenges the order of withdrawal issued under section 104(d)(2) of the Act on August 12, 1987, alleging an unwarrantable failure violation of 30 C.F.R. § 75.200. In the penalty proceeding, the Secretary seeks a civil penalty for the violation charged in the contested order. The cases were ordered consolidated for the purposes of hearing and decision in my prehearing order issued February 24, 1988. Pursuant to notice the cases were called for hearing in Wheeling, West Virginia on June 23, 1988. Lyle Tipton, Howard Snyder, and Keith Daniels testified on behalf of the Secretary. Michael Blevins, Michael Yarish, Larry Dow, Dave Hudson, and Lloyd Behrens testified on behalf of Consol. Both parties have filed post hearing briefs. I have considered the

entire record and the contentions of the parties in making this decision.

FINDINGS OF FACT

At all times pertinent to this proceeding Consol was the owner and operator of an underground coal mine in Marshall County, West Virginia, known as the Shoemaker Mine. During the year 1986, the subject mine produced 2,334,000 tons of coal. During the twenty four months prior to the date the contested order was issued, 595 violations were assessed and paid, having been charged during 717 inspection days. Eighty six were violations of 30 C.F.R. § 75.200, four were of § 75.202. This means there were more than eight violations in every ten inspection days, including almost 1.3 roof control violations. I consider this a significant history of prior violations. A withdrawal order was issued under section 104(d) on August 28, 1986, and there was no intervening clean inspection between that date and the date of the order contested herein.

MAINLINE HAULAGEWAY

The mainline haulage was originally developed many years ago beginning at the River portal. The River portal is now the area from which coal is moved to the outside of the mine. The coal is transported in coal cars (normally forty five 20 ton cars) with two locomotives, one in front and one in the rear. The locomotives weigh approximately 50 tons each. Each locomotive has one operator who sits on the trolley wire side (or "tight side") of the locomotive. The locomotives are electrically powered by an overhead 250 volt D.C. uninsulated wire. On a typical day, the motors travel through the mainline haulage every 10 to 15 minutes. There is a water line and a high voltage transmission cable paralleling the trolley wire and water sumps throughout the area. The area is required to be examined before each shift or three times in a 24 hour period. There is a high velocity of air, approximately 180,000 cubic feet per minute in the mainline haulage. This causes deterioration of roof and ribs especially in the summer months. The roof was initially supported in large part by planks, through which three roof bolts were inserted. The planks were installed on five foot centers. Additional supports were installed at crosscuts only if the roof showed need for such supports. The crosscuts had previously been driven, and the coal removed. The roof had fallen on many but not all of the crosscuts. It was not Consol's practice, and there was no requirement in its roof control plan that bolts or other roof supports be installed where the crosscuts intersected the mainline haulageway.

103(g) COMPLAINT

On July 21, 1987, mainline motorman, Bill Whitlatch, reported to union safety committeeman Howard Snyder and Consol foreman, Mike Yarish, that a rock had fallen on a crib "inby the passway." Snyder and Yarish went to the area. The rock was hanging over the crib leaning toward the track. Yarish said he would have to shut down the haulage to take down the rock and he decided to have it done during the next weekend. However, when Snyder returned to work the following Monday he was told by the foreman who had worked on the weekend that the crib felt tight and he did not see any reason to take it down. Snyder reported this to Yarish. Yarish told yet another foreman to take care of it the following weekend. The following Monday, Snyder saw that the condition was not corrected. He contacted the other safety committeemen who submitted a 103(g) complaint to federal mine Inspector Tipton on August 12, 1987. The complaint requested an investigation of "bad roof conditions along main line haulage that were reported to management." In addition to the complaint related to the rock fall on the crib, on several occasions during the weeks preceding August 12, 1987, Snyder told Yarish about areas of unsupported or inadequately supported roof in the mainline haulage.

INSPECTION AND WITHDRAWAL ORDER

On August 12, 1987, Inspector Tipton came to the subject mine to perform a regular inspection. He was given the 103(g) request by Keith Daniels. He proceeded to an area of the mainline haulage from the Whittaker Portal to the River Portal, accompanied by mine foreman Larry Dow and chairman of the mine safety committee Keith Daniels. The inspector cited four areas of what he considered inadequately supported roof and issued the contested withdrawal order.

a) The first area cited by Inspector Tipton was three blocks outby the top end of the number six passway. The inspector determined that because there was an area of eight feet, four inches between cribbing supports, and no supports were installed between the trolley wire and the rib line, the roof was not adequately supported. Consol's representative who accompanied the inspector did not disagree with the inspector's findings, but was of the opinion that the area was adequately supported.

b) The next area cited was one block further outby. The crosscut had fallen in. There was cribbing in the area, but the inspector measured 12 feet between cribbing or breaker supports. Consol's representative did not disagree with the measurements

and concluded that the inspector was not satisfied with the distance between cribs.

c) The third area cited was at a crosscut further outby. There was an area of eight feet, by seven feet on each side of a crib which was unsupported. There was also a large rock which had fallen on a crib dislodged from the roof at the edge of a crosscut which had fallen in.

d) The fourth location cited was at a crosscut two blocks inby the inby end of the number one passway. Crib supports were 12 feet apart with the unsupported roof extending into the trolley wire entry. There was a dislodged crib in the center of the opening with a large rock balanced on top of it almost directly over the high voltage transmission cable, the water line, and the trolley wire. The rock was on the edge of the crib and a failed roof bolt hung from the roof into the rock.

The inspector considered that the roof was not adequately supported in the cited areas to protect persons from roof falls. He determined that the violation was significant and substantial and was caused by the unwarrantable failure of management to comply with the standard. The condition was abated the same day by the installation of additional cribs and, in the third area, of additional roof bolts. One new crib was installed in the first location, two in the second and three in the third. In the fourth location, after the rock was removed, additional cribbing was added to the middle crib.

I find as facts that the roof conditions in the areas cited by the inspector were essentially as he described them, including the areas he measured between cribs and other roof supports. His testimony was corroborated by his contemporaneous notes and by the testimony of the union safety committee chairman Keith Daniels. The testimony of Consol's representative who accompanied the Inspector did not contradict his factual findings.

ISSUES

1. Whether the roof in the areas cited in the mainline haulageway was adequately supported to protect persons from roof falls?
2. If a violation is found, was it significant and substantial?
3. If a violation is found, was it caused by Consol's unwarrantable failure to comply?

4. If a violation is found, what is the appropriate penalty?

CONCLUSIONS OF LAW

JURISDICTION

Consol was at all times subject to the provisions of the Federal Mine Safety and Health act, and I have jurisdiction over the parties and subject matter of this proceeding.

VIOLATION

There was testimony both by government witnesses and Consol witnesses concerning the spacing of the crib supports. There was some indication that the Inspector required such supports on five foot centers, and that he followed an MSHA policy which required roof supports in all crosscuts along haulageways. The order, however, charges Consol with failing to provide adequate roof support. The Inspector explained that a roof fall in a cross cut (expected) will continue across the haulageway unless cribs or other supports are placed at the edge of the crosscut. Failure to install such supports renders the haulageway roof inadequate. I concur in the inspector's analysis, and conclude that the areas of unsupported roof in the four cited area were such as to render the roof inadequately supported to protect persons from roof falls.. The two areas where rocks had fallen on dislodged cribs were obviously inadequately supported on that basis alone. I conclude that the order properly charged a violation of 30 C.F.R. § 75.200.

SIGNIFICANT AND SUBSTANTIAL

A violation is properly designated significant and substantial if it contributes to a safety hazard which will reasonably likely result in a serious injury. Cement Division, National Gypsum, 3 FMSHRC 822 (1981); Mathies Coal Co., 6 FMSHRC 1 (1984). The area involved here was heavily travelled. The locomotives and coal cars cause considerable vibration. The area of unsupported roof was substantial and adjacent to crosscuts which had fallen in or were expected to fall in. A roof fall in one of the cited areas was reasonably likely, as was the fall of the large rocks poised on the cribs. All such falls would be reasonably likely to result in serious injuries. A roof fall could directly injure miners travelling the area (examiners, pumpers); it could fall on the track and cause a derailment; it could fall on a power line and result in a mine fire. The violation was properly denominated significant and substantial.

UNWARRANTABLE FAILURE

Unwarrantable failure means "aggravated conduct, constituting more than ordinary negligence, by an operator in relation to a violation of the Act." Emery Mining Corp., 9 FMSHRC 1997, 2010 (1987); Youghioghney & Ohio Coal Co., 9 FMSHRC 2007 (1987). In this case, Consol had been notified of the rock fallen on the crib on July 21. Consol's foreman said he would have it removed on the weekend. He did not do so. He was reminded of it the following week, but still did not have it removed. A 103(g) complaint was filed with the federal inspector. With respect to the general condition of the roof in the areas cited, there is disputed testimony as to whether the condition was obvious and known to Consol. The area was examined once each shift, or three times per working day. The inspector's contemporaneous notes state that "the violations were so obvious they jumped out at you when you ride past so nobody could have examined this haulage on a daily basis and not see these crosscuts were falling out in to the track entry." Consol's witnesses testified that the roof condition in the haulageway was stable and adequately supported. However, with respect to the rock on the dislodged crib, there is no genuine dispute. Consol knew of the condition. The condition was hazardous. Consol was guilty of aggravated conduct constituting more than ordinary negligence in failing to correct the condition between July 21 and August 12, 1987. The violation was due to Consol's unwarrantable failure to comply.

CIVIL PENALTY

Consol is a large operator, with a significant history of prior violations at the subject mine. The violation was serious, and caused by Consol's aggravated negligence. It was promptly abated in good faith. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$1000.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 2946760 issued August 12, 1987, including its findings that the violation was significant and substantial and caused by unwarrantable failure is AFFIRMED. The Notice of Contest is DISMISSED.

2. Consol shall within 30 days of the date of this order pay a civil penalty in the amount of \$1000 for the violation found.

James A Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
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SEP 16 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 87-108-M
Petitioner : A.C. No. 26-00457-05507
 : Gibson Road Pit and Mill
v. :
 : Docket No. WEST 88-8-M
ARC MATERIALS CORPORATION - : A.C. No. 26-00458-05508
WMK TRANSIT MIX, : Buffalo Road Pit and Mill
Respondent :

DECISION

Appearances: Jonathan S. Vick, Esq., Office of the Solicitor,
U.S. Department of Labor, Los Angeles, California,
for Petitioner;
Ralph Kouns, Safety Director, ARC Materials
Corporation, Las Vegas, Nevada.

Before: Judge Lasher

This matter arises pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a) (herein the Act). Petitioner seeks assessment of penalties for 2 violations- both of which are conceded by Respondent-- which are cited in 2 Citations (one in each docket). These two dockets were consolidated for hearing and decision by Notice dated March 22, 1988. Both Citations, issued under Section 104(a) of the Act, charged Respondent (ARC) with infractions of 30 C.F.R. § 56.14001, pertaining to "Guards" and entitled "Moving Machine Parts", which provides:

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

The Citations were issued by MSHA Inspector Earl W. McGarrah on different inspection dates and at the two mines reflected in the caption. Both Citations charged guarding violations involving tail pulleys and also alleged that the violations were so-called "Significant and Substantial" violations.

Issues

ARC concedes the existence of the occurrence of the violative conditions charged and described in both Citations. ARC

contends, however, with respect to both violations that it was not "reasonably likely" for the potential hazard created by the violative conditions to have occurred and to have resulted in injuries to any of its employees (miners). See Stipulation, Court Ex. 1. In the context of this proceeding, the concept of "reasonable likelihood" applies to and affects two aspects of each violation; first, as part of the consideration of the mandatory penalty assessment factor of gravity 1/, and, secondly, as one of the elements of proof required in "significant and substantial" violations.

General Findings.

Respondent ARC, at the times material herein, owned and operated a "ready-mix" sand and gravel operation with 3 pits- two in Nevada, the Gibson Road and Buffalo Road pits involved here and a third pit at Bullhead, Arizona. Respondent's payroll at the time of the violations and also at the time of hearing approximated 150 employees (T. 76-78, 83).

During the 2-year period prior to the commission of the violation charged in Citation No. 2671967, ARC had a compliance history of 19 prior violations at the Gibson Road Pit operation, 8 of which were guarding violations (T. 25).

During the 2-year period prior to the commission of the violation charged in Citation No. 2669032, ARC had a compliance history of 27 prior violations at the Buffalo Road Pit operation, 9 of which were guarding violations (T. 94-95).

After receiving notification of the violations charged in the two subject Citations, ARC demonstrated good faith in attempting to achieve rapid compliance with the regulations violated (Court Ex. 1).

The penalties herein assessed will not jeopardize ARC's ability to continue in business (Court Ex. 1; T. 15).

A. Docket No. WEST 87-108-M

Citation No. 2671967, issued December 16, 1986, by MSHA Inspector McGarrah, in Section 8 thereof, charges:

1/ On the face of the Citations, under Section 10 A thereof relating to "gravity", the Inspector checked the "Reasonably Likely" box indicating that an "injury or illness" would be reasonably likely to result from the violations. Box 10C was, as above noted, checked on both Citations indicating that the Inspector felt both violations were "Significant and Substantial."

The tail pulley on the west side feeder conveyor belt was not guarded. The pinch point was located about ground level where it could be contacted by a person and cause a serious injury.

At the time this violation was observed, the plant was not operating (T. 53, 65-66, 72, 92). The Inspector was unable to ascertain how long the guard, which he observed against a wall nearby, had been off (T. 34, 36, 63). The Inspector believed a laborer had told him the guard had been removed for "cleanup" and not been put back on (T. 36-37). The circumstances surrounding the removal of the guard and the timing thereof in relation to the shut-down of the plant were not ascertainable (T. 34-38, 63). There is no basis to infer that the guard would not have been put back prior to resumption of the plant's operation.

A person walking on the walkway alongside the pinch point would have been within 10 to 12 inches of the pinch point (T. 60). The hazard created by the unguarded self-cleaning tail pulley in question was of a person having their clothing caught and being pulled into the pulley (Ex. M-6; T. 30, 40, 61), or of slipping and falling into it or the pinch point (between the bottom of the conveyor belt and pulley itself). The unguarded pulley was in an area where employees could be expected and would have a reason to be working (T. 42-46, 47, 62, 66). Four or five employees would have been exposed to the hazard (T. 51, 66, 72).

Since the circumstances causing and surrounding the violation are not known it is concluded that it was not reasonably likely that the hazard envisioned by the Inspector would have occurred (T. 34-38, 89-90; Ex. M-6) even though reasonably serious or even fatal injuries could have resulted therefrom (T. 67-69) had the hazard come to fruition.

B. Docket No. WEST 88-8-M

Citation No. 2669032, issued May 19, 1987, in Section 8 thereof, charges:

The tail pulley was not guarded on the type two separator south dual conveyor belt at the dry plant. The pulley could be contacted by a person and could cause an injury.

The tail pulley in question (depicted in Ex. M-12) was also adjoined by a walkway which would have been traveled frequently by employees (T. 97-98, 101). Inspector McGarrah testified that the walkway was a foot or more from the tail pulley and, with respect to the hazard created thereby, that "a person could be walking along this walkway with those raw material and rocks laying on it and could twist his ankle and fall into the tail pulley or slip and get a foot or something over into it." (T. 98). The hazard posed is similar to that described in connection with Citation No. 2671967 hereinabove.

Four to six employees would have been exposed to the hazard (T. 101).

The plant was running on the day this violation was observed (T. 110-111). Inspector McGarrah testified that he was told by a laborer on the day the Citation was issued that "the guard had been taken off and hadn't been put back on" (T. 111). As with the prior Citation, the actual circumstances surrounding the commission of the violation and the length of time the guard was removed is not subject to determination.

The record does indicate that it was reasonably likely that the hazard envisioned by the Inspector would have occurred (T. 98, 99, 101-102, 105-106, 109) and that such would have resulted in the occurrence of reasonably serious injuries (T. 98, 105-106, 109).

Discussion

In Secretary v. Texasgulf, Inc., 10 FMSHRC 498 (April 20, 1988), the Commission reaffirmed its long-standing analytical formula for "significant and substantial" questions stating:

Section 104(d)(1) of the Mine Act provides that a violation is significant and substantial if it is of "such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984) the Commission explained:

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

The Commission has explained further that the third element of the Mathies formulation "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August

1984) (emphasis deleted). We have emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. Id. In addition, the evaluation of reasonable likelihood should be made in terms of "continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

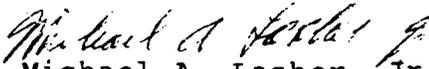
With respect to Citation No. 2671967, the Inspector conceded that the plant was not running at the time of his inspection and at the time the Citation was issued. Since it was not ascertainable how long the guard had been removed and the circumstances of its removal are unknown, in the context of the plant's being shut down it would be pure speculation to conclude that (1) there was a reasonable likelihood that the hazard contributed to would result in an injury or (2) that ARC was negligent in the commission of this violation. This is not found to be a significant and substantial violation. In all the circumstances, this is found to be a moderately serious violation as to which there is no evidence of negligence on the part of the mine operator. A penalty of \$100.00 is found appropriate.

As to Citation No. 2669032, the record supports, and I have previously found the factual underpinnings for, the application of the Commission's Texasgulf formula. This violation is thus found to be significant and substantial. Since several employees would have been exposed to the hazard created by the violation, and since reasonably serious injuries could be expected to have been incurred had the hazard come to fruition, this is found to be a moderately serious violation. While this infraction occurred while the plant was in operation, there again was no basis for concluding that the mine operator was negligent. Weighing these factors in conjunction with the previous findings as to the operator's size, good faith in abatement and compliance history, a penalty of \$125.00 for this violation is found and appropriate.

ORDER

Citation No. 2671967 in Docket No. WEST 87-108-M is modified to delete the "Significant and Substantial" designation thereon.

Respondent shall pay the Secretary of Labor the total sum of \$225.00 as and for the civil penalties above assessed for the two violations on or before 30 days from the date of this decision.


Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 20 1988

DAKCO CORPORATION, : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. WEVA 87-333-R
: Citation No. 2894879; 7/31/87
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. WEVA 87-334-R
ADMINISTRATION (MSHA), : Citation No. 2902509; 7/29/87
Respondent :
: Martinka No. 1 Mine
: Mine ID 46-03805 HIV

DECISIONS

Appearances: Ross Maruka, Esq., Fairmont, West Virginia, for
the Contestant;
Mark D. Swartz, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern Notices of Contests filed by the contestant pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, challenging the legality of two section 104(a) citations, with special "significant and substantial" (S&S) findings, issued at the mine by MSHA inspectors on July 29 and 31, 1987. The citations were issued because of the alleged failure by the contestant to provide training for one of its employees who was performing work at the mine preparation plant, and its failure to have available at the mine training records for seven employees who were also performing work at the plant.

The contestant stipulated that as of July 31, 1987, the cited employee had not received the twenty-four (24) hour new miner training specified at 30 C.F.R. § 48.25, and that on or before July 29, 1987, it did not have training certificates or other records required by 30 C.F.R. § 48.29(a), certifying that seven of its employees working at the preparation plant

had completed MSHA's approved training program. Contestant's defense is that the employees in question were construction workers performing construction work, rather than maintenance or service work, and were therefore excluded from the definition of "miners" found in section 48.22 for the purposes of MSHA's cited mandatory training standards. MSHA takes the contrary position, and asserts that the employees in question were performing repair and maintenance work for frequent or extended periods of time, and were regularly exposed to safety hazards at the preparation plant. Under these circumstances, MSHA asserts that the employees were in fact "miners" within the regulatory definition, rather than "construction workers," and were therefore required to take the training mandated by its regulations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301, et seq.
2. Sections 104(a) and 105(d) of the Act.
3. Commission Rules, 29 C.F.R. § 2700.1, et seq.
4. Mandatory training standards 30 C.F.R. § 48.25 and 48.29(a).

Issues

The critical issue in this case is whether or not the contestant's employees are "miners" subject to MSHA's training requirements as that term is defined by 30 C.F.R. § 48.22(a)(1). If they are, the additional issues are (1) whether the cited violations occurred, and whether or not they were "significant and substantial" (S&S).

Stipulations

The parties stipulated to the following (Exhibit J-1; Tr. 13-15):

1. Dakco Corporation is subject to the jurisdiction of the Federal Coal Mine Safety and Health Act of 1977, Public Law 91-173, as amended by Public Law 95-164 (Act).
2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Act.

3. Dakco Corporation employees were doing work at the preparation plant of the Martinka No. 1 Mine during the period from May through August 1987.

4. On and before July 29, 1987, Dakco Corporation did not have training certificates or other records certifying that seven (7) of its employees working at the Martinka No. 1 Mine preparation plant had completed the MSHA approved training program. The seven (7) employees had not been trained as of July 29, 1987.

5. Victor Wilson was a Dakco Corporation ironworker working at the preparation plant at the Martinka No. 1 Mine during July 1987.

6. As of July 31, 1987, Victor Wilson had not received the twenty-four (24) hour new miner training which is specified at 30 C.F.R. § 48.25.

7. Dakco Corporation was issued section 104(a) Citation No. 2902509 on July 29, 1987 and section 104(a) Citation No. 2894879 on July 31, 1987.

8. The parties stipulate to the authenticity and admissibility of the following documents:

a. A Copy of section 104(a) Citation No. 2902509 issued by inspector Alex Volek on July 29, 1987.

b. A copy of section 104(a) Citation No. 2894879 issued by inspector Edwin W. Fetty on July 31, 1987.

Discussion

The contested citations in issue in these proceedings are as follows: */

DOCKET NO. WEVA 87-333-R

Section 104(a) "S&S" Citation No. 2894879, issued on July 31, 1987, cites an alleged violation of mandatory training standard 30 C.F.R. § 48.25(a), and the cited condition or practice is described as follows:

Victor Wilson, ironworker, has been assigned work duties consisting of maintenance and repair work in and around the preparation plant, not provided with the required training.

A 104(g)(1) order (no. 2894880) will be issued in conjunction with this citation. Don Keffer is the responsible foreman.

DOCKET NO. WEVA 87-334-R

Section 104(a) "S&S" Citation No. 2902509, issued on July 29, 1987, cites an alleged violation of mandatory training standard 30 C.F.R. § 48.29(a), and the cited condition or practice is described as follows: "A copy of the records of training were not available at the mine site for seven of the 28 employees performing maintenance and repair work on the preparation plant."

Respondent's Testimony and Evidence

Albert H. Kirchartz, testified that he is employed by the Southern Ohio Coal Company at the Martinka No. 1 Preparation Plant as a plant mechanic on the midnight shift and also serves as a safety committeeman for UMWA District 31, Local 1949. He confirmed that he performs work in all areas of the plant, including the adjacent loadout, raw coal silos, and dump, and that his work includes the changing out of screens, complete units, pipework, and the repair and replacement of chutes. He explained the purpose of the preparation plant, and confirmed that the coal which is processed by the plant comes from the Martinka No. 1 Mine located approximately

*/ Although the parties have characterized the contested violations as "orders," and they have been described as such in the files, they are in fact "citations."

250 yards from the plant. He also identified and explained the equipment located inside the plant, and confirmed that approximately 16 employees normally work inside the plant on each of three shifts (Tr. 23-30).

Mr. Kirchartz stated that he worked at the plant from May through August, 1987, and was present during the July 25 through August 7, 1987 vacation period. He also stated that employees of the Dakco Corporation were in the plant for approximately 6 weeks, from May until "maybe a month after the vacation period." He believed that these employees worked in the plant from the 3 day Memorial Day period, and intermittently from that time through the vacation period from July 25 to August 7, and for approximately a month after vacation. He stated that the employees worked the day shift, starting at 7:00 a.m., and he would observe them coming in and starting to work, including periods when the plant was in operation (Tr. 30-32).

Mr. Kirchartz described the work being performed by the Dakco employees, and it included the removal and replacement of coal screens, the removal of handrails and the plant building siding, the removal and installation of new coal chutework, and the removal and replacement of the piping associated with the screens. He confirmed that Southern Ohio employees had previously performed some of this same type of work (Tr. 34-36).

Mr. Kirchartz stated that the preparation plant was in operation during the vacation period from July 25 through August 7, and that the midnight shift of July 25 "ran filter cake." He served as the tippie attendant and had to insure that all of the material was going through the chutes to the loading bins to be hauled away by trucks. He also worked in the plant control room the following day running the plant. Southern Ohio employees were also present in the plant during this time operating or testing equipment, and he observed people removing screens from the eighth floor of the plant (Tr. 37-38). He confirmed that all employees working in the plant, including Dakco employees, would have occasion to go to the plant control room to lock out equipment and tag it out while they were working on it, and although no coal was being processed through the plant at this time, he believed that "there was as many hazards at that time or just as many as with the coal being run through it" (Tr. 39).

Mr. Kirchartz described the types of hazards presented in the preparation plant during the vacation period when no coal was being processed, including potential fire hazards from the

use of oxygen and acetylene tanks and welding work, running belts, hoisting hazards, electrical lock-out hazards, slip and falls, blocked escapeways, noise, coal dust accumulated on structural beams and the chutes, and the presence of a 5,000 gallon caustic soda tank located adjacent to a loading crane (Tr. 41-49).

In addition to the aforementioned hazards, Mr. Kirchartz believed that Dakco employees would also be exposed to hazards associated with methane from the coal accumulated in the chutes and storage areas, the elevator hoist area used to carry men and small equipment, which was not always chained off, a warning light on the hoist which was not being used, tie-lines associated with the removal of the plant siding, and the old deteriorated screen framework and chutes which were being removed (Tr. 51-55). Mr. Kirchartz also confirmed that there were no barriers separating the work areas of Dakco personnel and Southern Ohio personnel. He also confirmed that the reason Dakco was doing the work during the 2-week period the mine was down was due to the scope of the work, which entailed the removal and replacement of a number of screens, and this work could not be performed during this time by Southern Ohio employees (Tr. 57).

On cross-examination, Mr. Kirchartz agreed that the previous work performed by Southern Ohio employees in the plant with respect to the screens was not of the magnitude or volume that was being done by Dakco during the vacation period. He also agreed that Dakco's work was performed on the third, eighth, and ninth floors of the plant, and it entailed the gutting, removal, and replacement of chutes, and screens, and tying the new ones into the old workings where necessary, and that any "repairing and patching" work was a necessary and integral part of the overall removal and installation work (Tr. 60).

Mr. Kirchartz confirmed that he was familiar "to a degree" with the citations which were issued to Dakco, and in his judgment, the work being performed by Dakco was "repairing and maintaining" work (Tr. 63). He agreed that the new structures installed by Dakco made for a more efficient system and increased the production capacity of the plant (Tr. 64).

Mr. Kirchartz agreed that the noise levels to which Dakco employees may have been exposed to during the vacation period when the plant was not processing coal was less than the exposure when it was fully operational. He also agreed that the quantity of any accumulated coal dust would be less when coal was not being processed through the plant, but maintained that

methane would still be present even if the coal were wet. He conceded that he made no actual count of the number of acetylene and oxygen tanks being used by Dakco during its work, and confirmed that all employees performing work on a piece of plant equipment, including Dakco employees, would have access to the plant control room so that they could lock-out the equipment while working on it (Tr. 64-68).

Mr. Kirchartz confirmed that Dakco employees worked on all three shifts during the time in question, and that while he worked the midnight shift for the first 2 days of the vacation period, July 25 and 26, he began working on the day shift on July 27, and was present in the plant most of the time that Dakco people were performing their work. He also confirmed that the work he and other employees of Southern Ohio were doing in the plant was not the same work being performed by Dakco (Tr. 68-69).

Alex K. Volek, MSHA Coal Mine Inspector, testified as to his experience and duties, and he confirmed that since October 1986, he has been assigned to inspect the work areas of independent contractors to insure compliance with the mandatory safety standards found in Parts 75 and 77, Title 30, Code of Federal Regulations, and the training requirements found in Part 48. He confirmed that he inspected the subject plant beginning on July 28, 1987, after determining that contractors were scheduled to do work there, and he identified some of the contractors, including Dakco, which had sub-contracted a job from Fair-Quip. At that time, he met with Mr. Don Keffer, the president of Dakco, and Mr. Keffer confirmed that his employees "would be doing some changing out work with screens, pipes and various other work in the plant." In response to his inquiries, Mr. Keffer speculated that 28 Dakco employees would be on the mine property, and that some of his people were trained. However, Mr. Keffer did not have any training records available at that time, and he informed Mr. Volek that he would make them available for review and discussion the next day, July 29. Mr. Volek stated that "I didn't see no addition to the plant being built. I didn't see any new construction being done" (Tr. 73-79).

Mr. Volek stated that when he inspected the plant on July 28, with Mr. Keffer, he observed a number of oxygen and acetylene tanks in the elevator approach area which were not secured, and he issued a citation to Southern Ohio. He also encountered an employee leaving an elevator on which he had also stored his equipment, and although he discussed the matter with the employee, he did not issue any citation. He also observed welding and burning work being performed on

different floors of the plant, and observed burning slag generated by the welding work falling to the floors below through the large holes and openings in the floors from where equipment had been removed. Some of the floor openings, which he estimated to be 15 by 12 feet, had ropes or tape strung along the back side as improvised handrails, and he concluded that they were insufficient to prevent anyone from falling into the floor openings. He also encountered an obstructed walkway and a leaking acetylene tank which had previously been detected and scheduled for change out. Mr. Volek confirmed that he issued no citation for the leaking tank because it was being taken care of, and he could not recall issuing any citations for any of the other conditions which he observed (Tr. 80-85).

Mr. Volek confirmed that he returned to the mine on July 29 and reviewed Mr. Keffer's training records which he had brought with him. Upon review of the records, Mr. Volek determined that 21 of Dakco's employees had been trained as reflected by the records produced by Mr. Keffer. However, Mr. Keffer had no training records for seven additional employees who were working at the mine. Under the circumstances, Mr. Volek issued a citation to Mr. Keffer for not having the records available as required by section 48.29(a), and he fixed the abatement time for the next morning, July 30, 1987 (exhibit R-1). He subsequently issued a section 104(b) order for non-compliance on July 30, when the records were not produced (exhibit R-1-A) (Tr. 85-88).

With regard to the citations issued for the failure of Mr. Keffer to make available any training records for seven of his employees, Mr. Volek confirmed that he characterized the work being performed by these employees as "maintenance and repair work" on the face of the citation and order because he believed that "the work that they were doing, I felt, was maintenance and repair work." He also confirmed that he applied MSHA's guidelines as follows at (Tr. 89):

A. As I -- the guidelines I have in relation to maintenance and repair work versus construction work are such that if the miners are working in the environment of the contractors -- or the contractors are working in conjunction with the miners and they are exposed to mine hazards and there is no building of a new facility or no expansion of a new facility and they are in the work environment of the miners, then they are required to train.

Mr. Volek confirmed that the guidelines to which he referred are those stated on page 34 and 35 of an MSHA Administrative Manual dealing with Part 48 training and retraining of miners, July 1, 1985 (exhibit ALJ-1; Tr. 93-94; 109). He also confirmed that since Mr. Keffer produced the training records for some of his employees, he must have been aware of the fact that his employees were required to be trained.

Mr. Volek explained that another prime contractor, Fair-Quip, had subcontracted the Southern Ohio preparation plant work to Dakco. At that time, Fair-Quip had its employees working at another plant performing repair and maintenance work, and the employees were not trained. Mr. Volek required them to be trained, and they did in fact receive MSHA approved training. Mr. Volek was sure that he issued a citation to Fair-Quip for not training its employees, but he was not certain (Tr. 101). Mr. Volek concluded that at the time Fair-Quip subcontracted the work to Dakco, Fair-Quip was aware of MSHA's training requirements, and its project manager John Pelagreen was present when he reviewed Dakco's records (Tr. 97).

Mr. Volek confirmed that he did not discuss with Mr. Keffer the reasons for his failure to produce Dakco's training records on July 30, because Mr. Keffer did not appear at the mine that day. Mr. Volek was told that Mr. Keffer was still in his office in Athens getting the records, but since he did not appear at the time the citation was due for abatement, Mr. Volek issued the order (Tr. 103). The order was terminated the next day, July 31, by Inspector Edwin Fetty after Mr. Keffer produced his records that same day (Tr. 103-104). Inspector Fetty determined that six of the seven Dakco employees for whom training records had been produced had been trained. Mr. Fetty also determined that one of the employees (Victor Wilson), had not been trained, and he issued a citation to Mr. Keffer on July 31 for not training Mr. Wilson. He also issued an order withdrawing Mr. Wilson from the mine until he was trained (exhibits R-2, R-2-A; Tr. 102-104).

Mr. Volek stated that contractors are not necessarily required to have their own MSHA approved training plans for their employees. If they choose not to have their own plan, they may use the existing plan applicable to the mine operator who hires them. Mr. Volek confirmed that at the time of his inspection he made no inquiry of Dakco as to whether it had its own training plan or relied on Southern Ohio's plan.

On cross-examination, Mr. Volek stated that he could not recall the type of training received by the 21 Dakco employees

for whom training records were made available by Mr. Keffer. He agreed that the type of training required of the other seven employees would have required removing them from work and undergoing a one-day long training program, and he was satisfied that the 21 employees did not require further training (Tr. 106-107).

Mr. Volek stated that he would not characterize the work being performed by Dakco's employees as "an alteration of existing facilities;" "rebuilding of an existing facility;" or the demolition "of an existing facility or a portion of an existing facility." He could not state whether the work being performed by Dakco was "routine maintenance" without speculating, but then said "I could say, yes, it is routine maintenance" (Tr. 108).

Referring to MSHA's manual guidelines, at pages 34 and 35 (exhibit ALJ-1) Mr. Volek disagreed that the distinctions between "service and maintenance and repair," as opposed to "construction" was "a fuzzy or gray area," and stated that it was clear to him, particularly when he had to consider that the contractor's employees are working in the same environment and are exposed to the same hazards as miners. He conceded that he made no mention of any hazard exposure by Dakco employees when he issued his citation (Tr. 109-111). He also conceded that on the days that he was at the mine, it was not producing coal through the preparation plant, and that following MSHA's guidelines, he would not consider the mine as "operational" on those days (Tr. 111). Mr. Volek also conceded that if one could establish that the mine was down at any particular time and was not operational, an employee engaged in construction work rather than in repair and maintenance work would fall under the exception found in MSHA's training requirements, and he would not be required to undergo training. In these circumstances, there would be no violation, and MSHA's counsel agreed that this would be the case (Tr. 114).

Referring to the language which appears at page 35 of MSHA's Manual (exhibit ALJ-1), "Installing or rebuilding of a conveyor system would normally be considered construction," Mr. Volek agreed that substituting the words "chute system, screen system" for "conveyor system" would also be considered construction work. He also agreed that what Dakco was doing was "tearing out old and installing new chutework, taking out old and installing new screenwork" (Tr. 115-116).

MSHA Coal Mine Inspector/Electrical Specialist Edwin W. Fetty testified as to his experience and duties, including work in the construction industry. He confirmed that he was

at the plant, beginning on July 28, 1987, to conduct electrical spot inspections of the work being performed by contractors, and was also there on July 29 and 31, 1987. He found no distinguishable barriers separating or distinguishing the work areas of Dakco and Southern Ohio employees, and he observed ribbon placed around exposed areas of the plant which had been cut through with jackhammers to facilitate the installation of pipes and chutes, and he also observed workers removing parts of screens and chutes. He noticed several hazards associated with rope or ribbon replacing handrails which had been removed, welding cables, torch and air hoses, oxygen and acetylene bottles, and materials lying in the walkways (Tr. 124-129).

Mr. Fetty stated that he was instructed to return to the mine on July 31, to follow-up on some pending paper work which Inspector Volek had issued, and after reviewing Dakco's training records with MSHA training specialist Aaron Justice, they found no training record for employee Victor Wilson. Mr. Fetty informed Mr. Keffer that Mr. Wilson would have to be withdrawn and trained and that he would issue an order and a citation requiring Mr. Wilson to be trained and that a record of this training had to be made available to him. Mr. Keffer immediately removed Mr. Wilson, and Mr. Wilson confirmed to Mr. Fetty that he had not been trained. Mr. Keffer advised Mr. Fetty that he needed Mr. Wilson on the job, and Mr. Fetty agreed to make himself available later in the day to abate the order and citation upon Mr. Keffer's proof that Mr. Wilson was trained. Mr. Keffer came by his home later that day, and after producing the required proof, Mr. Fetty terminated his citation and order, and the order previously issued by Inspector Volek (Tr. 129-134).

Mr. Fetty confirmed that during the course of his previous inspection of the plant on July 28, he issued no citations to Dakco. Any inspection of Dakco's work that day would have been in connection with electrical work. He had no knowledge as to how long Dakco may have been at the mine, and he could not recall speaking with Mr. Wilson about the nature of the work he was performing. When asked about any assumptions that he may have made with respect to whether Dakco was performing maintenance and repair work subjecting it to the MSHA's training requirements, Mr. Fetty responded as follows at (Tr. 136-137):

A. No, I didn't really assume. It was in my opinion of being in the construction business and doing things. I have my own distinguishment between what is construction and what is

construction repair. I feel if you remove something, a portion of, and replace it with something, you're actually restoring it back to what would be to originality or productive means. If you was putting all new chutework in, all new pipework, then that would be what I would consider to be construction work.

Mr. Fetty believed that the screens removed and replaced by Dakco were probably the original screens placed in the plant, and that due to updating and modern technology, Southern Ohio felt it was to their advantage to replace them. He had heard from others that Dakco had been on the property since May, 1987, doing other jobs, and he knew that they were on the property in 1986 doing some work during the miners' vacation period, but he had no records confirming how long Dakco had been on the property. He confirmed that Dakco abated his citation and order concerning Mr. Wilson by giving him 8 hours of refresher training, and Mr. Fetty had no knowledge as to the kind of training given the other Dakco employees (Tr. 139-141).

On cross-examination, Mr. Fetty confirmed that while he did not observe the work being performed by Dakco on July 31, 1987, when he issued his citation, he did observe some of the work being performed by Dakco employees, particularly with regard to the removal of chutes and screens by means of a large crane. Mr. Fetty agreed that the new installation by Dakco upgraded and improved the efficiency of the system being replaced (Tr. 144).

Contestant's Testimony and Evidence

Donald A. Keffer, President, Dakco Corporation, testified that his company has been in existence since 1984, and that it is engaged in construction work in the coal mining industry. He confirmed that his company performed work at Southern Ohio's Martinka No. 1 Mine in 1987, and that prior to this time he had performed work at the mine three or four times, including 1986 when work was performed at the breaker building during the vacation period. Mr. Keffer stated that during the vacation period of 1987, Dakco removed four screens from the eighth floor of the plant, two screens from the seventh floor, and three screens from the third floor. Dakco was on the property on June 17 for the vacation job. It had previously been there from May 20 through 26 removing and replacing an old belt drive at the preparation plant, and when it finished that job, it came back and started on the vacation job. Employees were on the job from June 17 through the vacation

period which began on July 25, and the work week was Wednesday through Sunday. The work performed before the vacation period involved the replacement of a magnetic separator tank, which was part of the plant upgrading, and during the vacation period, screens and chutes were dismantled, removed, and replaced, and cranes and hoists were used to remove the old screens through an opening in the side of the plant (Tr. 147-152).

Mr. Keffer identified two photographs depicting the removal of screens from the side of the plant opening (exhibits C-1 and C-2), and he explained that the work performed by Dakco in the plant included concrete floor work, and the installation of structural steel on the floors where the screens and chutes were replaced, and he confirmed that none of the work performed by Dakco employees involved "fixing something which was broken so it could then operate correctly." The work consisting of the "gutting out or removing existing chutework and existing pipework and existing screens and replacing them" with new ones. The installation of new equipment upgraded and improved the efficiency of the preparation plant, and Mr. Keffer was of the view that the work performed was construction work, rather than repair and maintenance work. He believed that the plant had been in place for approximately 12 years (Tr. 153-156).

Mr. Keffer confirmed that at the time the citations were issued he discussed the matter with the inspectors and took the position that the training standards did not apply to his employees because the work they were performing was construction work. However, the inspectors interpreted the work as "maintenance and repair" and so stated on the citations. Mr. Keffer also confirmed that Southern Ohio's policy requires that all mine visitor take 15-minute hazard training, including the wearing of hard hats, hard-toed shoes, and hearing protection as required while in the plant (Tr. 156-158).

Mr. Keffer stated that the vacation work performed in 1987 was his first major project at the plant and that 20 to 25 percent of the plant was removed and replaced. Prior work performed in 1986 at the breaker building, which is physically separated from the plant, lasted 2 weeks, and although MSHA inspectors were present during that work, no training citations were issued. He confirmed that the employees working in the breaker plant had received no MSHA training, and that none of the inspectors who were present at that time questioned any lack of training (Tr. 159, 172-173).

Mr. Keffer believed that the mine may have operated on Saturday and Sunday, July 25 and 26, before the citations were

issued, and that while no coal was run through the plant, "filter cake" was. This was done to collect fine refuse material to clean up the water system, and entailed the operation of some pumps, filters, and one conveyor belt, and the work was done on the third floor next to where his employees were working (Tr. 160).

Mr. Keffer stated that at the time Inspector Volek appeared at the plant, most of "the junk" had been removed from the plant. All of his employees were experienced workers and were not "hired off the street" (Tr. 161). He characterized the previous work performed at the breaker plant as construction work involving the removal and replacement of deteriorated floors and grating, sandblasting, painting, and concrete work on seven floors (Tr. 164).

Mr. Keffer stated that when he discussed the matter with Inspector Volek all of his employees working at the plant had initially received or signed up for the 15-minute hazard recognition training conducted by the foremen, and weekly safety meetings were held. In addition, the employees whose training records he produced to abate the citation had all received 8-hour comprehensive annual refresher training which was given on July 28, 1987, when Mr. Fetty, Mr. Volek, and Mr. Justice took the position that he was engaged in repair and maintenance work. Six or seven employees were pulled off the job and given training that same night to meet MSHA's requirements (Tr. 167, 171). All of the training given his employees at this time, with the exception of the 15-minute hazard recognition, was given in order to abate the citations and to comply with MSHA's requirements as communicated to him by he inspectors (Tr. 172).

With regard to Inspector Volek's citation, Mr. Keffer stated that after issuing the citation on Wednesday, July 29, 1987, Mr. Volek advised him that he would meet with him on Friday morning. However, because of a schedule change, Mr. Volek returned prematurely on Thursday, July 30, and Mr. Keffer was not available because he was in Ohio retrieving his records (Tr. 172).

Mr. Keffer believed that the training citations he received came about as a result of a dispute and grievance filed by the local union against his company for using non-union labor for the Southern Ohio work which he performed (Tr. 173-176). Mr. Keffer conceded that prior to July 28, 1987, except for the 15-minute hazard recognition training required by Southern Ohio's policy, none of his employees had

ever received the type of training required by MSHA's regulations, and this included the time that work was performed at the breaker building (Tr. 173-176). Not until after he received the citations did he ever subject any of his employees to any training on the assumption that they were subject to MSHA's regulations, and the training was given after the citations were issued so that they could be abated.

Mr. Keffer confirmed that his consistent position has been that his employees were not covered by MSHA's training regulations because they are construction people. He denied that any of his work for Southern Ohio has been maintenance and repair work, except for those instances where a job bid required maintenance and repair work. He stated that his work with Southern Ohio has always been "new" and that "we take out old and put in new" (Tr. 180-183).

Mr. Keffer explained that the work in question at the preparation plant was initially bid by Fair-Quip with Southern Ohio as a non-union job, and after Fair-Quip over-extended itself during the vacation period and could not do the job, it sub-contracted the work to Dakco, with Southern Ohio's approval (Tr. 184-187). Mr. Keffer confirmed that previous work done by Dakco for Southern Ohio consisted of the breaker building job when the refuse belt drive conveyor was changed out during Thanksgiving of 1986, and the replacement of an underflow thickener pump and new piping in the plant. This work was done in December, 1986, and in both instances Dakco was the prime contractor. Mr. Keffer also confirmed that more work is being scheduled for the 1988 vacation period, and that he contested the citations in order to establish a precedent as to the training requirements which he does not agree with (Tr. 188).

On cross-examination, Mr. Keffer identified and explained several training certificates for several of his employees, and confirmed that the training information shown on the forms were to satisfy the requirements of Southern Ohio's hazard training policy (Tr. 189-195). He confirmed that his employees took the longer 8 hour training course in order to insure that he was in compliance with MSHA's requirements, even though he does not agree with them, and that his present company policy is that all of his employees take 8 hours of annual comprehensive training to avoid future citations (Tr. 198-199).

Frederick J. Hastwell, III, testified that he is a senior coal preparation engineer for the American Electric Power Service Corporation, the parent company of the Southern Ohio

Coal Company, which operates the mine and plant. He confirmed that he was the project manager for the work being performed by Dakco in July, 1987, and that he was on the premises on a daily basis, and also during the vacation period from July 25 through August 7 (Tr. 203-205).

Mr. Hastwell confirmed that Southern Ohio's policy at the time Dakco was performing the work in the plant required that Mr. Keffer and each shift foreman receive hazard training, and they in turn would train their employees regarding specific construction hazards, and this policy applied to everyone coming on mine property. Mr. Hastwell confirmed that he was familiar with the citations issued to Dakco, and he explained the circumstances under which they were issued. He stated that Mr. Keffer became concerned that the inspectors were requiring other contractors present on the job to show that their employees had received MSHA approved training, and he permitted Mr. Keffer to use Southern Ohio's facilities to insure that his employees received the 8 hour refresher training to abate the citations, even though he (Hastwell) did not agree that MSHA training was required (Tr. 203-210).

Mr. Hastwell stated that in all of his dealings with contractors performing work for Southern Ohio, the Dakco case is the first instance that he knows of where MSHA has requested training records from contractors and issued citations for non-compliance (Tr. 211, 213). Inspector Volek disputed this contention, and stated that he has issued prior citations under similar circumstances, but without reviewing his records, he was uncertain as to whether he has issued citations to contractors who claimed that they were only performing construction work. Mr. Volek stated further that although most contractors performing work in preparation plants have taken the position that they are performing construction work, rather than maintenance and repair, they have always accepted the citations and trained their people without contesting the matter. Although these contractors may have a difference of opinion, Mr. Volek stated that he explained to them the same position he has taken in this case that such workers are working in the same environment as those miners in the production and extraction process (Tr. 214-216).

Mr. Hastwell stated that he was present when Mr. Keffer reviewed his training records with Inspector Volek on July 29, and discovered that everyone but Mr. Wilson had been trained. Mr. Hastwell stated that Mr. Wilson's failure to receive training was a mistake, and that the training records for the other seven employees were found not to be in order because of

insufficient employment applications or improper hazard training (Tr. 222).

Mr. Hastwell agreed that the work performed by Dakco was construction work, and not repair and maintenance work, and that the replacement of the existing plant facilities provided a major improvement in the efficiency of the plant, including increased capacity and money savings. The replacement of the existing facilities resulted in an increased production capacity of over 200 tons of coal an hour, which resulted in an annual savings of millions of dollars. He also agreed that the employees at the mine had never undertaken a project of the magnitude of that performed by Dakco, and while employees in the past have dismantled broken units and rebuilt them, Dakco took out complete units, installed new structural steel, motors, wiring, put in units in completely new floor space configurations, and upgraded the plant. Mr. Hastwell described the work and equipment installation performed by Dakco by reference to a series of slides shown by Dakco's counsel (Tr. 223-233; exhibits C-3-A through C-3-S).

Inspector Volek was called in rebuttal, and he denied ever suggesting that Mr. Keffer avail himself of union labor for the project in question. He indicated that he did mention that other contractors may be in a position to help him with training, and did so only because he knew that Mr. Keffer and Mr. Hastwell had a job to do (Tr. 238-239).

Mr. Hastwell was called in rebuttal, and he confirmed that the Dakco project took approximately 2 months to complete, starting with preliminary work on June 17, and extending through the vacation period for 2 or 3 weeks to approximately August 24. Since the completion of that project, Dakco has had no other involvement at the Martinka Mine or other Southern Ohio locations (Tr. 242-244).

MSHA's Arguments

In its posthearing brief, MSHA asserts that the Dakco employees working at the preparation plant were "miners" under the definition found in section 48.22(a)(1), because they fall within two of the four categories set forth in that provision. MSHA states that the employees were working in a surface area of an underground mine, namely a preparation plant, and that they were regularly exposed to mine hazards. Secondly, MSHA states that the employees were maintenance or service workers contracted by the mine operator to work at the mine for frequent or extended periods, and that they do not fall within

the exclusion for construction workers and shaft and slope workers.

MSHA maintains that Dakco's employees were regularly at the preparation plant from June 17, 1987 through at least August 17, 1987, and that they also worked at the plant during May 20 to 26, 1987. With the exception of the vacation period from July 25, 1987 through August 7, 1987, MSHA states that the preparation plant was in operation when Dakco employees were present, that the plant equipment was in operation during the vacation when filter cake was run during the midnight shift of July 25, 1987, and that various pieces of equipment were run dry and tested during the vacation.

MSHA asserts that throughout the time that Dakco employees were working at the plant, employees of the operator, Southern Ohio Coal Company, were working there as well, and that no physical barriers separated Dakco's employees from Southern Ohio's employees, and that both sets of employees were working in close proximity to each other on at least some occasions. Under these circumstances, MSHA concludes that Dakco workers were exposed to any hazards stemming from the presence of Southern Ohio workers in the same work environment, and vice versa. MSHA further concludes that the hazards described by the witnesses during the hearing are those which one could expect to confront at any preparation plant environment, and that most, if not all, of these hazards could have been present even if Dakco workers had not been carrying out the particular project in question. These are hazards which could result from normal preparation plant operations, including maintenance and repairs that might be carried out by the plant employees themselves.

MSHA points out that the work being performed by Dakco was the subject of a contractual relationship between Fair-Quip and Southern Ohio Coal Company, and since Fair-Quip subcontracted its work to Dakco, Dakco's employees thus were "contracted by the operator" Southern Ohio Coal Company. MSHA maintains that Dakco's employees were working at the mine "for frequent or extended periods" in that the particular project in question lasted at least 2 months, from June 17, 1987 through at least August 17, 1987, and that Dakco had also been at the mine three or four previous times, including a project at the breaker building during the 1986 vacation and a project at the preparation plant from May 20-21, 1987. MSHA concludes that the particular project in question in these proceedings was for a substantial period of time and was one of a continuing series of projects carried out by Dakco at the mine.

With regard to the project in question, MSHA maintains that Dakco workers were performing maintenance or service work, as opposed to construction, because they were carrying out activities at an already existing mine facility. MSHA asserts that the purpose of the Subpart B training regulations is to protect those workers who come in contact with the unique conditions and hazards of a mine environment, and that maintenance or service employees who work in the vicinity of, and in conjunction with, mine products and equipment must receive this training. On the other hand, employees who are merely digging a mine, building a new mine structure, or expanding a mine into new facilities need only construction-oriented training of the sort to be included eventually in Subpart C when it is promulgated.

MSHA takes the position that Dakco's employees were clearly working at an established functioning mine facility, shared the work environment with Southern Ohio employees, and had to contend with walkways, escapeways, equipment, and elevators that are laid out in a configuration unique to mines as opposed to other facilities. Moreover, Dakco employees were performing tasks done on other occasions by Southern Ohio's personnel, albeit on a significantly larger scale.

MSHA maintains that certain details of Dakco's project-whether they upgraded productive capacity, whether they installed structural steel, whether they changed the physical layout of chutes, screens, and piping - are not critical to resolving this case. MSHA asserts that it is irrelevant that Dakco may call itself a construction contractor, and that the key distinction between "maintenance or service" versus "construction" work is based upon whether a new mine facility was being created or changes were being made within an established mine facility. MSHA concludes that in this case, the facts clearly establish that the latter was taking place, and that the work must be defined as "maintenance or service."

MSHA asserts that the eventual purpose of Subpart C of Part 48 of its training regulations, when they are promulgated, will be to insure that appropriate training is provided to workers exposed to construction-oriented conditions and hazards as opposed to these uniquely related to surface mines and surface areas of underground mines. Workers to be covered under Subpart C are therefore excluded from the coverage of Subpart B. "Construction workers" for the purposes of this exclusion should be defined as those employees exposed strictly to construction conditions and hazards as opposed to those also involving mine conditions and hazards.

MSHA finds it noteworthy that the exclusion found in section 48.22(a)(1)(i) associates construction workers and shaft and slope workers, and it maintains that these are people engaged in digging new mines, not upgrading, rearranging, or maintaining existed mines. MSHA concludes that the definition of construction workers must fit within this context since these workers are building or erecting entirely new facilities or new structures that are extensions of existing facilities, and are constructing or installing an external shell of a facility as well as the equipment to be placed inside.

MSHA asserts that Dakco was not building a new preparation plant, was not adding a new building or section onto the preparation plant, and was not even building a new level onto the existing plant, a project that might arguably involve significant exposure to the mining conditions on other levels and thus be considered maintenance or service work. To the contrary, MSHA maintains that Dakco changed screens, chute-work, and piping in an effort to replace old equipment and upgrade productive capacity at several levels of the already functioning plant, and that in these circumstances, its employees did not fall within the definition of construction workers as contemplated by section 48.22(a)(1)(i).

Dakco's Arguments

In its posthearing brief, Dakco asserts that the sub-contracting work it was performing at the preparation plant consisted of removing 12 year old chutes, screens and piping in completely different configurations, for the purpose of upgrading and improving the efficiency of the preparation plant. Dakco takes the position that the work being performed by its employees was construction work, rather than repair and maintenance work, and that in the circumstances, its employees were excluded from MSHA's training requirements. Dakco maintains that as construction workers, the employees performing the work in question were not "miners" within the definition of that term found in section 48.22(a)(1), and were therefore not subject to MSHA's training regulations. Dakco points out that since both of the contested citations refer to the work being performed as maintenance and repair work, the inspectors obviously relied on this definitional language as the basis for the citations, rather than any concern for employee regular exposure to mine hazards. In short, Dakco contends that the basis for both citations is the inspectors belief that the work being performed was "repair and maintenance," as opposed to "construction."

In support of its position, Dakco relies on MSHA's policy interpretation and guidelines concerning "construction" work, as opposed to "maintenance and repairs," as found in an August 26, 1985, MSHA Administrative Manual dealing with the training and retraining requirements found in Part 48, Title 30, Code of Federal Regulations (Exhibit ALJ-1). In this regard, Dakco makes reference to one of the guidelines found in paragraph (2) on page 35, of the manual which states that no training is required if the mine is not operational and workers are performing construction work. Dakco also makes reference to the manual policy interpretation of the term "construction work," which states that such work "involves the building, rebuilding, alteration, or demolition of any facility or addition to an existing facility," and the interpretation of "maintenance or repair work" as including "routine upkeep of operable equipment or facilities and the fixing of equipment or facilities."

Dakco asserts that the mine was not operational, and that the work being performed constituted the replacement of a 12 year old system, which included the rebuilding, alteration and demolition of the chute system, screen system and piping, rather than routine upkeep, or the replacement of a single chute, screen, or pipe. Dakco further maintains that its preparation plant work was not designed to "repair" or "service" or "maintain" the chute system, screen system and piping, so that they could continue to operate at their optimum levels of performance. Rather, the work was done to upgrade the overall system and improve efficiency, with the result being that the upgraded system saved Southern Ohio millions of dollars.

Dakco suggests that MSHA's enforcement action in these cases may have been prompted by union pressure to force it to use union workers for the work being performed at the preparation plant. In support of this assertion, Dakco stated that a grievance was filed by UMWA District 31 a few weeks before the issuance of the citation because Dakco is a non-union contractor, and that Inspector Volek was identified by one of its witnesses as the individual who suggested that experienced miners from the local Union hall could be called to do the necessary work at the plant. Dakco asserts further that in 1986, when it was performing similar work on a breaker system at the mine, MSHA inspectors who were present raised no questions concerning training or training records of its employees, even though they had not received any MSHA training.

Finally, Dakco suggests that any ambiguity found in MSHA's regulations or administrative manual should be resolved

in its favor, and that on the facts here presented, the citations should be vacated.

Findings and Conclusions

Docket No. WEVA 87-334-R

Fact of Violation-Citation No. 2902509, July 29, 1987,
30 C.F.R. § 48.29(a)

The facts in this case establish that Inspector Volek went to Southern Ohio's mine on July 28, 1987, to inspect certain work areas where several independent contractors were either performing work or scheduled to perform work. Mr. Volek spoke with Dakco's President, Donald Keffer, who was at the mine, and Mr. Keffer advised Mr. Volek that he would have approximately 28 employees working at the mine, and that some of them had received training. Mr. Keffer advised Mr. Volek that he did not have any training records available with him at the mine, but that he would make them available to Mr. Volek. Upon his return to the mine, Mr. Volek reviewed the training records made available to him by Mr. Keffer. The records reflected that 21 Dakco employees had received the required MSHA training, and although Mr. Volek could not recall the type of training that they had received, he was satisfied that they did not require any further training. With regard to the remaining seven employees, Mr. Volek found no training records confirming that they had been trained, and he issued the citation because Mr. Keffer could not produce any training records for these employees, and he cited a violation of training standard 30 C.F.R. § 48.29(a), which provides as follows:

§ 48.29 Records of training.

(a) Upon a miner's completion of each MSHA approved training program, the operator shall record and certify on MSHA form 5000-23 that the miner has received the specified training. A copy of the training certificate shall be given to the miner at the completion of the training. The training certificates for each miner shall be available at the mine site for inspection by MSHA and for examination by the miners, the miners' representative and State inspection agencies. When a miner leaves the operator's employ, the miner shall be entitled to a copy of his training certificates.

Mr. Volek confirmed that he issued the citation because he believed the seven employees in question were engaged in maintenance and repair work, and were therefore required to be trained. In making this judgment, he relied on the nature of the work being performed by Dakco, and MSHA's policy guidelines found at pages 34 and 35 of MSHA Administrative Manual 30 C.F.R. Part 48 - Training and Retraining of Miners, August 26, 1985 (exhibit ALJ-1). Mr. Volek rejected Mr. Keffer's claims that his employees were "construction" workers, rather than "maintenance and repair" workers, and he relied on the manual guidelines which he believed required MSHA training for contractor employees who are working in the same work environment as other miners, and who are exposed to the same mine hazards, and who are not engaged in the construction or expansion of a new mine facility such as the existing preparation plant.

MSHA's training requirements for miners working at surface mines and surface areas of underground mines are found in Subpart B of Part 48, Title 30, Code of Federal Regulations. The specific training requirements are found in sections 48.25 through 48.28. The cited standard, section 48.29, is a record keeping requirement which requires an operator to record and certify on an MSHA form that a miner has received the specified training, and to have the training records available at the mine for inspection by the inspector. I find nothing in this record keeping requirement that requires any particular types of training. Those requirements are found in the aforementioned training standards. Section 48.29 simply requires certain record keeping upon completion of a miner's training. It does not per se mandate training.

Notwithstanding Dakco's assertions that its employees are not required to be trained pursuant to MSHA's training requirement, the fact is that on July 29, 1987, when Mr. Volek reviewed Dakco's training records, Mr. Keffer produced training records for the 21 employees who had received and completed the requisite training, and insofar as these employees are concerned, Dakco was in compliance with section 48.29, because it produced records for the employees who had completed the training.

With regard to the lack of any available training records for the seven employees cited by Inspector Volek, since they had not completed the training which Mr. Volek believed they should have received, no records were available, and this obviously explains the reason why Mr. Volek did not find them. Had the employees completed the training, the failure by Mr. Keffer to produce the records confirming this fact would

have justified the issuance of the citation. However, based on the facts of this case, and Mr. Volek's testimony, I am convinced that he issued the citation because he believed the seven employees in question had not received the training which he believed was required. Under these circumstances, I conclude and find that Mr. Volek should have cited the applicable training standard requirement, rather than the record keeping standard. Accordingly, I find no basis for concluding that Dakco was in violation of section 48.29, for failing to have training records available for the seven employees in question, and the citation IS VACATED.

Docket No. WEVA 87-333-R

Fact of Violation - Citation No. 2894879, July 31, 1987,
30 C.F.R. § 48.25(a)

In this case, Dakco is charged with a violation of mandatory training standard section 48.25(a), for failure to provide the required training for one of its employees performing work at Southern Ohio's preparation plant. The employee was identified in the citation as Victor Wilson, an ironworker. The facts show that MSHA Electrical Inspector Edwin Fetty was at the mine during July 28-31, 1987, conducting electrical spot inspections of certain work being performed at the mine by several contractors. Mr. Fetty returned to the mine on July 31, as part of a follow-up inspection, and to abate the section 104(b) order previously issued by Inspector Volek because of the asserted failure by Mr. Keffer to timely produce the training records for seven of his employees. Upon review of these records, Mr. Fetty found records confirming the fact that six of the employees had been trained, but he found no training record for Mr. Wilson, and he issued the citation because of Dakco's failure to train Mr. Wilson. Mr. Fetty also issued a simultaneous order withdrawing Mr. Wilson until he could be trained. Dakco withdrew Mr. Wilson, provided him with training that same day, and Mr. Fetty abated his citation and order. He also abated Mr. Volek's previously issued withdrawal order.

Section 48.25 requires certain training for new miners. Included among the requirements is a provision requiring no less than 8 hours of training for all new miners before they are assigned to work duties. The 8 hours of training includes an introduction to the miner's work environment, hazard recognition, and health and safety aspects of the tasks to which the new miner will be assigned.

Section 48.22(a)(1) provides the following definition of a "miner" who is required to receive training:

For the purposes of this Subpart B(a)(1) "Miner" means, for purposes of sections 48.23 through 48.30 of this Subpart B, any person working in a surface mine or surface areas of an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods. This definition shall include the operator if the operator works at the mine on a continuing, even if irregular, basis. * * * * This definition does not include:

* * * * *

(1) Construction workers and shaft and slope workers under Subpart C of this Part 48:
* * * (emphasis added).

MSHA's policy guidelines concerning the training requirements of Subpart B, Part 48, Title 30, Code of Federal Regulations, are found at pages 34 through 36 of MSHA Administrative Manual 30 C.F.R. Part 48 - Training and Retraining of Miners (exhibit ALJ-1). The guidelines for persons performing construction, maintenance, or repair work are found at page 35, and they state as follows:

Construction work includes the building, rebuilding, alteration, or demolition of any facility, or addition to an existing facility. Installing or rebuilding of a conveyor system would normally be considered construction. Maintenance or repair work includes routine upkeep of operable equipment or facilities, and the fixing of equipment or facilities. Replacement of a conveyor belt would normally be considered maintenance or repair.

The training required for persons performing construction, or maintenance or repair work often depends upon: (1) whether or not a mine is operational; (2) whether the work is performed on a regular basis; and (3) whether the

exposure to mining hazards is frequent. Generally, a mine is operational if it is producing material or if a regular maintenance shift is ongoing; it is not operational if it is not producing material due to miners' vacations, strikes, or other shutdown periods. Work performed on a frequent basis is work performed for more than five consecutive working days. Regular exposure to mine hazards is exposure that follows a recognizable pattern on a recurring basis.

The following guidelines should be used to apply the above factors:

- (1) If workers are performing shaft and slope construction work, whether or not the mine is operational - No training is required.
- (2) If the mine is not operational and workers are performing construction work - No training is required.
- (3) If the workers are performing maintenance or repair work on an infrequent or irregular basis, and they are independent contractors or their employees, Hazard training under 48.31 is required. However, if such workers are employees the operator - Comprehensive training under Subpart B is required.
- (4) If workers are performing maintenance or repair work on a frequent or regular basis, whether or not the mine is operational - Comprehensive training under Subpart B is required.

Dakco's president, Donald Keffer, confirmed that all of his workers were experienced, and he conceded that prior to July 28, 1987, none of his employees had ever received the type of training required by MSHA's regulations. However, they did receive 15-minute hazard recognition training as required by Southern Ohio's policy. Mr. Keffer's position is that none of his employees are covered by MSHA's training requirements because they are engaged in construction work, rather than maintenance and repair work. He confirmed that he advised the MSHA inspectors of his position, but they believed his employees were engaged in maintenance and repair work and were required

to be trained pursuant to MSHA's requirements. Mr. Keffer confirmed that he agreed to remove the affected employees from the job so that they could receive 8 hour training in order to abate the citations, and that he now requires all of his employees to take 8 hours of annual comprehensive training pursuant to MSHA's requirements in order to avoid future citations, notwithstanding his position that his employees are not covered by MSHA's training regulations.

In this case, Dakco is charged with the failure to provide at least 8 hours of new miner training for Mr. Wilson. A "new miner" is defined by section 48.22(a)(2)(c) as "a miner who is not an experienced miner." An "experienced miner" is defined by subsection (b) as a person who received training within the preceding 12 months from an appropriate State agency; a person who has had at least 12 months' experience working in a surface mine or surface area of an underground mine within the past 3 years; or a person who has received new miner training as prescribed by section 48.24, within the preceding 12 months. Although Mr. Keffer testified that all of his employees were experienced workers, no testimony or evidence was forthcoming from Dakco or MSHA as to Mr. Wilson's background, experience, or prior training, and Dakco has conceded that he had not received the training required by the cited section 48.25. However, in order to establish a violation in this case, MSHA has the burden of establishing that Mr. Wilson was a "miner" within the definition of that term under section 48.22(a)(1), and that Dakco was required to provide him training.

The definition in section 48.22(a)(1) of a "miner" subject to MSHA's training requirements found in sections 48.23 through 48.30, includes four categories of individuals performing work at the preparation plant in question, and they are as follows:

- any person who is engaged in the extraction and production process.
- any person who is regularly exposed to mine hazards.
- any person who is a maintenance or service worker employed by the operator.
- any person who is a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods.

Also included in the definition of a "miner" subject to the training requirements of sections 48.23 through 48.30, are operators working at the mine on a continuing, even if irregular basis. The term "operator" as defined by subsection (e) of section 48.22, includes an independent contractor performing services or construction at the mine. Included in the section 48.22(a)(2) definition of "miner" for purposes of hazard training pursuant to section 48.31, is an "occasional, short-term maintenance or service worker contracted by the operator."

Excluded from the definition of miner for purposes of section 48.23 through 48.30 training are construction and shaft or slope workers under MSHA's Subpart C, Part 48 construction safety and health standards. These standards have not as yet been promulgated by MSHA. The general OSHA construction industry health and safety standards were published in the Federal Register on February 9, 1979, 44 FR 8577, and they are found in Part 1926, Title 29, Code of Federal Regulations. I take official notice of a September 4, 1979, MSHA Memorandum circulated to "interested persons" by its Office of Standards, Regulations, and Variances inviting comments to MSHA's draft safety and health standards for construction work on the surface of mine property. Section 1926.21 of the draft proposed regulations requires employer compliance with the training standards to be promulgated by MSHA as Subpart C, Title 48, Code of Federal Regulations, and it notes that "these regulations are currently under development by MSHA. The term "employer" as defined by draft section 1926.32(k), includes an independent contractor performing services or construction at a mine, and the term "construction work" is defined by subsection (g) of section 1926.32(k), as "the building, rebuilding, alteration, or demolition of any facility or addition to an existing facility at a surface mine or surface area of an underground mine, including painting, decoration or restoration, associated with such work, but excluding shaft and slope work."

In support of the citation in question, MSHA takes the position that the Dakco employees working at the preparation plant were "miners" under section 48.22(a)(1) because they fall within two of four categories set forth therein; namely, (1) they were regularly exposed to mine hazards, and (2) they were maintenance or service workers contracted by the operator to work at the mine for frequent or extended periods. Furthermore, MSHA contends that these employees do not fall within the exclusion for construction workers and shaft and slope workers. Taking into account MSHA's position in this case, in order to establish a violation with respect to Mr. Wilson, it

has the burden of establishing that Mr. Wilson was either regularly exposed to mine hazards or was a maintenance or service worker contracted by the operator to perform work at the mine for frequent or extended periods of time.

Regular Exposure to Mine Hazards

The parties have stipulated that Dakco employees were performing work at the mine preparation plant from May through August 1987. Mr. Kirchartz testified that Dakco employees were working at the preparation plant during the 3-day memorial day period, which would have been the week-end of May 30-31, 1987, and intermittently from that time through the vacation period from July 25 to August 7, and for approximately a month thereafter (Tr. 30-32). Inspectors Volek and Fetty did not document the actual time frames during which Dakco was present at the plant during 1987, and the citation issued by Mr. Fetty does not state precisely when Mr. Wilson was performing work at the plant. Although the parties stipulated that Mr. Wilson was working at the plant "during July 1987," the only direct evidence establishing his actual presence at the plant is the citation issued by Mr. Fetty which reflects that Mr. Wilson was immediately withdrawn from the mine that day and allowed to return after he was trained.

Mr. Keffer testified that Dakco probably had three or four jobs at the mine prior to 1987, and that during May 20 through 26, 1987, work was performed at the plant removing an old belt drive and replacing it with a new one. After this work was completed, Dakco returned on June 17, 1987, to do some preparation work for the "vacation work," and this work included the replacement of a magnetic separator in the plant. Dakco continued its work at the plant dismantling, removing, and replacing screens and chutes, from June 17 through the vacation period which began on July 25, on a Wednesday through Sunday work schedule (Tr. 149-150). No testimony was elicited from Mr. Keffer as to precisely when Mr. Wilson performed work at the plant, or what he was doing, and Mr. Wilson was not called to testify in this case. In response to pretrial interrogatories, Dakco lists the name of Victor Wilson as an ironworker who performed work at the plant "during the period including July 29, and 31, 1987."

Although Dakco's responses to the interrogatories reflect that it had performed work at the mine during September - December 1985, June - July, and December, 1986, and January and May, 1987, there is no evidence or testimony that Mr. Wilson had ever performed any work during these time periods. In short, the only probative evidence of record

reflects that Mr. Wilson performed some work at the plant sometime during July 29 and 31, 1987.

The testimony by the inspectors who issued the citations in question establishes that they issued them because they believed that Dakco's employees were performing maintenance and repair work, rather than construction work. Although Inspector Volek confirmed that he followed the manual guidelines, and generally alluded to contractor employees exposure to the same hazards to which other miners are exposed, his belief that Dakco employees were covered by MSHA's training requirements was based on his view that no new facility was being constructed or expanded. His citation makes no mention of any Dakco employees being exposed to any hazards, and although he testified as to several hazards which he believed were present, he issued no citations or violations to Dakco.

With regard to Inspector Fetty's citation concerning Mr. Wilson, the citation makes no mention of any hazards associated with any work being performed by Mr. Wilson. Although Mr. Fetty alluded to several hazards which he believed were generally associated with the work being performed by Dakco at the plant while he was there during July 28-31, 1987, he issued no hazard citations to Dakco, and admitted that when he issued his citation on July 31, 1987, he did not observe the work being performed by Dakco. As a matter of fact, Mr. Fetty could not recall speaking with Mr. Wilson about the nature of the work he was performing, and Mr. Fetty had no knowledge as to how long Dakco may have been at the mine performing work, and he had no factual basis for determining whether or not Dakco may have been present for frequent or extended periods of time (Tr. 138, 141). Having closely examined Mr. Fetty's testimony, it seems clear to me that he issued the citation because he believed the nature of Dakco's work involved restoration maintenance and repair work, rather than new work.

The definition of "miner" found in section 48.22(a)(1) includes one who is regularly exposed to mine hazards. MSHA's general policy guideline found at page 34 of its manual adds the term "frequent" so that the definition reads "regular" or "frequent" exposure to mine hazards. The guideline then defines "regular exposure" as "a recognizable pattern of exposure on a recurring basis," and the term "frequent exposure" as "exposure to hazards for more than five consecutive days." Under the general discussion concerning persons performing construction, maintenance, or repair work, found at page 35 of the manual, the guidelines define work performed on a "frequent basis" as work performed for more than five consecutive working

days, and "regular exposure to mine hazards" as exposure "that follows a recognizable pattern on a recurring basis."

The contested citation in this case is confined to Mr. Wilson, and no other Dakco employee, and I am constrained to limit my findings and conclusions only to Mr. Wilson and no one else. After careful review and examination of all of the evidence adduced in this case, I conclude and find that MSHA has failed to establish that Mr. Wilson was regularly exposed to any mine hazards within the meaning of that term as found in section 48.22(a), or in MSHA's policy guidelines. The evidence of record in this case does not establish that Mr. Wilson was exposed to any hazards, and any suggestions in this regard by MSHA are simply unsupported, and they ARE REJECTED. Further, although Mr. Kirchartz alluded to several hazards which he believed were generally associated with the preparation plant work environment, there is absolutely no credible evidence establishing that Mr. Wilson was exposed to any of these asserted hazards. In short, MSHA has failed to establish any nexus between Mr. Wilson's work and any existing hazards which would have exposed him to any potential injury.

Maintenance or Service Worker Issue

MSHA's assertion that construction work can only take place when a mine or associated facility such as a preparation plant are initially built and become operational, and that any subsequent work may only be considered maintenance or repair is not well taken. MSHA's policy guidelines clearly state that the rebuilding, alteration, or demolition of any facility is construction work. Maintenance or repair work is construed by the policy as the routine upkeep or fixing of equipment and facilities. (Exhibit ALJ-1, pg. 35). The guidelines do not distinguish "new" or "old" facilities.

On the facts and evidence presented in this case, it seems clear to me that the work performed by Dakco was construction work entailing an extensive demolition, rebuilding, renovation, and installation of a rather extensive coal chute and screen system in the preparation plant. The work included the removal and replacement of plant siding to facilitate the removal and replacement of complete units, extensive steel and concrete floor work to accommodate the new system, new floor configurations, and the removal and replacement of piping, electrical wiring, and the like. The reconfigured chute and screen system resulted in a marked increase in the plant's productive capacity, with substantial savings to the mine operator. Given the scope of the project, I conclude and find

that the work performed by Dakco was not "routine upkeep and fixing."

MSHA's further assertion that the exclusion of construction workers from the definition of "miner" found in section 48.22(a), for purposes of mandatory training sections 48.23 through 48.30, is limited only to workers engaged in shaft and slope construction work is likewise not well taken. MSHA's current training regulations found in Subpart B, of Part 48, which are applicable to surface areas of underground mines, contain no mention or definition of the term "construction work." The only Subpart B reference to "construction" is found in the definition of "operator" in section 48.22(e), which includes "any independent contractor identified as an operator performing services or construction at such mine." On the other hand, MSHA's Subpart A training regulations, which apply to underground mines, exclude shaft and slope workers, workers engaged in construction activities ancillary to shaft and slope sinking, and workers engaged in the construction of major additions to an existing mine which requires the mine to cease operations (section 48.2(i)). Subparts A and B both rely on MSHA's unpromulgated Subpart C regulations as the basis for excluding construction workers and shaft and slope workers.

MSHA's draft unpromulgated construction regulations, Part 1926, Title 29, Code of Federal Regulations, at section 1926.32(g), defines the phrase "construction work" as follows:

[T]he building, rebuilding, alteration, or demolition of any facility at a surface mine or surface area of an underground mine, including painting, decoration or restoration associated with such work, but excluding shaft and slope sinking. (Emphasis added).

As noted above, MSHA's unpromulgated draft definition of "construction work" specifically excludes shaft and slope sinking, and the exclusionary language found in section 48.22(i), on its face distinguishes construction workers from shaft and slope workers. Under the circumstances, I have difficulty comprehending MSHA's argument that only shaft and slope workers qualify for an exemption from MSHA's Subpart B comprehensive training requirements. I also have difficulty in accepting the reliance by the parties on regulations such as Subpart C, which have yet to be promulgated by MSHA.

MSHA's policy guidelines concerning the training requirements found in its Subpart B regulations appear to be based on

a mix of the definition of a "miner" for training purposes pursuant to Subpart A, as well as Subpart B, and to this extent I find the guidelines to be rather confusing and contradictory. For example, guidelines No. 1, No. 2, and No. 4, which appear at page 35 of the policy manual, are premised in part on the fact that a mine may be operational or not. Guideline No. 1 totally exempts shaft and slope construction workers from all training requirements, regardless of whether or not the mine is operational. Guideline No. 2 totally exempts workers "performing construction work," without limitation as to whether or not it is slope and shaft work, as long as the mine is not operational. Guideline No. 4 requires comprehensive training if workers are performing maintenance and repair work on a frequent or regular basis, regardless of whether or not the mine is operational.

I find nothing in MSHA's Subpart B surface area training regulations that even suggests that the operational mode of the mine at any given time is the determining factor as to whether training is required. On the other hand, the definition of a covered "miner" found in Subpart A, section 48.2, for underground mines, includes language that excludes workers engaged "in the construction of major additions to an existing mine which requires the mine to cease operations." If this language found in section 48.2 is the basis for MSHA's policy distinctions between an operational and non-operational mine for purposes of the training requirements found in Subpart B, it would seem that MSHA has published a surface area training policy based on regulatory provisions applicable to underground mines.

Another area of confusion is found in guideline No. 3. That guideline states that maintenance or repair workers of independent contractors who work on an infrequent or irregular basis are only required to have hazard training under training section 48.31. However, the guideline goes on to state that if such workers are employees of the operator, comprehensive training is required. Since the term "operator," by definition, includes an independent contractor performing services or construction at a mine, one could argue that contractor employees working on an infrequent or irregular basis are also required to have comprehensive training.

In the case at hand, MSHA takes the position that Mr. Wilson comes within the section 48.22(a)(1) definition of "miner" for purposes of section 48.23 through 48.30 training because he was a maintenance or repair worker contracted by the operator to perform work at the mine for frequent or extended periods of time. Since I have concluded that Dakco was engaged in construction work, rather than maintenance or

repair work, it follows that Mr. Wilson's work status was that of a construction worker, rather than a maintenance or repair worker.

MSHA's policy guideline No. 2 states that workers performing construction work at a mine which is not operational are not required to be trained. MSHA's policy states that an "operational" mine is one which is producing material, or one in which there is an ongoing regular maintenance shift. A mine which is not producing material because of miners' vacations is not considered to be operational. In the instant case, MSHA has conceded that the mine was not producing coal and was not operational during the vacation period from July 25 through August 7, 1987, and Mr. Kirchartz confirmed that no coal was being processed during this vacation period (Tr. 39). Inspector Volek conceded that when he was at the mine, no coal was being produced, and he did not consider the mine to be operational (Tr. 111). He further conceded that if an employee were engaged in construction work when the mine was not operational, he would not require training (Tr. 114). MSHA's counsel also agreed with Mr. Volek's position.

MSHA's policy guideline No. 3 requires only hazard training under section 48.31, for independent contractor workers performing maintenance or repair work on an infrequent or irregular basis. If such workers are employees of the operator, comprehensive training is required. Guideline No. 4 requires comprehensive training for workers performing maintenance or repair work on a frequent or regular basis regardless of whether the mine is operational or not. MSHA's policy states that "work performed on a frequent basis" is work performed for more than 5 consecutive working days.

Insofar as Mr. Wilson is concerned, Inspector Fetty had no knowledge as to the nature of his work, nor did he know how long Dakco had been at the mine performing work. Further, he did not document the period of time that Mr. Wilson may have been present at the mine, and the citation which he issued does not state when Mr. Wilson performed any work at the mine. As noted earlier, although the parties stipulated that Mr. Wilson was working at the plant "during July 1987," the only evidence establishing the number of days he was performing work is the citation issued by Mr. Fetty on July 31, 1987, which reflects that Mr. Wilson was withdrawn on that day, and immediately returned to work after he was trained that same day. Dakco's pretrial responses to interrogatories reflect that Mr. Wilson performed work at the plant "during the period

including July 29 and 31, 1987." Under all of these circumstances, and based on the available evidence, I can only conclude that the record establishes that Mr. Wilson at best performed work at the mine on 2 days when the mine was not operational. I find no evidentiary support for any conclusion that Mr. Wilson was a worker performing work for more than 5 consecutive days.

In view of the foregoing, and on the basis of my findings and conclusions that Mr. Wilson was an independent contractor construction worker, who was not regularly exposed to any mine hazards, rather than a maintenance or repair worker regularly exposed to any mine hazards, or a maintenance or repair worker working at the mine for frequent or extended periods, or a worker working at the mine which was operational, I conclude and find that MSHA has failed to establish by a preponderance of any credible testimony or evidence that Mr. Wilson was a "miner" within the definition of section 48.22(a)(1), or that he required the comprehensive training mandated by the cited section 48.25(a). Under the circumstances, I conclude and find that MSHA has failed to establish a violation, and the citation IS VACATED.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED THAT:

1. Dakco's Contests ARE GRANTED.
2. The contested section 104(a) Citation Nos. 2894879 and 2902509, ARE VACATED.


George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 23 1988

STANLEY BAKER. : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 87-142-D
: :
KENTUCKY STONE COMPANY, : Pulaski Plant
Respondent :
:

DECISION

Appearances: Philip P. Durand, Esq. and Wendy Tucker, Esq.,
Ambrose, Wilson, Grimm & Durand, Knoxville,
Tennessee, for Complainant;
John G. Prather, Jr., Esq., Law Offices of John G.
Prather, Jr., Somerset, Kentucky, for Respondent.

Before: Judge Weisberger

On July 28, 1988, a Decision was issued in which it was found that Complainant had established a cause of action under section 105(c) (the Act). The Decision contained an Order directing the Complainant to file a statement, within 20 days of the Decision, indicating the specific relief requested. The Order further provided that Respondent shall have 20 days to reply to Complainant's statement. It was further provided that the Decision was not to be final until a further order was issued with respect to Complainant's relief.

On August 15, 1988, Complainant filed a request for specific relief, which set forth the following requested relief:

- | | |
|--|-------------|
| 1. Net back wages to August 22, 1988 | \$23,168.00 |
| 2. Litigation Expenses (other than #3) | \$ 2,034.00 |
| 3. Attorney's fees to August 22, 1988 | \$17,871.00 |
| 4. Interest* | |
| Interest on net back wages | \$ 5,821.00 |
| Interest on net insurance damages | \$ 547.00 |
| Total interest on damages | \$ 6,368.00 |
| 5. \$52.00/year bonus given each year for wearing steel tip boots. (\$52.00 x 3 years) | \$ 156.00 |

6. Reinstatement in his former position at Kentucky Stone as a front-end loader operator, together with all the accompanying benefits and privileges.
7. Reinstatement as well as back contribution to the pension plan at Kentucky Stone, such that the Plaintiff will be afforded the same benefits and rights he would have had if he had not been fired.
8. Net increase in health insurance expenses incurred as a result of the higher costs of insurance provided at Elmo Greer & Sons \$ 2,890.00
9. Any safety bonuses paid for the years 1986, 1987, or 1988.

*By agreement of the Parties, interest will be computed at a stated rate of 10 percent simple interest per annum.

On August 22, 1988, Respondent filed a Response to Complainant's Request for Specific Relief, in which Respondent requested itemization of back wages, litigation expenses, attorney's fees, and equitable relief. On August 25, 1988, in a telephone conference call initiated by the undersigned with Counsel for both Parties, it was agreed that Complainant would furnish Respondent with the requested itemization. On September 1, 1988, Complainant filed an Amendment to Request for Specific Relief, which set forth an itemization and computation of back wages, attorney's fees, and litigation expenses. On September 2, 1988, an Order was entered allowing Respondent until September 12, 1988, to respond to Complainant's Amendment to Request for Specific Relief. To date, Respondent has not filed any such response.

Accordingly, I conclude that Respondent does not challenge the Specific Relief requested, and I find such relief to be reasonable and justified.

ORDER

Based on the record in this case, it is ORDERED that:

1. The Decision issued July 28, 1988, is CONFIRMED, and is now FINAL.

2. Respondent shall, within 30 days of this Decision, pay Complainant:

a. Net back wages to August 22, 1988, in the amount of \$23,168.00. Respondent shall also pay Complainant back pay, at the rates set forth in Complainant's Amendment to Request for Relief for the period August 23, 1988, until Complainant is reinstated at his former job.

b. Recoupment of litigation expenses to August 22, 1988, in the amount of \$1,751.00.

c. Attorney's fees to August 22, 1988, in the amount of \$18,564.00.

d. Interest in the amount of \$6,368.00 to August 22, 1988. In addition, Respondent shall pay Complainant interest, at the rate set forth in Complainant's Amendment to Request for Relief, for the period from August 23, 1988, until Complainant is reinstated at his former job.

e. Past bonuses missed in the amount of \$156.00 for wearing steel tip boots.

f. Net increase in health insurance expenses incurred as a result of the higher cost of insurance provided at Elmo Greer & Sons in the amount of \$2,890.00.

g. Any safety bonuses paid for the years 1986, 1987, and 1988.

3. Respondent shall, within 5 days of this Decision, reinstate Complainant to his former position at Kentucky Stone as a front-end loader, together with all the accompanying benefits, privileges, and shall provide back contributions to the pension plan at Kentucky Stone such that Complainant will be afforded the same rights he would have had had he not been fired.



Avram Weisberger
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 23 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MHSA), : Docket No. PENN 88-62-M
Petitioner : A. C. No. 36-04243-05506
v. :
EUREKA STONE QUARRY, INC., : Pocono Quarry & Plant
Respondent :
:

DECISION

Appearances: James E. Culp, Esq., Office of the Solicitor,
U. S. Department of Labor, Philadelphia,
Pennsylvania, for the Secretary;
John T. Kalita, Jr., Esq., Eureka Stone Quarry,
Inc., Philadelphia, Pennsylvania, for the
Respondent.

Before: Judge Weisberger

Statement of the Case

On January 19, 1988, the Secretary (Petitioner) filed a
Petition for Assessment of Civil Penalty for an alleged violation
by the Respondent of 30 C.F.R. § 56.3200. Respondent filed its
Answer on March 2, 1988. Pursuant to notice, the case was heard
in Philadelphia, Pennsylvania, on March 25, 1988. Robert L.
Carter and Steve Moyer, Jr., testified for the Petitioner. James
Cliff, James L. Gower, and Barry Lutz testified for the
Respondent. Petitioner filed its Proposed Findings of Fact and
Memorandum of Law on August 1, 1988, and Respondent filed its
Proposed Findings of Fact, Conclusions of Law, and Memorandum of
Law on July 29, 1988. Time was allowed for Reply Briefs, but
none were filed.

Stipulations

The Parties entered into the following stipulations as con-
tained in Respondent's Pretrial Statement:

1. Pocono Quarry and Plant Mine (hereinafter referred
to as "Pocono Quarry") is owned and operated by Eureka
Stone Quarry, Inc., a Pennsylvania Corporation with
offices at Pickertown and Lower State Roads, Chalfont,
Pennsylvania.

2. Pocono Quarry is subject to the provisions of the Federal Mine Safety and Health Act of 1977.

3. In the 2 year period prior to May 1987, Pocono Quarry had zero paid violations of the standards contested in this case. The size of the operation is that the Pocono Quarry employs 25 employees. The annual production of Eureka Stone Quarry is approximately 304,903 tons; the annual production of Pocono Quarry is approximately 57,562 tons.

4. The Administrative Law Judge has jurisdiction over this matter.

5. The Respondent operates nine mines.

6. The authenticity of the exhibits to be offered at hearing is hereby stipulated. No stipulation is made as to the facts asserted in such exhibit.

7. The subject of the Citation and Termination were properly served on a duly authorized representative of the Secretary of Labor upon agents of Eureka Stone Quarry, Inc. as to the dates, time and places stated therein and may be admitted into evidence for the limited purpose of establishing their issuance, but not for the truthfulness or relevance of any statement asserted therein.

8. The alleged condition was abated within the required time.

9. The imposition of a proposed penalty by the Administrative Law Judge will not affect Respondent's ability to continue in business. However, Respondent does not stipulate to the appropriateness of the imposition of any penalty.

Issues

1. Whether the Citation was so vague as to have denied Respondent due process.

2. Whether the Respondent violated 30 C.F.R. § 56.3200, and if so, whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. If section 56.3200 has been violated, it will be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Federal Mine Safety and Health Act of 1977.

Regulations

30 C.F.R. § 56.3200 provides as follows:

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

Citation

Order No. 2851904, issued on May 29, 1987, provides as follows:

A section of high wall on the East face had loose and fractured rock throughout the top half of the high wall. The rock appeared it could slide out and down the face into the shovel that was digging under it (56.3131). The high wall was approximately 50 ft high. The loose fractured rock extended approximately 30 ft wide, at the top of the face on the high wall. The high wall was a working face where the Biryus crib shovel F-614, and three quarry haul trucks had previously worked (56.3200).

Findings of Fact and Conclusions of Law

Robert L. Carter, an Inspector for the Mine Safety and Health Administration, testified that on May 29, 1987, in the course of an inspection of Respondent's Pocono Quarry and Plant, he observed, in the muck pile of the highwall, over hanging material which he described as a very large boulder that would not fit in a 35-ton truck, and other large material. He observed a shovel operator, James L. Gower, approximately 5 feet from the face digging material from the face, and below the overhang. He testified that he observed rocks sliding down the pile when Gower dug, and opined that further digging underneath the material that he was concerned about, would cause it to slide down, causing injury to those in the area. Steve Moyer, Jr., an Inspector for the Mine Safety and Health Administration, essentially corroborated Carter's opinion with regard to the hazard of the conditions observed by Carter. Carter further testified that

testified that when he approached Gower and told him the he was working under a dangerous condition, and asked him if he was aware of it, Gower indicated in the affirmative. Carter testified that Gower said he realized that there was a dangerous rock that could come down on him.

In essence, it is Respondent's position that it was not afforded due process, inasmuch as the Citation in question describes the hazardous condition as being located at the top of the face on the highwall, whereas Carter's testimony placed the condition in the muck pile. Respondent argues that due process was denied, as it prepared its defense based on the condition of the highwall rather than the condition of the muck pile. Respondent further asserts, in essence, that it was irrevocably prejudiced by the failure of the Citation to properly describe the location of the hazardous condition, as the muck pile itself was quarried and no longer available for its testing and measurement.

The rocks in question were, as indicated by Carter, located in the muck pile. Carter also recognized the difference in definition between a highwall and a muck pile, and appeared to agree that to be "technical" the Citation should have referred to the muck pile. (Tr. 47) I find that the language of the Citation in its entirety is specific enough to provide notice of the location of the rocks as depicted in Government Exhibits 2, 3, 4, and 6. Additionally, I find that the wording of the Citation has not prejudiced the Respondent, as it has not been established that it prevented Respondent from defending against the Petition herein. The evidence fails to establish that Respondent was not apprised of the alleged hazardous material in question. Barry D. Lutz, Respondent's driller, was working on the highwall on the date in question, and indicated there was no loose or unconsolidated material on the highwall, and that there was not any rock on the face that appeared to be in danger of slipping down. Thus, Lutz may not have had knowledge of the location of the cited material. However, he was not one of Respondent's managers, and there is no evidence he had any conversations with Carter with regard to the latter's finding of a dangerous condition. In contrast, Carter testified he discussed the condition with Joe Less, Respondent's Superintendent, and had a "long discussion" with Respondent's Manager, James Cliff. (Tr. 69) The former did not testify, and the latter (Cliff), did not state that he had no notice of the location of the alleged hazardous rocks. Indeed, although he opined there was no danger, he saw some large rock when viewing the face and indicated the highwall had loose material and was fractured. His testimony further indicates he was aware of large pieces of rock which he thought were on the muck pile not attached to the highwall. (Tr. 125, 126) Also, James C. Gower, Respondent's Shovel Operator, although he denied that he told Carter he was aware he was working under a dangerous condition, he nonetheless indicated that although the highwall did not have loose rock, there was fractured rock. Also, in its Response filed on March 2, 1988, Respondent manifested that it had notice of the location of

the rocks in question, as it indicated that the "mass of rock" was not in danger of falling and that attempts were made to scale it back. This can only refer to the rocks in question, as there is no evidence that any large loose rocks were on the highwall.

According to Cliff, the conditions herein were blown down approximately 2 weeks after the citation was written. Further, pictures indicating the location of the rocks in question were taken by Petitioner 4 or 5 days after the Citation was issued. Thus, any ambiguity with regard to the location of the Complainant of conditions could here been ascertained with certainty by way of pretrial discovery. (I have examined these pictures and conclude that GX 2 and GX 3, provide a depiction of the relative size of the rocks in question compared to the two men in the pictures). Respondent asserts, in essence, that inasmuch as, when it was cited, it had no notice of the correct location of the rocks in question, it lost its right to a defense as it was unable to get "... information, tests, measurements, or the like regarding the muck pile." (Respondent's Memorandum of Law, Page 6). Respondent has not indicated with any specificity the information or tests it would have taken, and how these would have related to its defense. Indeed, I find Respondent's witnesses provided their opinion with regard to the lack of hazard from rocks in the muck pile.

James Cliff, Respondent's Manager, testified that he looked at the face approximately 7:15 on May 29, 1987, and that when viewing the face, there was "some large rock" and "loose and fractured rock on top of the highwall," (Tr. 124, 125), but that he did not feel there was any danger, and that it did not appear that the material will slide out. He was asked whether in his opinion anyone was in danger, and he testified that he did not feel so "at that particular time," (Tr. 126), and that his opinion has not changed. Barry D. Lutz, Respondent's Driller, who was working on the highwall on May 29, 1987, provided his opinion that there was no danger of any rock falling on the shovel, and that no one was in danger from any condition. Also, Gower, when asked on direct-examination whether it appeared that the loose fractured rock on the muck pile could slide out, stated "not out of the ordinary." (Tr. 140) He indicated that there was no indication of instability which would have dislodged the rock. Gower also indicated on direct-examination that he did not tell Carter that he was fearful that a rock would fall and did not say that he felt endangered. Gower stated that Carter told him that he (Gower) was in danger, but he Gower did not tell Carter he felt endangered. However, I note that on cross-examination, when asked whether he told Carter he was watching the rocks above him, Gower testified that he did not recall that specific statement and "couldn't you tell exactly what was said." (Tr. 147)

Further, in support of its contention that the material observed by Carter was not in any danger of sliding down, Respondent refers to testimony, indicating that on May 29, 1987,

a crane fell off the highwall and ran over the boulder observed by Carter without dislodging it. (The testimony was in conflict between Carter and Lutz, with regard to the path taken by the crane falling off the highwall. I have adopted the version testified to by Lutz as he, not Carter, actually observed this mishap). Carter in cross-examination, agreed that this provides an indication that the boulder in question would not slide.

I find the opinion of Carter and Moyer with regard to the danger posed by the material in question to be credible, inasmuch as it appears likely that continued shoveling 1/ would have deprived the material of its support and hence it would have fallen down. 2/ In contrast, neither Cliff, nor Lutz, nor Gower provided any basis to support their opinion that the material in question was not in danger of falling. Also, I note that although the falling crane did not dislodge the material in question, this does not negate the opinion of Carter and Moyer that continued digging by the shovel operator would have deprived the material in question of support, thus causing it to slide or fall. Therefore, based upon all the above, I conclude that the conditions observed by Carter, as testified to, created a hazard to persons within the purview of Section 56.3200, supra, and hence, this section has been violated.

In the opinion of Carter and Moyer, continued shoveling below the cited material would cause it to fall and that the shovel operator and truck driver working in the area would be exposed to the danger of being hit with falling material. Carter and Moyer further testified, in essence, that there was a reasonable likelihood of a serious injury or a fatality should the cited material fall. I do not find any significant evidence of record to contradict the opinions of Moyer and Carter, that there was a reasonable likelihood that the hazard of the materials sliding down the muck wall would result in an injury of reasonably serious nature.

1/ The transcript reference cited by Respondent on pages 8 and 10 of its Memorandum of Law do not support the proposition that Respondent had no intention to undermine the cited material. Indeed Cliff indicated he agreed it was his intention to remove as much of the muck pile as possible prior to shooting the top of the pile down (Tr. 134). Also, Gower indicated that he was planning on digging in the muck pile in an area that is depicted as below the material in question (Tr. 145, GX 4).

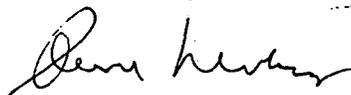
2/ I accepted Carter's opinion that with further digging underneath the material in question could fall down, as it is based on the laws of gravity. It thus is irrelevant that he is not a geologist, nor licensed blaster, nor has experience in the reduction of a mountain.

Although Respondent's witnesses essentially indicated that generally a muck pile contains loose fractured rock, the material in question, as depicted in GX-2, GX-3, and GX-6, posed a hazard due to their size, particularly in relation to the other material in the muck pile. As discussed, infra, I have concluded that with continued digging by the shovel operator, there was a distinct hazard of the cited material coming loose and falling down the slope. I adopt the version testified to by Carter, due to observations of his demeanor, and conclude, that Gower, the shovel operator, was working under the overhanging cited material in very close proximity to the face. Also present in the area, at intervals of approximately 3 to 4 minutes, was a truck driver. I conclude that with continued digging as planned, that there was a reasonable likelihood of the cited rocks falling and resulting in an injury of a reasonably serious nature.

For the above reasons, I conclude that the gravity of the violation herein was relatively high. Further, Cliff had indicated essentially that approximately 7 to 7:15 on the morning of May 29, 1987, he inspected the face of the highwall. Gower indicated on cross-examination that when he started to dig at 7:00 in the morning he inspected the top of the highwall. Carter testified that Gower told him that he was aware of the materials cited by Carter. I find this testimony not to have been rebutted by Gower who indicated on cross-examination that he could not recall exactly what was said between him and Carter. Thus, I find that Respondent was aware of the condition cited by Carter, and should have been aware of the hazards posed by these conditions as testified to by Carter and Moyer. I thus find that Respondent exhibited negligence to a relatively high degree. I have also considered the other factors contained in section 110(i) of the Federal Mine Safety and Health Act of 1977, as stipulated to by the Parties. Based upon all of the above, I conclude that a penalty of \$1,000, as proposed, is proper for the violation herein.

ORDER

It is ORDERED that the Respondent pay the sum of \$1,000, within 30 days of this Decision, as a Civil Penalty for the violation found herein.



Avram Weisberger
Administrative Law Judge

Distribution:

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER CO 80204

SEP 26 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 87-206-M
Petitioner : A.C. No. 05-03998-05506 NYO
: :
v. : Summitville Mine
: :
INDUSTRIAL CONSTRUCTORS :
CORPORATION, :
Respondent :

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Mr. James A. Brouelette, Industrial Constructors
Corporation, Missoula, Montana,
pro se.

Before: Judge Cetti

Statement of the Case

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801 et seq., (Mine Act). The Secretary of Labor on behalf of the Mine Safety and Health Administration, charges the respondent, Industrial Constructors Corporation (ICC), the operator of the Summitville Mine with the violation of 30 C.F.R. § 56.4402 a mandatory safety standard promulgated by the Secretary of Labor.

The proceeding was initiated by the Secretary with the filing of a proposal for assessment of civil penalty. The operator filed a timely appeal contesting the existence of the alleged violation and the amount of the proposed civil penalty. An evidentiary hearing was held on these issues at Denver, Colorado. Oral and documentary evidence was presented and the matter submitted for decision. The parties waived filing of briefs.

REVIEW OF EVIDENCE AND FINDINGS

This Summitville Mine is an open pit, heap leach gold mining operation located in Summitville, Rio Grande County, Colorado. The mine was owned by Summitville Consolidated Mining Company

Inc. Industrial Constructors Corporation (ICC) was under contract to complete the mining phase.

Approximately 325 employees worked two-eleven hour shifts, seven days a week performing the mining tasks and three eight hour shifts, seven days a week milling.

During the early morning hours of September 5, 1986, at approximately 2 a.m. an accident, involving an explosion and fire, occurred at the bulk fuel storage tank area of the mine. The accident resulted in serious injury to the driver of ICC's fuel tank truck and injury to another miner who came to the truck driver's assistance.

At the time of the accident the driver was replenishing the supply of diesel in the large supply tank of his fuel tanker truck. He was using a Honda draft pump, driven by a 5 h.p. internal combustion gasoline engine, to pump the diesel fuel from one of the large storage tanks into the 3,000 gallon capacity tank of the fuel truck. Suddenly there was an explosive fire which engulfed the driver causing serious injuries.

MSHA investigated the accident. The preliminary investigation started September 5, 1986. It commenced its on-site investigation about noon Monday September 8, 1986 and completed it on September 10, 1986. Its primary concern was to determine the ignition source of the fire. MSHA concluded in its investigation report that the ignition source of the fire could not be determined.

At the hearing MSHA Inspector Simpson testified that even though they could not determine the ignition source of the fire they did establish that the fire started around the gasoline powered Honda pump while it was being used to pump diesel from the storage tank into the supply tank of the fuel truck.

When the MSHA investigators first saw the Honda pump on September 8, 1986 it was in a wheelbarrow used to move it from tank to tank and it was located underneath a box-like protective cover approximately 20 feet from where the pump was in use when the fire broke out. The pump had been taken out of service, "tagged" and placed underneath the cover to protect it from the elements. Respondent had "tagged it out", shortly after the accident.

When MSHA commenced its on-site inspection on September 8th it took a photograph of the pump. This photograph, Exhibit P-4, shows the engine of the pump as it appeared when first observed by the MSHA investigators. They noticed that the pump's engine did not have the manufacturer's control switch. There was just an open box-like area where the manufacturer's control switch would normally be located. MSHA investigators looked but were

unable to find any other "on/off" switch. MSHA Inspector Simpson stated this lack of switch was unusual. He testified that where there was no "on/off" switch on an engine such as this the normal procedure for shutting off the engine would be to either pull a spark plug wire or possibly "flood out" the engine. It was later determined that the engine had been turned on and off by the use of a toggle switch. It is undisputed that sometime after the Friday morning September 5th accident and before the commencement of the on site investigation on Monday September 8th, that some unknown person had removed this toggle switch from the engine of the Honda pump.

This alteration of the accident scene was determined through the use of a photograph taken and provided by ICC's management. The photograph was taken by ICC's project superintendent on September 6th the day after the accident. The negative was given to MSHA by ICC's safety director on September 22nd but was not developed by MSHA until the first part of October. A comparison of that photograph, Exhibit P-3, with the photograph taken by MSHA when it commenced its on-site inspection (Exhibit P-4) plainly shows a toggle switch that was not present at the time the on-site inspection commenced.

On November 12, 1986 MSHA issued its Section 104(a) Citation No. 2638787 charging ICC with a violation of 30 C.F.R. § 50.12. The citation reads as follows:

On September 5, 1986 an accident occurred at the Summitville Mine. The accident scene was altered, by removing a toggle switch on the Honda Engine involved in the accident. Photographs taken by the company after the accident show this switch. The switch was missing from the Honda engine prior to an on-site investigation by MSHA. This action by the company is in direct violation of 103(j) of the Act. The switch in question could possibly have direct bearing on the possible cause of this accident.

30 C.F.R. 50.12 provides as follows:

Unless granted permission by a MSHA District Manager or Subdistrict Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

Stipulations

1. Industrial Constructors Corp., respondent, is the operator of the Summitville Mine located at Rio Grande County, Colorado.

2. The operations and products of the mine affect commerce, its products enter commerce and accordingly, the mine and its operators are subject to the provisions of the Act.

3. The undersigned ALJ has jurisdiction to hear and decide this case.

4. Respondent is a large operator that employed approximately 200 people at this mine site at the time of the alleged violation and overall employed approximately 700 people.

5. This is the first citation issued to this operator for allegedly altering an accident site.

Respondent presented evidence that its management fully cooperated in MSHA's investigation of the accident. In addition, the operator had outside professionals (Rampart Investigators Inc.) conducted a "cause and origin investigation" regarding the September fire and explosion. Rampart's investigators reported that a cigarette butt was found in the immediate area and that this butt was the same brand of cigarettes the victim (truckdriver) had on his person at the time of the accident. Rampart Investigation Inc. concluded that the probable source of ignition was the discarding of the cigarette butt into the gasoline fumes or spilled gasoline on the ground next to the tanker truck.

Discussion and Further Findings

Irrespective of the cause of the accident the evidence establishes that the accident scene was altered by the removal of a toggle switch from the Honda gasoline engine that powered the pump involved in the accident. In addition, the undisputed testimony of the MSHA mine inspector established the fact that this alteration of the accident scene hampered the investigation.

No evidence was presented as to who removed the toggle switch from the Honda engine. A comparison of the two photographs Exhibit P-3 and Exhibit P-4 clearly shows that the toggle switch was removed from the Honda engine between the time of the accident occurred on September 5th and the time MSHA commenced its on-site inspection on September 8th. During that time the Honda engine was under the control of ICC in a secured area of the mine site approximately 200 yards south of the main guard house. Approximately 200 employees had access to the Honda engine at that site.

Evidence was presented that before the accident the original design of the Honda engine had been modified by wiring in the

toggle switch. The MSHA inspector testified that that this was a very unsafe modification. From the evidence presented and the facts established and the reasonable inferences that can be drawn from them, it is found that the accident scene was altered by an employee or someone under the control of the respondent. Respondent was responsible for taking the measures needed to prevent this deliberate alteration of the accident scene. I find that respondent was negligent in its failure to prevent the alteration before MSHA commenced its on-site investigation.

Respondent argued that it had in effect preserved the evidence by taking the photograph of the Honda engine that shows the toggle switch. It points to the fact that its project superintendent took the photograph of the Honda engine the day after the accident and (22 days later) it gave the negative to MSHA. The photograph clearly shows the toggle switch dangling along side the engine with open contacts where the terminal wires were attached. This contention that the photograph preserved the evidence must be rejected in view of the undisputed testimony of MSHA's investigator that the removal of the toggle switch hampered the investigation. It is found that the accident scene was altered before MSHA could complete its investigation and that this was a violation of 30 C.F.R. § 50.12.

PENALTY

With respect to the penalty for Citation No. 2638787 the Mine Safety and Health Administration under 30 C.F.R. § 100.5 elected to waive the regular assessment formula and decided to make a special assessment in accordance with 30 C.F.R. § 100.5. In its narrative findings for a special assessment MSHA found that the gravity of the violation was "non-serious", that the violation resulted from the operator's negligence, and that the violation was abated within a reasonable period of time. The special assessment report concluded with a statement that "based on the six criteria set forth in 30 C.F.R. § 100.3(a) and the information available to the Office of Assessments, it is proposed that the Industrial Constructors Corporation be assessed a civil penalty of \$250.00."

I agree with the finding in the narrative report of MSHA's Office of Assessments that the gravity of the violation was non serious. I also find the violation resulted from the operator's negligence which I evaluate as low under the facts and circumstances of this case. Arguably it is only with hindsight that respondent would have reason to suspect that someone would alter the accident scene.

At the hearing Petitioner argued that the alteration was a "purposeful" alteration and that the penalty for the violation should be \$5,000. I have determined that the penalty should be

more than the \$250 initially proposed by MSHA. The violation could contribute to another fire or explosion. Complete accident investigations are necessary to determine the cause of an accident so corrective action can be taken to prevent another occurrence. However, in view of my findings on gravity and negligence and on the undisputed testimony that Respondent's top management fully cooperated in the investigation to determine the cause of the accident, a \$5,000 penalty would be excessive. Based on careful consideration of the entire record and the six criteria set forth in 30 C.F.R. § 100.3(a), I find that the appropriate civil penalty in this case for the violation of 30 C.F.R. § 50.12 as alleged in Citation No. 2638787 is \$500.00.

Citation No. 2638556

Respondent moved to withdraw its contest of Citation No. 2638556 which alleges a violation of 30 C.F.R. § 56.4402 and agreed to pay the \$46.00 proposed penalty. The motion is granted and the \$46.00 proposed penalty is approved.

Conclusions of Law

Based upon the entire record and the findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. The respondent violated the provisions of 30 C.F.R. § 56.4402, a mandatory safety standard.
3. The appropriate penalty for this violation is \$500.00.
4. The appropriate penalty for the violation of 30 C.F.R. § 56.4402, alleged in Citation No. 2638556, is \$46.00.

ORDER

Citation Nos. 2638556 and 2638787 are affirmed and Industrial Constructors Corporation is ordered to pay civil penalties totaling \$546.00 within 30 days of the date of this decision.


August F. Cetti
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

SEP 27 1988

ROCHESTER & PITTSBURGH COAL CO., : CONTEST PROCEEDING
Contestant :
 : Docket No. PENN 88-194-R
v. : Citation No. 2879240; 4/21/88
 :
SECRETARY OF LABOR, : Greenwich Collieries
MINE SAFETY AND HEALTH : No. 2 Mine
ADMINISTRATION (MSHA), : Mine ID 36-02404
Respondent :

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, PA, for
Respondent;
Joseph A. Yuhas, Esq., Rochester & Pittsburgh
Coal Company, Ebensburg, PA, for Contestant.

Before: Judge Fauver

In this proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., Rochester & Pittsburgh Coal Company seeks to vacate a citation and the Secretary seeks a civil penalty for the violation cited. The parties stipulated at the hearing that the Secretary's petition for a civil penalty may be adjudicated in this proceeding.

Based upon the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable and probative evidence establishes the following:

FINDINGS OF FACT

1. Greenwich Collieries No. 2 Mine is operated and managed by Rochester & Pittsburgh Coal Company.
2. In 1979, the Mine Safety and Health Administration (MSHA) of the United States Department of Labor notified Leonard Edwards, a miner at such mine, that his X-ray report was positive for pneumoconiosis.
3. In April, 1985, due to a layoff at the mine, there was a realignment of the work force. Edwards, a shear operator, was scheduled to be transferred from Greenwich South Mine to Greenwich North Mine. He requested that he remain at the South Mine and was reclassified as a general laborer at the South Mine with a reduction in hourly pay from \$14.41 to \$13.31. When he

learned of the pay reduction, Edwards produced the 1979 MSHA letter, and mine management restored his pay to \$14.41 per hour. Both Edwards and mine management apparently assumed that Edwards was a Part 90 (Title 30, C.F.R.) miner in April, 1985.

4. However, Leonard Edwards did not exercise his Part 90 option until March 1, 1988, when he signed a "Notice of Exercise of Option" form and mailed it to MSHA.

5. MSHA received Edwards' signed form on March 3, and notified Rochester & Pittsburgh Coal Company of Edwards' status as a Part 90 miner in a letter received by the company on March 14. The letter stated, inter alia: "This letter is to inform you that the miner named above has exercised the option" and that "Part 90 requires that each Part 90 miner be compensated at not less than the regular rate of pay received by that miner immediately before exercising his or her option, or if ever transferred, at not less than the regular rate of pay immediately before the transfer."

6. At least as early as December, 1987, mine management knew that Edwards had not yet exercised his option as a Part 90 miner.

7. Edwards received MSHA's notification of his Part 90 status on March 12 and on March 14, his next work day, he told his foreman that he was exercising his option to work in a less dusty part of the mine. His foreman told him that his wages would probably be reduced if he transferred to a less dusty area. Edwards transferred March 14 and on March 15 his pay rate was reduced from \$15.81 to \$14.78 per hour.

8. After investigating Edwards' complaint of a pay reduction, MSHA issued Citation No. 2879240 on April 21, 1988.

DISCUSSION WITH FURTHER FINDINGS

Edwards exercised his option under Part 90, 30 C.F.R. on March 1, 1988, by mailing a signed "Notice of Exercise of Option" form to MSHA. MSHA acknowledged his status as a Part 90 miner by a notification letter received by Rochester & Pittsburgh Coal Company on March 14 and received by Edwards on March 12.

On March 14, Edwards told his foreman that he was exercising his option to work in a less dusty part of the mine. His foreman told him that his wages would probably be cut if he transferred to a less dusty area. Edwards transferred to a less dusty area on March 14 and his wages were cut the next day, from \$15.81 to \$14.78 an hour.

His pay rate immediately before he mailed the Exercise of Option form on March 1, 1988, was \$15.81 an hour and he was

receiving that rate the day (March 14) he told his foreman he was exercising his option to work in a less dusty area.

Rochester & Pittsburgh Coal Company defends Edwards' pay cut on the ground that it was done to correct a pay error made back in April, 1985. It offered some testimony that the decision to cut his pay to \$14.78 an hour was made "on the 10th or 11th of March" in 1988 (Tr. 115).

Section 90.3 of the regulations provides:

(a) Any miner employed at an underground coal mine or at a surface work area of an underground coal mine who, in the judgment of the Secretary of Health and Human Services, has evidence of the development of pneumoconiosis based on a chest X-ray, read and classified in the manner prescribed by the Secretary of Health and Human Services, or based on other medical examinations shall be afforded the option to work in an area of a mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air. Each of these miners shall be notified in writing of eligibility to exercise the option.

* * *

(d) The option to work in a low dust area of the mine may be exercised for the first time by any miner * * * by signing and dating the Exercise of Option Form and mailing the form to the Chief, Division of Health, Coal Mine Safety and Health, 4015 Wilson Boulevard, Arlington, Virginia 22203.

(e) The option to work in a low dust area of the mine may be re-exercised by any miner * * * by sending a written request to the Chief, Division of Health, Coal Mine Safety and Health, MSHA, 4015 Wilson Boulevard, Arlington, Virginia 22203. The request should include the name and address of the mine and operator where the miner is employed.

(f) No operator shall require from a miner a copy of the medical information received from the Secretary or Secretary of Health and Human Services.

Section 90.103(a) provides:

(a) The operator shall compensate each Part 90 miner at not less than the regular rate of pay received by that miner immediately before exercising the option under § 90.3 (Part 90 option; notice of eligibility; exercise of option).

Section 90.2 defines a "Part 90 miner" as "a miner... who has exercised the option under ... § 90.3...."

In Matola v. Consolidation Coal Co., 647 F.2d 427,430 (4th Cir. 1981), the court held that "the regular rate of pay is the dollar rate -- the rate at which the miner was actually remunerated for the work he did -- irrespective of his job classification." In Mullins v. Andrus, 664 F.2d 297,305,310 (D.C. Cir. 1980), the court rejected an interpretation that "a transferring miner is entitled to receive the rate of pay to which he had a right immediately prior to transfer" and held that "the phrase 'regular rate of pay' ... means the rate at which the transferring miner was actually and regularly compensated when the transfer occurred."

I hold that, when a miner becomes a Part 90 miner the operator may not go back several years from that date to change the miner's pay rate to one the operator decides the miner "should have been" receiving immediately before he became a Part 90 miner. To permit such retroactive changes would have a chilling effect on the exercise of Part 90 rights. Rochester & Pittsburgh Coal Company is bound by the pay rate that Leonard Edwards was actually and regularly receiving immediately before his exercise of the Part 90 option.

Rochester & Pittsburgh Coal Company contends that Edwards did not become a Part 90 miner until the company received MSHA's notice of his exercise of the Part 90 option, on March 14. However, the regulations, § 90.3(d), provide that "the option to work in a low dust area of the mine may be exercised for the first time...by signing and dating the Exercise of Option Form and mailing the form [to MSHA]." Edwards signed and mailed the required form on March 1, 1988. It was received by MSHA on March 3. He became a Part 90 miner on March 1, 1988, and effective that date he was protected against a reduction of the pay rate he was regularly receiving immediately before March 1.

Thus, for the purpose of determining when a Part 90 miner's pay rate becomes protected against reduction, the effective date is the date the miner mails a signed "Exercise of Option" form to MSHA under § 90.3(d). However, for the different purpose of determining when liability for a civil penalty occurs, I hold that a violation subject to a civil penalty can occur only after the operator receives notice that the miner is a Part 90 miner. If an operator reduces a miner's pay rate after the miner becomes a Part 90 miner but before the operator receives MSHA's notice of the miner's Part 90 status, the operator has a reasonable opportunity to revoke the pay cut and restore the pay to the rate the miner had been receiving immediately before exercising the Part 90 option. Failure to restore the miner's pay to the correct rate after receiving MSHA's notice of the Part 90 status would be a constructive pay cut in violation of § 90.103(a) and subject to a civil penalty.

In this case, the pay cut was direct, and not constructive. Rochester & Pittsburgh Coal Company received MHSA's notice of Edwards' Part 90 status on March 14, 1988. It violated § 90.103(a) by reducing his pay rate on March 15.

Considering the criteria for a civil penalty in § 110(i) of the Act, I find that the Secretary's proposed civil penalty of \$78 for this violation is appropriate.

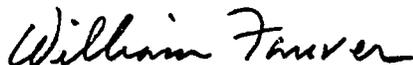
CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.
2. Rochester & Pittsburgh Coal Company violated 30 C.F.R. § 90.103(a) as alleged in Citation No. 2879240.
3. Leonard Edwards is entitled to be restored to the pay rate he received immediately before his exercise of the Part 90 option on March 1, 1988, plus any pay increases he would have received thereafter in the employment, and to receive back pay (the difference between the pay rate he received and the rate he should have been paid) retroactive to March 15, 1988, with interest at the rate or rates published by the Internal Revenue Service for the period involved.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 2879240 is AFFIRMED.
2. Rochester & Pittsburgh Coal Company shall pay a civil penalty or \$78 within 30 days of this Decision.


William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 29 1988

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 87-21-D
ON BEHALF OF	:	
DONALD J. ROBINETTE,	:	NORT CD 87-5
Complainant	:	
v.	:	Mine No. 8
	:	
BILL BRANCH COAL COMPANY,	:	
INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 87-22-D
ON BEHALF OF JOEY F. HALE,	:	
Complainant	:	NORT CD 87-7
v.	:	
	:	Mine No. 8
	:	
BILL BRANCH COAL COMPANY,	:	
INC.,	:	
Respondent	:	
	:	

DECISION

Appearances: Patricia L. Larkin, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia, for
the Secretary;
Robert J. Breimann, Esq., Street, Street, Street,
Scott & Bowman, Grundy, Virginia, for the
Complainants.

Before: Judge Weisberger

Statement of the Case

On May 20, 1987, the Secretary, on behalf Donald J. Robinette and Joey F. Hale, filed a Complaint alleging violations of § 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1). Respondent filed its Answer on August 20, 1987. On August 28, 1987, an Order was issued consolidating Docket Nos. VA 87-21-D and VA 87-22-D and setting these cases for hearing in Kingsport, Tennessee, on December 1, 1987. On October 28, 1987, Complainants requested a continuance of the

scheduled Hearing as one of their perspective witnesses had recently undergone surgery, and the request for continuance was not opposed. On September 2, 1987, Complainants filed a Motion for Leave to file an Amended Complaint and this Motion was not opposed. An Order was entered on September 10, 1987, granting this Motion.

A Hearing was subsequently rescheduled for January 26 - 27, 1988, in Kingsport, Tennessee. Due to the unavailability of a MSHA Inspector for deposition, the Hearing scheduled for January 26 - 27, was rescheduled for February 29, and March 1, 1988, in Kingsport, Tennessee. On February 24, 1988, Respondent, in a telephone call to the undersigned, made a request to compel Petitioner to produce names of certain witnesses pursuant to a written interrogatory. In response to this request on February 24, 1988, a telephone conference call was arranged by the undersigned with the attorneys for both Parties. In this conference call the hearing previously set for February 29 and March 1 was adjourned, and the Parties were requested to file Memoranda setting forth their position on the issues raised by Respondent's request. Memoranda were filed on March 7, 1988. On March 10, 1988, an Order was entered requiring Petitioner to serve upon Respondent the names, addresses, and telephone numbers of all witnesses who are not miners, and to file with the undersigned a statement to be examined in camera containing names of witnesses who are alleged to be informers, and a statement setting forth any facts relied upon to establish the informer's privilege for each of the witnesses alleged to be informers. On May 2, 1988, an Order was issued, that having examined the statements in camera, the witnesses listed therein were declared to be informers within the preview of 29 C.F.R. § 2700.59.

Pursuant to notice, the case was rescheduled and heard in Johnson City, Tennessee, on May 10 - 12. At the hearing, Donald Joe Robinette, Gary Compton, Fred L. Howery, Franklin Dallas Perkins, Donald James Morris, Junior Vidis Price, Joey Fred Hale, Donald Cook, John Kyle Griffith, and Russell Wayne Reynolds testified for the Complainants. Rexley Ray, Ivan Leon Vandyke, Charles Lee Boyd, and Doris Allen Nickels testified for the Respondent. At the conclusion of the Complainant's case, Respondent made a Motion to strike the Secretary's case and dismiss the Complaints. After oral argument, this Motion was denied.

At the conclusion of testimony on May 12, Respondent requested that the Hearing be adjourned and be rescheduled to allow it to present two additional witnesses. The case was subsequently rescheduled for July 13, 1988, in Johnson City, Tennessee. At the commencement of the rescheduled hearing on July 13, 1988, Respondent indicated that it had not been able to locate one of its witnesses, Gary Compton, and it had decided not to call any other witnesses.

Proposed Findings of Fact and Memorandum of Law were filed on August 12, 1988, by Complainants, and by Respondent on August 15, 1988. A Reply Brief was filed on September 12, 1988, by Respondent; none was filed by Complainants.

Issues

1. Whether the Complainants have established that they were engaged in an activity protected by the Act.
2. If so, whether the Complainants suffered adverse action as the result of the protected activity.
3. If so, to what relief are they entitled.

DONALD JOE ROBINETTE

In evaluating the evidence presented herein, I have been guided by the Commission's recent decision. The Commission, in a recent decision, Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986), which reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, Goff, supra, at 1863, stated as follows:

A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Pasula, 2 FMSHRC at 2797-2800; 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 not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

Protected Activity

Donald Joe Robinette, a coal miner with 23 years experience, worked for Respondent in 1984, until he was laid off in that year, and then was rehired in July or August 1986. Robinette testified that, at various times, he spoke with his foreman at the time, Russell Wayne Reynolds, about "improving the ventilation" and asked him to speak to the Superintendent, C. L. Boyd,

about this matter. (Tr. Vol 1, P. 91). He also said that, on one occasion, between a few days and 3 weeks prior to the time he was fired, November 21, 1986, he asked Boyd for a curtain to get more air on the section. In contrast, Boyd indicated that Robinette never registered a complaint with him with regard to air or ventilation, nor did Robinette communicate the same through any other person. Boyd, in general, indicated that he did not receive complaints from any miners with regard to insufficient air. He also said that in February 1986, the brattice was repaired and the air in the section was then measured at 12,000 cubic feet, which exceeded the federally mandated minimum of 9000 cubic feet. Boyd also said that a larger fan was installed in March 1986, and that subsequent air readings indicated air movement of 26,000 cubic feet.

In reconciling the conflict between Robinette and Boyd, I have concluded, based upon my observations of the witnesses' demeanor, that Robinette was truthful and that he did indeed ask Boyd on one occasion for a curtain to get more air on the section. Also, Reynolds corroborated Robinette's testimony that Robinette and other men complained to him about the air on the section. I therefore conclude that Robinette did voice complaints to Reynolds about the air on the section, and did request a curtain from Boyd to get more air on the section. I further find these activities of Robinette to be protected within the purview of the Federal Mine Safety and Health Act of 1977.

Motivation

Gary Compton, who was the foreman of the section on which Robinette worked on November 21, 1986, testified that on that date he worked overtime along with two roof bolters. He said that while traveling on the scoop he hit a drill which was parked inby behind a curtain and that the drill did not have its lights on. Compton, in essence, said that it was not proper for Robinette to have left the drill behind the curtain with its lights off, and it was also contrary to Respondent's policy. Compton said that after he hit the drill he called Respondent's Superintendent, Boyd, and told him that he had "...no further use for Mr. Robinette on the coal drill." (Tr. Vol 1, P. 161). Boyd indicated that Compton told him (Boyd) that as far as he (Compton) was concerned, Robinette was fired if Boyd "did not have any thing else for Donald Robinette to do at the mine." (Tr. Vol III, P. 43). Boyd further said, in essence, that Compton told him that Robinette was fired because Robinette had parked his drill behind the fly curtain and Compton ran into it. Boyd also said that Robinette was caught sleeping 2 to 3 days prior to November 21.

Boyd, who had the authority to fire, indicated that when Robinette came outside, he told Robinette that he did not have

any thing else for him to do and that he would have to fire him. Boyd said that Robinette got angry, and he (Boyd) asked Robinette to wait outside and he said to Robinette "we'll work it out." (Tr. Vol III, P. 44). Boyd said that Robinette waited approximately 10 minutes and then left. When questioned by Respondent's attorney, Boyd agreed that there were no other reasons for Robinette's termination other than what he previously stated, and that it was not motivated by any other external factor. Boyd also testified that he never discussed with Compton the need to fire Robinette.

In contrast, it was the testimony of Robinette that, when he left the section at the end of his regular shift, and prior to the commencement of the overtime shift, his drill was parked halfway under the curtain and the lights were on. Although the testimony of Rexley Ray appears to corroborate that of Compton, in that the former indicated that the Robinette's drill was pretty close to the curtain and there were no lights on, it is significant to note that Ray observed the drill only after the accident. In contrast, Robinette's testimony finds corroboration in the testimony of Joey Hale that the drill was parked in the middle of the curtain. I observed Hale and found, based upon his demeanor, that his testimony was truthful on this point. Also, Robinette's version finds some corroboration in the testimony of Donald J. Morris, a roof bolter, who worked overtime along with Compton on November 21, that prior to the accident, he saw light coming down the hallway one break back "...from something parked down there." (Tr. Vol I, P. 227). Accordingly, I adopt Robinette's version and find that at the end of his shift he had left the drill halfway through the curtain with its lights on.

Russell Wayne Reynolds, who was Robinette's section boss when Robinette commenced working for Respondent in 1986, testified that 2 weeks prior to November 17, 1986, Boyd told him that Robinette had told Boyd that, in essence, if the section did not get more air that he, Robinette, "...would call somebody that could get it." (Tr. Vol II, P. 159). I find this testimony truthful, as it was not contradicted by Boyd who subsequently testified. 1/

1/ Although Boyd stated, in essence, that Robinette did not complain to him about the air or ventilation, he did not specifically deny having told Reynolds, as testified by Reynolds, that Robinette told him that if Boyd did not get more air Robinette would call someone who would.

On November 17, 1986, a spot inspection was performed at Respondent's mine by MSHA Inspectors Franklin Dallas Perkins and Fred L. Howery. According to Howery, (it was stipulated that if Perkins were to testify, the answers that he would give to questions on direct and cross-examination would be the same as Howery), he indicated, in essence, that upon serving a citation on Boyd, the latter asked if the MSHA Inspectors had been called to make the inspection. Howery, in essence, further testified that Boyd said that if the identity of the person who called the inspectors would be ascertained then that person would be fired. Reynolds said that a few days after the inspection on November 17, Boyd said he'd fire the one who called the inspectors. Boyd, however, said that no one ever told him that Robinette had called the inspectors and that he never threatened to fire an employee for calling the inspectors and never made such a statement. However, I find, based on observations of their demeanor, that Howery and Reynolds were truthful in testifying that Boyd had told them on separate occasions that the one who called the inspectors would be fired. Also, I note that Boyd did not specifically deny making those specific statements to Howery and Reynolds. Further, it was Robinette's uncontradicted testimony that Boyd asked him prior to November 21, 1986, if he had called the inspectors. (Tr. 82). Robinette also testified that Boyd said that he would find the one who called the inspectors and fire him.

In addition, Griffith testified that sometime prior to November 17, 1986, Compton initiated a conversation and indicated that Robinette had called the MSHA Inspectors and that he (Compton) "...was going to get rid of him." (Tr. Vol II, P. 131). In this regard Reynolds also testified that on November 17, the day of the inspection, Compton said that he would fire the one who called the inspector. I find the testimony of Griffith and Reynolds to be truthful based upon observations of their demeanor, as well as the fact that their testimony in this regard has not been contradicted. It is further significant to note that Robinette's uncontradicted testimony was to the effect that Compton had asked him if he had called the inspectors.

In addition, it was Robinette's testimony that on the Monday after he was fired, he asked Eugene Altizer (one of Respondent's owners at the time) if he (Robinette) was fired because of anything he had done, and Altizer said that he did not know why Robinette was fired as Boyd had taken that action but "...if it was because the inspectors had been called, that he would find out who called them if he had to fire every man on that section." (Tr. Vol I, P. 81). I find Robinette's testimony truthful in this regard based upon observations of his demeanor, the fact that his testimony was uncontradicted, and the fact it was corroborated by Hale, who was present when this conversation took place.

The record contains further evidence bearing on Respondent's motivation. In this connection, I note the testimony of Reynolds that in January 1987, Boyd accused him of having previously called the inspectors to Respondent's mine. Boyd disputed the details of this conversation, denied making such a statement and denied indicating that an employee would not be rehired if he called an inspector. I have resolved this conflict in testimony in favor of Reynolds based upon observations of the witnesses' demeanor. In the same fashion, it was Reynolds' testimony that Leon Vandyke, his present employer, told him that Dors McLaughlin, Respondent's owner, and Boyd told him that he (Reynolds) had called the inspector to Respondent's mine.

Based upon a combination of the above testimony, I conclude that the firing of Robinette was motivated in "any part," by Respondent's perception that Robinette had called mine inspectors to the mine. Further, I find, based upon an analysis of the above outlined evidence, that Respondent has neither shown that the adverse activity was not motivated in any part by the protected activity, nor has it established an affirmative defense.

Hence, I conclude that Respondent did violate § 105(c) of the Act as it did commit an act of discrimination against Robinette within the purview of § 105(c) of the Act.

JOEY HALE

Protected Activity

Joey Hale, a miner employed by Respondent from October 1981 to November 22, 1986, testified that he told Reynolds on one occasion that if proper ventilation was not provided, he would call the inspector. Hale also said that several times, 2 or 3 weeks before he was fired, he complained to Boyd, in essence, that additional air was needed on the section. In contrast, Boyd essentially testified that he did not receive complaints from other employees about the air in the section, and that the section boss did not tell him that he received any complaints. However, based upon observations of their demeanor, I find Hale's testimony more credible. I thus find that Hale engaged in protected activities in making complaints to Reynolds and Boyd with regard to proper ventilation.

Motivation

According to Hale, on November 17, 1986, the date of the MSHA spot inspection, while he and Robinette were in the section, he thought he saw Compton approaching. He then approached Robinette and asked him if they would have time "to shoot the place." (Tr. Vol II, P. 15). He said that he did not think that

Robinette was asleep and he did not wake him. Robinette indicated that he was not asleep and stated that Compton asked him if he was going to wake up. Griffith testified that approximately during Compton's first or second week on the section, Compton initiated a conversation and indicated that he was trying to catch Robinette asleep.

Doris Allen Nickels, another miner on the section on November 17, indicated that he was approximately 5 feet away from Robinette during the above incident. He said that Hale did not try to wake Robinette before Compton arrived. It was his testimony, in essence, that when he observed a light approaching the section, Hale asked whether that was Compton and Nickels indicated in the affirmative. Nickels said that Hale then hollered at Robinette 2 or 3 time and said "Don, I believe there comes the boss," (Tr. Vol III, P. 201), but that Robinette did not answer. Nickels said that Hale then picked up some lumps of coal and threw them at Robinette who then raised himself up and put his light on. I find the version testified to by Nickels to be more credible. In reaching this conclusion, I note that neither Hale nor Robinette were recalled to offer testimony in rebuttal to the specifics testified to by Nickels. According to Nickels, later the same evening, Compton asked him whether Robinette was asleep and whether he (Nickels) woke him up. Nickels said that he then proceed to tell Compton that Hale had hollered at Robinette saying "there comes the boss," (Tr. Vol III, P. 204), and threw rocks at him. The only significant evidence having any tendency to impeach the creditability of Nickels, was Hale's statement that on November 22, Nickels told him that Compton had told Nickels on the morning of November 22, "he had better keep his mouth shut if he wants to keep his job" (Tr. Vol II, P. 24). Nickels, however, indicated that Compton had not made such a statement to him and he also denied having himself made such a statement to Hale. Even if Nickels was coerced into not stating certain facts, I can not infer that he was in any fashion coerced to fabricate what transpired on November 21.

According to Hale on November 22, he was summoned to the mine office where Compton and Boyd were present. He said that Compton accused him of waking Robinette up and said that if Hale did not admit that he woke up Robinette he was fired. Hale said that he denied waking up Robinette, and Compton asked Boyd if he had any thing else that he wanted Hale to do and Boyd told Hale that he could go home.

According to Boyd, Compton initially asked Hale why he woke Robinette up and Hale denied waking him up. However, according to Boyd, when Compton indicated that he had a witness, Hale said he did not mean to wake Robinette up and Compton told him "... that he no longer needed him or he was fired for interfering with his work." (Tr. Vol III, P. 50). Compton was, according to

Respondent, unavailable for testimony on its behalf, and thus was unable to explain his specific reasons for firing Hale. In this connection, I find that Boyd is not competent to testify as to what Compton meant when he said he fired Hale "for interfering with his work." (Tr. Vol III, P. 50). I accordingly did not give any weight to his testimony in this regard.

I find, as analyzed in the portion in this Decision dealing with the complaint of Donald Robinette, infra, that Boyd and Compton, Respondent's supervisors at the time, both indicated that the persons who called the inspectors would be fired. I also find, as analyzed above, infra, that a statement to the same effect was made by Altizer, one of Respondent's owners at the time. In this connection, I note that Hale testified that approximately 2 to 3 months prior to his discharge, he told Reynolds that if proper ventilation was not provided for he was going to call the inspectors. Also, approximately 2 to 3 months before his discharge, Hale was present in the house of Donald Cook, an employee miner of Respondent from April to July 1986, when a telephone call was made to a Lacey Horton, a State Mine Inspector. According to Cook, he (Cook) spoke with Horton regarding ventilation problems at Respondent's mine. According to Hale, he (Hale) spoke to Horton with regard to his rights working in smoke and dust. It is not necessary to reconcile this conflict in the testimony as it is clear, from the testimony of both Cook and Hale, that in the conversation with Horton, neither one either identified himself or the mine involved. However, significantly, Hale indicated that he discussed this conversation with several other miners.

Also I note, that although Hale's actions on November 17, in waking up Robinette might have been part of the reason for his being fired, Respondent did not discipline him or talk to him about this incident until 5 days later, on November 22, which is 1 day after Robinette had been fired. In this connection, I note that I concluded, infra, that Robinette's firing was motivated in part by Respondent's perception that he had called the inspectors.

I conclude, based on the combination of all the above factors, that Hale established his prima facie case in establishing that his discharge was motivated "in any" part by management's retaliation against those suspected of having called the inspector, and that Respondent has neither rebutted this prima facie case, nor has it established any affirmative defense. (See, Goff, supra.)

ORDER

It is ORDERED that:

1. Respondent shall, within 15 days of the date of this Decision, post a copy of this Decision at its Mine No. 8 where notices to miners are normally placed, and shall keep it posted there for a period of 60 days.

2. Complainants shall file a statement, within 20 days of this Decision, indicating the specific relief requested. The statement shall be served on Respondent who shall have 20 days, from the date service is attempted, to reply thereto.

3. This Decision is not final until a further Order is issued with respect to Complainants' relief and the amount of Complainants' entitlement to back pay if any.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SEP 30 1988

BOBBY R. LUTTRELL, : DISCRIMINATION PROCEEDING
Complainant :
 :
v. : Docket No. KENT 87-214-D
 :
 : BARB CD 87-36
JERICOL MINING, INC., :
Respondent : No. 1 Creech Mine

DECISION

Appearances: Sidney B. Douglass, Esq., Harlan, KY, for
Complainant;
William D. Kirkland, Esq., and Christopher M. Hill,
Esq., McBrayer, McGinnis, Leslie and Kirkland,
Frankfort, KY; for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

Complainant contends that he was discharged from his job as a roof bolter on April 27, 1987, for complaining of safety conditions, activities which are protected under the Federal Mine Safety and Health Act of 1977, (hereinafter the Act). He filed a discrimination complaint on May 14, 1987, with the Mine Safety and Health Administration (MSHA). On July 15, 1987, MSHA notified him of its finding that a violation of section 105(c) of the Act had not occurred.

Mr. Luttrell thereafter filed a pro se complaint with this Commission on July 29, 1987, naming Jericol Mining, Inc., (Jericol) as respondent. The complaint was not served upon Jericol until September 1, 1987, but Jericol had been notified by the Commission on August 4, 1987 that an incomplete complaint had been filed. The complainant thereafter completed his filing and on October 2, 1987, Jericol filed its answer. Respondent contends that Luttrell was discharged for insubordination and engaging in threatening behavior against his superiors and not because of any protected activity.

Pursuant to notice, an evidentiary hearing was held in Lexington, Kentucky on May 25, 1988. Both parties elicited oral testimony and submitted documentary evidence into the record. Additionally, the post-hearing deposition of Mr. Harold Brewer,

which was taken on June 17, 1988, has been offered and received into the record of trial.

By motion, complainant also seeks to file his own post-hearing deposition wherein he alleges that on May 26, 1988, the day after the hearing, he and one of the men who had testified on his behalf, were terminated from their employment with General Testing of Harlan, Kentucky, a construction firm, because of this case against Jericol Mining, Inc. The complainant asserts that his deposition testimony is relevant to show bias and malice against him on the part of Jericol. Respondent objects to the admission of this deposition into the record on several grounds, including relevancy. The relevancy objection is well taken. I am concerned in this proceeding with an April of 1987 discharge which is allegedly unlawful. What may have occurred in May of 1988 between the complainant and some other third party with or without the complicity of the respondent is too remote to have any bearing on the case before me. Accordingly, complainant's motion to file the deposition of the complainant or in the alternative to reopen the hearing is denied.

Both parties have filed post-hearing briefs which I have considered along with the entire record and considering the contentions of the parties, make this decision.

ISSUES

1. Whether complainant has established that he was engaged in activity protected by the Act.
2. If he was, whether the complainant has suffered adverse action as a result of that protected activity.
3. If he did, to what relief is he entitled by law.

STIPULATIONS

The complainant and respondent stipulated to the following by Joint Exhibit No. 1:

1. The complainant's last day of work was April 21, 1987.
2. Prior to his discharge, the complainant was employed by the respondent as a "miner" within the meaning of 30 USC § 802(g).
3. The respondent is an "operator" within the meaning of 30 USC § 802(d).

4. The complainant was first employed by the respondent on January 15, 1979.

5. The complainant resigned on March 26, 1982.

6. The complainant was reemployed on October 8, 1983.

7. The complainant resigned again on April 6, 1984.

8. The complainant was rehired on July 11, 1984.

9. The complainant quit his job with the operator on September 9, 1985 and filed a MSHA complaint.

10. The complainant withdrew the above MSHA complaint on September 30, 1985, and was allowed to come back to work.

11. On April 21, 1987, Millard Perry held the position of section foreman with respondent and was the complainant's supervisor.

12. Robert McConnell, Wayne Sizemore, Larry Blanton, Mike Smith, Don Pittman and Doug Brewer were witnesses to the confrontation on April 21, 1987 between complainant and Millard Perry.

13. The Kentucky Division of Unemployment Insurance has determined that the complainant was not entitled to collect unemployment compensation because he was discharged for insubordination.

14. The Mine Safety and Health Administration has determined that the respondent has not violated § 105(c) of the Federal Mine Safety and Health Act of 1977 with regard to the complainant's discharge.

DISCUSSION

Mr. Luttrell first went to work for Jericol in January of 1979, while the company was in the midst of a strike with the United Mine Workers. He endured hardships during his first seven to nine months of employment due to the strike. The miners were escorted back and forth to work by the State Police in armored busses and there were shootings. One man was killed on the same bus with Luttrell and two others were wounded, but Luttrell continued to cross the picket line and go to work.

Mr. Luttrell has been a roof bolter for most of his career with Jericol and over the years has made safety-related complaints to the company on numerous occasions.

For instance, in 1982 or 1983, when he worked at the Wallins Mine, he had complained of the roof bolts he was furnished being too short to hold the top. He also complained that the "boss" and the continuous miner operator were using LSD, Valium, "speed" and other drugs while on the job and were consequently making cuts forty and fifty feet deep. He also testified that the mine foremen were giving the miners all sorts of drugs such as THC, animal tranquilizers, Valium, "speed" and Percodan right on the job. Allegedly as a result of these complaints, they moved him to the Creech No. 2 Mine. On cross-examination, however, he testified that he, too, smoked marijuana underground while operating the roof bolter.

In 1985, he filed a prior discrimination complaint with MSHA, but it was dropped after the company gave him his job back, and moved him to the Creech No. 1 Mine.

In 1986, at the annual retraining meeting for the Jericol employees at Keokee, Virginia, Luttrell spoke out and complained about safety conditions—the roof bolters being under too much pressure and having to work too many hours. This was in front of all the company employees, including Mr. Baker, the Vice-president of Operations.

In June of 1987, Luttrell testified on behalf of Mr. Roger Hall, who had also filed a discrimination case against Jericol, but he (Luttrell) had already been fired for two months at this point. Therefore, absent proof of some connection between giving this testimony on behalf of Hall and his own discharge, I cannot find that this was protected activity relevant to his April 1987 discharge. Baker's testimony is that he had no knowledge that Luttrell would testify in the Roger Hall case at the time he fired Mr. Luttrell. In fact, Luttrell himself testified that he told Baker that he would not testify two weeks before he was terminated. In any event, it defies common sense that Baker would fire Luttrell before the Hall case went to trial, if his purpose was to prevent Luttrell from testifying for Hall.

There was also some testimony concerning the issue of whether or not Luttrell had called the federal mine inspectors in to inspect the mine. However, Luttrell maintains he did not and there is nothing in the record otherwise to suggest that he did, or that Mr. Baker thought he did.

Mr. Luttrell had also on occasion made safety complaints to Millard "Red" Perry, his section foreman and supervisor. Specifically, he had complained about his "pinner" cable being "blocked in". That means it was wired straight in from the power cable, around the circuit breaker, so that the

breaker wouldn't trip in the event of a short in the circuit, and shut the equipment off.

The most significant safety complaint Bobby Luttrell seems to have made was that he had to work under deep cuts. Several witnesses for the complainant testified to this effect and I find it to be a credible claim.

On the last day Mr. Luttrell actually worked for Jericol, April 21, 1987, the circuit breaker tripped on the roof bolter, shutting the machine down, until the maintenance foreman, Doug Brewer, "blocked it in". This is a practice Mr. Luttrell believes to be very dangerous. He had complained of this practice in the past, but there was no testimony that he made any mention of it on this day.

In any case, foreman Perry was of the opinion that Luttrell was bolting slower than usual that day and he also believed that Luttrell was attempting to get the bolting machine stuck in loose coal, ostensibly so he could take a break from bolting. Mr. Luttrell, on the other hand, states that he could not have bolted any faster that day because the top was bad and he denies that he was trying to get the bolter stuck, although he admits it did get stuck and he was done bolting for the rest of the shift.

After what turned out to be his final shift, Luttrell and his partner on the "pinner," Mike Smith, were called into the mine superintendent's office. Their foreman, Millard Perry, was waiting there for them, along with Wayne Sizemore, and he confronted them both about their work. Smith testified that Perry said they were both too slow and that they could bolt better. He (Smith) acknowledged that they could have probably bolted more top, but I note that this whole issue of productivity is largely irrelevant to this case. Whether or not Mr. Luttrell is a slow bolter or a fast bolter is relatively insignificant compared to his violent reaction to this criticism coming from his supervisor.

With the four men gathered in the superintendent's office, Perry asked Luttrell and Smith if they had a problem working for him. Smith replied in the negative. Luttrell responded by asking if Perry had a problem with them, to which Perry replied that he did have a problem with that day's bolting. According to Perry's testimony, which is corroborated in the main by Smith's and Sizemore's, it was at this point that Luttrell started cussing him, calling him names and invited him out to his truck to take care of him there. Perry testified that he understood that Luttrell meant to kill him. He quoted Luttrell as saying to him: "Come out to my truck; I've got something to take care of you with."

Robert McConnell, another Jericol foreman happened to be in the same building, but in a different room while all this was going on. He testified that he heard a lot of screaming through the door and then the door was flung open, Mr. Luttrell came out and then turned and called foreman Perry a "motherfucker," and that he would meet him at Slope Hollow and take care of him there; and he said that he had something in his truck to take care of him with. Luttrell did in fact wait for Perry at Slope Hollow, but Perry didn't stop.

Foreman McConnell had also had an earlier episode with Mr. Luttrell. On January 15, 1987, McConnell was acting section foreman on the section Bobby Luttrell was running a bolting machine on. When the bolter broke down, he told Luttrell to go and shovel around the coal feeder and tailpiece. Instead of performing this task, Luttrell began operating one of the shuttle cars until McConnell saw him. At that time he told him he didn't want him operating the car and to go back to the dump and shovel the loose coal alongside the batwings on the feeder. When he went back a short time later to check on Luttrell, he wasn't there. He found him back at the bolting machine watching the repairman work on the drill. McConnell again told him to go to the dump and finish shoveling the loose coal. According to Respondent's Exhibit No. 5, which is a Jericol Mining, Inc., Incident Report and the testimony of McConnell at the hearing, Luttrell said words to the effect that he was tired of the foreman "fucking" with him, called him a "motherfucker" and threatened to take a piece of drill steel and "knock his goddamned head off". He purportedly added that if that wasn't enough, he had a gun in his truck to take care of the situation. McConnell fired him on the spot. He later rescinded this action after Luttrell had calmed down, but warned him that if it happened again, he would be discharged.

Mr. Baker, the Vice-president of Operations at Jericol, was advised the next day of the incident with Millard Perry in Sizemore's office. At that time, he reviewed Luttrell's personnel file which included the report of the McConnell incident of January 15. Based on the fact that Luttrell had in the very recent past threatened and verbally abused two foremen who were his immediate supervisors, Baker felt he had no alternative but to discharge him for the safety of the other employees at the mine. He ordered that be done the next time Luttrell reported to work, which was the following Monday.

The complainant maintains that he was discharged for activity protected by the Mine Act. More specifically, he testified that he believed he was terminated because he had complained about safety conditions over the years and that he had

been provoked into cursing Perry on April 21, 1987, so the company would have an excuse to fire him.

I believe and find credible that on occasion over the years he had made safety-related complaints to his immediate supervisor concerning matters which he believed to be unsafe mining practices. This is obviously protected activity. However, in order to make a prima facie case, more is required. In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary of Labor ex rel. Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (April 1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (August 1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983).

Of particular importance in this case is the second part of the complainant's burden of proof. He must make an initial showing that his discharge was motivated at least in some part by his protected activity. If he fails to establish a causal connection between his protected activity, i.e., the safety complaints he made and the adverse action taken against him, he has failed to prove an essential element of his case and his Complaint is subject to dismissal.

It seems clear to me from the record in this case that Mr. Luttrell was discharged from his job solely for aggravated insubordination on not just one, but two separate occasions, approximately three months apart.

Complainant has most definitely not shown by a preponderance of the reliable and probative evidence that his discharge was motivated in any part by protected activity. He has therefore failed to meet his burden of proof in this regard.

The respondent, however, has shown by an overwhelming preponderance of the evidence that Mr. Luttrell was discharged solely for threatening and verbally assaulting his foreman on two different occasions in January and April of 1987, as more fully set-out earlier in this decision. Furthermore, there was no showing that Mr. Baker, who was the individual responsible for Luttrell's discharge, was even aware of Luttrell's prior safety complaints to his various foremen over the years. To the

contrary, it is un rebutted in this record that Baker was not aware of any safety complaints made by Luttrell to anybody.

An additional point is noteworthy in that regard. Mr. Luttrell claims to have made safety complaints to his foremen over the entire span of his years with Jericol. As established in the stipulations, supra, between 1979 and 1987, Mr. Luttrell left voluntarily and was subsequently re-hired by the company on several occasions. If company management was aware of Luttrells' safety complaints and was bothered by them to any degree, they could have simply not re-hired him on any one of those occasions.

I must concur with the respondent that repeated threats and verbal abuse by an employee directed towards his supervisor need not be tolerated by any company, and is certainly not protected activity under § 105(c) of the Mine Act.

ORDER

In view of the foregoing findings and conclusions, and after careful consideration of all of the credible evidence and testimony adduced in this case, I conclude and find that the complainant has failed to establish a violation of section 105(c) of the Act. Accordingly, the Complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.


Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER CO 80204

SEP 30 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 87-179-M
Petitioner	:	A.C. No. 05-00516-05523
	:	
v.	:	Leadville Unit
	:	
ASARCO INCORPORATED,	:	
Respondent	:	

DECISION APPROVING PARTIAL SETTLEMENT

Before: Judge Lasher

Upon Petitioner's motion for approval of a proposed partial settlement and the same appearing proper and in the full amount of the initial assessments for 10 of the 19 Citations involved, the settlement is approved.

Pursuant to the agreement reached, Respondent agrees to pay the following penalties:

<u>CITATION NO.</u>	<u>PENALTY</u>
2638789	\$ 20.00
2638867	112.00
2638859	20.00
2638872	20.00
2638874	20.00
2638875	20.00
2638876	20.00
2638922	20.00
2638878	20.00
2638923	20.00
TOTAL	\$292.00

Respondent, if it has not previously done so, is ordered to pay to the Secretary of Labor within 30 days from the date hereof the total sum of \$292.00 as and for the civil penalties above listed.

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

ADMINISTRATIVE LAW JUDGE ORDERS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

August 30, 1988

**EMERY MINING CORPORATION
AND/OR UTAH POWER & LIGHT
COMPANY,**

Contestants

v.

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

and

**UNITED MINE WORKERS OF
AMERICA, (UMWA),
Intervenor**

: CONTEST PROCEEDINGS

**: Docket No. WEST 87-130-R
: Citation No. 2844485; 3/24/87**

**: Docket No. WEST 87-131-R
: Order No. 2844486; 3/24/87**

**: Docket No. WEST 87-132-R
: Order No. 2844488; 3/24/87**

**: Docket No. WEST 87-133-R
: Order No. 2844489; 3/24/87**

**: Docket No. WEST 87-134-R
: Citation No. 2844490; 3/24/87**

**: Docket No. WEST 87-135-R
: Citation No. 2844491; 3/24/87**

**: Docket No. WEST 87-136-R
: Citation No. 2844492; 3/24/87**

**: Docket No. WEST 87-137-R
: Citation No. 2844493; 3/24/87**

**: Docket No. WEST 87-144-R
: Order No. 2844795; 3/24/87**

**: Docket No. WEST 87-145-R
: Order No. 2844796; 3/24/87**

**: Docket No. WEST 87-146-R
: Order No. 2844798; 3/24/87**

**: Docket No. WEST 87-147-R
: Order No. 2844800; 3/24/87**

**: Docket No. WEST 87-150-R
: Order No. 2844805; 3/24/87**

**: Docket No. WEST 87-152-R
: Order No. 2844807; 3/24/87**

**: Docket No. WEST 87-153-R
: Order No. 2844808; 3/24/87**

: Docket No. WEST 87-155-R
: Citation No. 2844811; 3/24/87
:
: Docket No. WEST 87-156-R
: Order No. 2844813; 3/24/87
:
: Docket No. WEST 87-157-R
: Order No. 2844815; 3/24/87
:
: Docket No. WEST 87-158-R
: Citation No. 2844816; 3/24/87
:
: Docket No. WEST 87-159-R
: Citation No. 2844817; 3/24/87
:
: Docket No. WEST 87-160-R
: Order No. 2844822; 3/24/87
:
: Docket No. WEST 87-161-R
: Order No. 2844823; 3/24/87
:
: Docket No. WEST 87-163-R
: Citation No. 2844826; 3/24/87
:
: Docket No. WEST 87-243-R
: Citation No. 2844828; 8/13/87
:
: Docket No. WEST 87-244-R
: Citation No. 2844830; 8/13/87
:
: Docket No. WEST 87-245-R
: Citation No. 2844831; 8/13/87
:
: Docket No. WEST 87-246-R
: Citation No. 2844832; 8/13/87
:
: Docket No. WEST 87-247-R
: Citation No. 2844833; 8/13/87
:
: Docket No. WEST 87-248-R
: Citation No. 2844835; 8/13/87
:
: Docket No. WEST 87-249-R
: Citation No. 2844837; 8/13/87
:
: Wilberg Mine
: Mine I.D. No. 42-00080

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 87-208
Petitioner	:	A.C. No. 42-00080-03578
	:	
v.	:	Docket No. WEST 87-209
	:	A.C. No. 42-00080-03579
EMERY MINING CORPORATION, and	:	
ITS SUCCESSOR-IN-INTEREST	:	Docket No. WEST 88-25
UTAH POWER & LIGHT COMPANY,	:	A.C. No. 42-00080-03584
MINING DIV.,	:	
Respondent	:	Wilberg Mine
	:	
and	:	
	:	
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	
Intervenor	:	

ORDER

The issues presented here involve the Secretary of Labor's renewed motion for summary decision and a motion by Utah Power and Light Company, Mining Division (UP&L) to vacate 30 modified citations and orders. 1/

Utah Power and Light opposes the Secretary's renewed motion for summary decision 2/ and further moves to dismiss the citations and orders as modified or, in the alternative, moves for a summary decision if the modifications are ruled invalid.

1/ In the alternative, UP&L considers its pleading to be a motion for summary decision if the citations and orders are invalid as modified.

2/ A similar motion filed by the Secretary on June 25, 1987 was denied by the Judge on August 5, 1987.

Prior to discussing the pending issues it is necessary to detail certain relevant procedural history:

On March 4, 1988 the Judge severed 11 cases from the general consolidation of the cases. After severance these cases were re-consolidated. The cases were docketed as WEST 87-138-R, WEST 87-139-R, WEST 87-140-R, WEST 87-141-R, WEST 87-142-R, WEST 87-143-R, WEST 87-148-R, WEST 87-149-R, WEST 87-151-R, WEST 87-154-R and WEST 87-162-R. The dual common denominator in these cases was that Emery Mining Corporation (Emery) had paid the proposed penalties in full and a dismissal had been entered as to Emery (Order, August 5, 1987). Further, a renewed motion for a summary decision by UP&L was pending in the cases.

On March 9, 1988 UP&L's motion was granted. Since there were no remaining issues the cases were returned to the Commission. These cases are reported at 10 FMSHRC 339.

The ruling in the cases holds that UP&L had not been cited as an operator and an enforcement action could not be sustained against it. Specifically, in part, the Judge stated that "UP&L was not cited as an operator but as a successor-in-interest," 10 FMSHRC at 349. The decision further holds that the successorship doctrine did not apply under the circumstances of the case.

The Secretary did not appeal the Judge's order of dismissal but on April 27, 1988 she restated her prior position and indicated she would modify the remaining citations and orders to cite UP&L as an owner-operator.

The nature of the modification of the citations and orders are as stated below in her renewed motion for summary decision. The modifications were made on April 25, 1988 and filed with the Commission on May 4, 1988.

On May 17, 1988 the Secretary filed her renewed motion for summary decision. The motion, in its entirety, provides as follows:

The Secretary of Labor hereby renews her previously filed motion for summary decision on the issues of Utah Power and Light's (UP&L) liability as an operator. This motion is renewed because of additional information obtained in discovery after the Judge's March 9, 1988, Order of Dismissal, and because the remaining unpaid citations and orders were modified in response to the Judge's Order. As modified, those citations describe the operators as:

Utah Power & Light Company, owner-operator as well as the successor-in-interest to Emery Mining Corporation; and Emery Mining Corporation.

The additional information, which was received in discovery on March 14, 1988, consists of a portion of the Coal Mining Agreement between UP&L and the American Coal Company, which, in 1979, became the Coal Mining Agreement (Agreement) between UP&L and Emery. ^{1/}(See Appendix A hereto). Under the Agreement, UP&L agreed to provide a mining plan for its Wilberg and Deer Creek Mines and to "furnish all capital equipment, [and to] pay for materials and supplies" in exchange for American Coal Company's, and later Emery's agreement to "perform all of the work and services necessary for the production of coal mined by deep mining or underground methods" from the Wilberg and Deer Creek Mines (See Appendix A, p.1). Although the Secretary has not yet received the entire Agreement from UP&L or Emery, the portion that has been produced indicates that UP&L agreed to pay the "Total Cost of Production" at the Wilberg Mine. Under the Agreement, the "Total Cost of Production" means "all costs incurred by American [and later Emery] for the purpose of mining, washing, blending, processing, storing and loading coal produced from Deer Creek and Wilberg Mines and in operating and maintaining said Deer Creek and Wilberg Mines under the terms of this Contract." (See Appendix A, p. 2).

These costs included salaries and wages, etc., as well as the:

"(v) costs of complying with federal, state or local laws, rules, regulations, including mining laws and regulations and court orders, judgments and settlements including related attorneys fees relating to proceedings arising out of American's [Emery's] performance under this Contract, but excepting all costs incurred by American [Emery] with respect to any proceeding against Utah [UP&L];" (emphasis supplied) (See Appendix A, p. 3).

The Secretary's footnote reads as follows:

1/ A copy of the entire Coal Mining Agreement between UP&L and Emery was requested in discovery by the Secretary on January 28, 1988. To date, the entire Agreement has not been received. It is extremely possible that the Agreement, in its entirety, will show an even closer nexus between UP&L's and Emery's operations at the Wilberg Mine.

There remains no genuine issue of material fact in dispute concerning UP&L's status as an owner-operator at the time of the December 19, 1984, Wilberg Mine Fire or as a successor-in-interest operator when Emery Mining Corporation (Emery) departed from the Wilberg Mine operation on April 16, 1986 (Order, page 4). The Secretary supports the renewed motion with the following undisputed facts:

Undisputed Facts.

1. UP&L has been owner of the coal mineral rights for the Wilberg Mine since 1976 (pages 2, 4, Judge's March 4, 1988, Order of Dismissal, hereinafter "Order"). UP&L contracted with the American Coal Company in 1972 to operate UP&L's Deseret, Beehive and Little Dove mines as a contract operator and in 1976 to operate the Deer Creek and Wilberg mines. Beginning in June 1979, and ending on April 16, 1986 UP&L contracted with Emery Mining Corporation (Emery) to operate UP&L's mines as a contract operator (Order, page 2).

2. UP&L submitted its mining application for the Wilberg Mine to the Bureau of Mines. Subsequently, UP&L submitted mining plans for the Wilberg mine to the Bureau of Mines. These extensive mining plans were prepared and submitted without Emery involvement. (Order, page 4).

3. During the entire time that Emery was under contract with UP&L to operate the Wilberg Mine, UP&L had a resident engineer present at the mine on a daily basis to make sure that the mining plans referred to above, were followed (Order, page 4).

4. UP&L purchased and owned all of the major mining equipment used at the Wilberg Mine during the entire June 1979 to April 16, 1986 contract period with Emery (Order, page 4). The Agreement between Utah Power and Light and Emery stated that UP&L would:

"provide a mining plan and will furnish all capital equipment, [and] pay for materials and supplies . . ." (see Appendix A, p.1).

5. In UP&L's contractual mining Agreement with American Coal Company, and subsequently with Emery, UP&L agreed to pay the "Total Cost of Production" as described under Article VII of the Agreement (see Agreement, Appendix A). One of the costs described in Paragraph 7.01 (iii) of the Agreement relates to: taxes, assessments and fines except for willful violations and other charges imposed on Emery by federal, state, or local governments. (This section was amended February 24, 1984, to "taxes, assessments and similar charges").

In addition, Paragraph 7.01(v) provided that UP&L would reimburse Emery for the:

"costs of complying with federal, state or local laws, rules, regulations, including mining laws and regulations . . . (emphasis supplied).

(See Appendix A, Para. 7.01(v)).

The fact that UP&L reimbursed Emery is supported by Emery's Answer to Interrogatory 3a of the Secretary's First Set of Interrogatories and Request for Production of Documents:

Interrogatory 3a

(a) Explain any indemnity agreement between Emery and UP&L concerning liability for violations and penalties under the Mine Act and other state and federal laws. Submit a copy of any written agreement to this effect.

3a. Response: UP&L and American Coal Company (the predecessor of Emery) entered into a Coal Mining Agreement dated November 24, 1976. The Coal Mining Agreement originally provided that fines (except for willful violations) were a reimburseable cost from UP&L to Emery.

6. UP&L and Emery mutually agreed on production goals for the Wilberg Mine during the June 1979-April 16, 1986, period (Order, page 4). The amended Mining Contract Agreement between the companies refers to monthly fees paid to Emery for coal tonnage delivered to UP&L each month with different fees for different tonnage quotas. (See pages 1 and 2 of the "Second Amendment to Coal Mining Agreement Between Emery Mining Corporation" (included in Appendix A hereto) where reference is made to the deletion of Paragraph 6.03 of the Agreement).

7. Under the Mine Act and its implementing regulations, mine operators are required to submit a number of mine plans to MSHA for approval. UP&L reviewed Emery's mine plans before they were submitted to MSHA when these plans concerned the mining system in use at the Wilberg Mine (Order, page 4) 2/ .

8. As stated by UP&L (page 3, Statement of Facts to its Motion for Summary Judgment), UP&L retained most of Emery's work force when it took over complete operations of the Wilberg Mine in April 1986. Although this transfer did not include all of Emery's officers and directors, UP&L retained Emery mining supervisors and management personnel including David D. Lauriski, Safety Director, and John Boylen, Mine Manager, at the Wilberg Mine (See Exhibits C, D, and E To Secretary's Response to Contestant's Motion for Summary Decision). (See also Order, p.4).

A list of UP&L employees after April 16, 1986, and a list of Emery Wilberg employees before April 16, 1986, were submitted by UP&L and Emery in response to Interrogatory 3(b) and 3(c) of the Secretary's First Set of Interrogatories and Request for Production of Documents. Comparison of these lists indicates that most of Emery's work force at Wilberg was retained by UP&L, including several foremen, i.e., Mr. Clifford N. Leavitt, General Maintenance Foreman; Richard A. Cox, Mine Foreman; Lee Lemon, Maintenance Superintendent; Harry Earl Snow, General Mine Foreman; Scott Timothy, Section Foreman; and others.

9. After the December 19, 1984, Wilberg fire, UP&L personnel directly participated in MSHA's investigation of the fire origin area of the Mine.

The Secretary's footnote reads as follows:

2/ This makes business sense, for as stated above in Paragraph 5, UP&L reimbursed Emery for total production costs, including costs incurred in complying with federal mining laws and regulations.

David D. Lauriski, presently UP&L's Safety Director (formerly Emery's Safety Director), helped plan and direct UP&L employees in this crucial aspect of MSHA's investigation. Mr. Lauriski and/or other UP&L personnel were present or nearby at all times during the underground investigation (Order, page 4).

10. At their request, UP&L representatives were present in January 1985, at the initial sworn statement proceedings held by MSHA during MSHA's investigation of the Wilberg fire. (See Appendix B hereto, Secretary of Labor's Memorandum in Opposition to Motion for Preliminary Injunction, in pertinent part, pages 1, 3 and 4). When the Society of Professional Journalists sought access to the proceedings, a Temporary Restraining Order was issued on January 24, 1985, stopping the taking of the sworn statements.

On February 8, 1985, the U.S. District Court for the District of Utah issued a preliminary injunction permitting the taking of statements with MSHA, the State Commission, and the United Mine Workers of America (UMWA) present. Emery, but not UP&L, then filed a complaint asking permission to participate. On February 14, 1985, the preliminary injunction was modified to permit Emery to participate (MSHA Wilberg Mine Fire Report at page 26). By its own choice, UP&L never filed a complaint requesting participation. Verbatim transcripts of the sworn statements taken at the proceedings were available to the public, including UP&L (Appendix B, page 4).

11. On March 24, 1987, when the mine fire investigation orders and citations were issued by MSHA, UP&L owned, operated and fully controlled the Wilberg Mine. (This is indicated by the Legal Identity Reports filed by Emery and UP&L with MSHA as required by law. See Exhibits D and E to the Secretary's Response to Contestant's Motion for Summary Decision). At the time the citations and orders were issued, UP&L, and not Emery, had responsibility for abatement of the violations and for compliance with mandatory federal mine safety and health standards at the Wilberg Mine. In addition, UP&L, and not Emery, had the responsibility to post the citations and orders pursuant to Section 109(a), 30 U.S.C. § 819(a), of the Mine Act. Further, as indicated on the face of the citations and orders issued on March 24 and August 13, 1988, both UP&L and Emery were served copies of the citations/orders.

On July 6, 1988 UP&L responded to the Secretary's renewed motion and on July 12, 1988 UP&L moved to vacate the 30 modified citations and orders dated April 25, 1988.

Extensive briefs were filed by the Secretary and UP&L.

Discussion

The pivotal issue presented by UP&L's motion is whether the Secretary can modify the 30 citations and orders herein to charge UP&L with direct liability for the alleged violations.

By way of background: the Wilberg Mine fire started December 19, 1984. On March 24, 1987 the Secretary issued citations and orders charging Emery, as the operator, with 34 (later increased to 41) violations of the Act. The citations and orders further charged UP&L with derivative liability for Emery's alleged violations as Emery's alleged successor-in-interest.

In his order of March 9, 1988 in 11 of the pending cases the Judge ruled that UP&L had not been cited and could not be held as an operator; further, he ruled that UP&L could not be held liable as a successor-in-interest, 10 FMSHRC 339.

On April 25, 1988 the Secretary sought to modify ^{3/} the citations and orders so as to charge UP&L with direct liability for the alleged violations as an operator. In sum, this new attempt to impose direct liability comes in the 40th month after the fire and in the 13th month after the citations and orders were originally issued against Emery.

On the factual scenario presented here I conclude that the purported modifications cannot stand. In particular, the modifications are untimely, were not issued "forthwith" nor with "reasonable promptness," and the modification conflicts with the procedural requirements of the Act; further, they are prejudicial to UP&L.

In review of the untimeliness issue: on April 25, 1988 the Secretary no longer had the authority to modify the 30 citations and orders since each had already been terminated by MSHA. Section 104(h) of the Act gives the Secretary the power to modify citations and orders but this power is not unlimited. The Act provides that

^{3/} The modifications do not change any factual assertions relating to the individual citations and orders.

a citation or order shall remain in effect until modified or vacated by the Secretary. Section 104(h). But once a citation or order is no longer in effect because it was terminated it cannot be modified. Old Ben Coal Co., Docket No. VINC 76-56 (June 15, 1976) (ALJ Sweeney). Appeal dismissed, IBMA 76-104 (October 19, 1981). 4/

In Old Ben, a § 104(c)(2) order [the predecessor to the current § 104(d)(2) order] had been issued under the 1969 Coal Act, alleging a violation of 30 C.F.R. § 75.400. After the operator had abated the violation and after MSHA had terminated the order and 11 days after the operator had filed its application for review challenging the order, MSHA purported to modify the order to correct certain errors with respect to its recitation of the necessary underlying elements of the § 104(c) unwarrantable failure chain. MSHA claimed that the modification was authorized by the predecessor to § 104(h), § 104(g) of the 1969 Coal Act, which provided that "[a] notice [of violation -- the predecessor of a citation] or order . . . may be modified or terminated by an authorized representative of the Secretary."

The Administrative Law Judge held that the order could not be modified by MSHA after it had already been terminated, noting that "[no]thing remains to be modified in an order after such order has been terminated." Unlike "vacation," the Judge explained, termination does not indicate "an expungement ab initio," but rather "a cessation of continuing liability":

[T]he essential function of a termination is to give notice to the operator of a cessation of liability. An operator is entitled to rely upon the finality of an order upon its termination; and in a section 105(a) review proceeding is entitled to challenge that order as it is written as of the time of its termination.

[A] rule of reason must prevail in determining the time-frame within which [MSHA] may be permitted to modify an order of withdrawal. I conclude that subsequent to the point of abatement and termination an operator is entitled to

4/ Cited case appended to UP&L's motion filed July 12, 1988.

an assurance that the citation which it seeks to challenge under the Act is a fixed target. This is particularly true, as here, where an application [for review -- the predecessor of the notice of contest] had already been filed [challenging, as here, the very element MSHA would seek to change by its modification]. Id. at 10.

Finally, the Judge concluded:

In sum, an operator seeking review of an order of withdrawal is entitled to rely upon the form and content of that order as of the filing of its application for review, where such order has already been abated and terminated by [MSHA]. Such termination by [MSHA] leaves no operative part of its order extant, and consequently there is nothing left of it to modify. Should bona fide clerical errors exist in the order, then it remains for [MSHA] to argue in a review proceeding that said errors are harmless, or that they do not otherwise effect [sic] the validity of the subject order. But where, as here, the errors are of such a basic nature . . . , then vacation of the order is the only appropriate sanction in a section 105(a) review proceeding. Id. at 11.

Similarly, in Peabody Coal Co., Docket No. DENV 77-57-P (October 21, 1977) (ALJ Sweitzer) a modification was not permitted where "over two years [had] elapsed since the alleged violation ha[d] occurred and the attempted modification [was] being requested after the [civil penalty] petition had been filed and after the Respondent had moved to dismiss the violation Slip op. at 3.

In the instant cases the Secretary wants to change her charge not only after the notice of contest had been filed (as in Old Ben and Peabody) but after an order had been entered against her on the charge she had prosecuted.

In review of the untimeliness issue under § 104: Section 104(d)(1) requires that orders must be issued "forthwith." However, the Secretary's proposed modifications were not issued until 40 months after the alleged violations occurred and until 13 months after citations and orders alleging the same violations were issued to Emery.

It is a fundamental principle of statutory construction that courts must start with the plain language of the statute. Rubin v. United States, 449 U.S. 424, 430 (1981); International Union, UMWA v. Federal Mine Safety and Health Review Commission, 840 F.2d 77, 81 (D.C. Cir. 1988) ["It is a fundamental rule, too often neglected, that in statutory construction the primary dispositive source of information is the wording of the statute itself." (quoting Association of Bituminous Contractors v. Andrus, 581 F.2d 853, 861 (D.C. Cir. 1978))]. Where the language is clear, courts must enforce the terms of the statutory provision as they are written unless it can be established that Congress clearly intended the words to have a different meaning. Chevron, U.S.A. v. NRDC, 467 U.S. 837, 842-43 (1984) (affirming that where intent of Congress is clear, agency must follow that intent); United States Lines v. Baldrige, 677 F.2d 940, 944 (D.C. Cir. 1982); Phelps Dodge Corp. v. Federal Mine Safety & Health Review Commission, 681 F.2d 1189 (9th Cir. 1982); Freeman United Coal Mining Co., 6 FMSHRC 1577, 1578 (1984).

Section 104(d) clearly states that unwarrantable failure orders shall be issued "forthwith."^{5/} The words used by Congress are clear: the Secretary must issue a § 104(d) order immediately after

5/ In full, § 104(d)(1) provides that:

If, during the same inspection or any subsequent inspection of such mine with 90 days after the issuance of [a § 104(d)(1) citation] an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated. (Emphasis added.)

she finds another unwarrantable failure violation within 90 days of the issuance of a § 104(d)(1) citation. ^{6/} See Greenwich Collieries, 9 FMSHRC 2051, 2055-56 (1987) (ALJ Maurer), review pending. Furthermore, there is no language in § 104(d) which could authorize, either explicitly or implicitly, the Secretary to delay for over 13 months in modifying the orders to charge UP&L with direct liability. See International Union, UMWA v. MSHA, 823 F.2d 608, 617 (D.C. Cir. 1987).

Further indicating the Congressional intent is the fact that § 104(d) does not contain a savings clause. For example, a § 104(a) citation must be issued with reasonable promptness. But the Act provides that "reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of the Act," 30 U.S.C. § 814(a). The omission of a similar provision in § 104(d) is significant because it is evident that if Congress had intended to include such a savings clause it knew how to do so; Clark-Cowlitz Joint Operation Agency v. FERC, 798 F.2d 499, 502 (D.C. Cir. 1986) (Congress demonstrated that it knew how to restrict the duration of a privilege by including a temporal limit in Exemption 9 and the absence of such a limit in Exemption 10 shows none was intended); Gray v. OPM, 771 F.2d 1504, 1511 (D.C. Cir. 1985), cert. denied, 475 U.S. 1089 (1986).

In sum, the Act does not authorize the Secretary to delay for 13 months the issuance of § 104(d) orders. Further, the § 104(a)

^{6/} According to common, ordinary usage, the term "forthwith" means "immediately." See e.g., Webster's New Collegiate Dictionary (1979). Congress' use of the term "forthwith" in the context of providing notice to operators under § 103(g)(1) of the existence of an imminent danger -- where the concern of protecting miners right away is primary -- indicates that Congress intended forthwith to mean immediately.

citations were not issued with "reasonable promptness" 7/ as required by the Act.

While reasonable promptness is not a per se jurisdictional bar to their issuance, the legislative history indicates there must be a reasonable basis for the delay, such as a "protracted accident investigation." S.Rep. No. 181, 95th Cong., 1st Sess. 30 (1977). Here, the protracted accident investigation could justify the initial delays. But by August 13, 1987 the last of the citations and orders had been issued and there appears to be no legitimate basis for the further delay until April 1988 to cite UP&L.

Nor are there any safety issues to justify the delay. As is evident from the face of the citations and orders themselves, any violations that existed at the time of the fire have long since been abated.

In her response to UP&L's motion to vacate the Secretary asserts the modifications of the citations and orders were timely.

(Response filed August 1, 1988 at 8 - 13.)

7/ Section 104(a) provides, in full, as follows:

"Sec. 104(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act. (Emphasis added.)

I recognize that considerable delay was caused due to the condition of the mine after the fire and the necessary laboratory studies. But the fact remains that the last of the citations were issued on August 13, 1987; further, the modifications of the citations and orders were issued against UP&L on April 25, 1988. The Secretary relies on proceedings before the Commission to justify the delay but I am not aware that such proceedings justify a further delay in the issuance of 104(a) and 104(d) citations and orders.

In support of her position the Secretary also cites Greenwich Collieries, 9 FMSHRC 2051 (1987), pending on appeal. It may be that the resolution of Judge Maurer's case will have a bearing on the issues argued here.

In review of the "procedural shortcut" issue:

In the order of dismissal issued by the Presiding Judge on March 9, 1988 involving other related cases, it was noted that "procedural shortcuts" have been condemned by the Commission. In reaching this conclusion the Judge relied on the Commission decision in Monterey Coal Company, 7 FMSHRC 1004 (1985) and he emphasized that:

The foundational principles set forth in Monterey bar the Judge from holding UP&L liable for civil penalties assessed directly against it as a mine operator in the absence of UP&L being cited as an operator and a civil penalty being proposed against it directly. UP&L has only been cited, and it is being subjected to civil penalty liability in these proceedings, for Emery's alleged violations. Had UP&L been cited as an operator, the entire course of this litigation would have been different. Any proposed penalties assessed by MSHA against UP&L as an operator would most likely have been dramatically lower. This is one of the reasons why the Commission in Monterey would not allow the Secretary to shortcut the Act's required procedures by commencing a proceeding against Frontier-Kemper in the midst of an ongoing proceeding against another operator. As the Commission explained:

Our insistence on the need for compliance with the procedural requirements [of the Act for initiating such proceedings] also serves a practical purpose and furthers the enforcement scheme contemplated by Congress in the Mine Act. Providing a mine operator with the opportunity to pay a civil penalty before the institution of litigation promotes judicial and administrative economy and can assist more expeditious resolution of enforcement disputes.

7 FMSHRC at 1007. See also Phil Baker v. U.S. Department of Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978), wherein the Court held that a judge could not find a violation of a mandatory safety standard absent the particular statutory proceedings for bringing that issue to federal attention. 595 F.2d at 750. Emery Mining Corporation, et al, 10 FMSHRC at 352 (emphasis in original).

The prior ruling provides that the Act does not permit the Secretary to prosecute UP&L for a violation without "a civil penalty being proposed against it directly." The Secretary's 30 modifications seek to do that and constitute a procedural shortcut. Additional substantive rights effectively denied UP&L are the right to participate in any investigation relating to the citations and orders, the right to have an individualized penalty assessment, the right to participate in an assessment conference and the right to pay any penalty rather than litigate Emery's proposed assessments.

The Secretary states that she did not take procedural shortcuts. She states UP&L and Emery were cited from the beginning (date of issuance) and the Secretary intended and proposed only one penalty per violation against both of them jointly. (Secretary's response to UP&L's motion filed August 1, 1988 at 11, 12.) The Secretary states that obviously in a practical and equitable sense, in this case, one penalty for two co-operators is more appropriate and more fair than a separate penalty for each operator.

This Judge is bound to follow Commission precedent. The Monterey case is clear on the issue of procedural shortcuts. Accordingly, the Secretary's position is rejected.

In review of the prejudice issue: the Secretary contends UP&L has not been prejudiced. 8/

8/ Response to motion to vacate (pages 12, 13) filed August 1, 1988.

The Presiding Judge stated in his order of March 9, 1988 as follows: "UP&L was not cited as an operator but as a successor-in-interest. An enforcement action cannot be sustained absent implementation by the issuance of a citation or order against UP&L as an operator, Act § 104(a)(d)." 10 FMSHRC at 349. This ruling is now a final order of the Commission. The prejudice, as detailed above, flows from the failure to cite UP&L as an operator. In short, since UP&L was not cited as an operator it did not receive the statutory rights mandated under the Mine Act.

On the issue of prejudice to UP&L, the Secretary argues that UP&L has been cited and served copies of the citations and orders. It, indeed, did contest all 41 citations and orders, and it did, indeed, contest all the civil penalties assessed herein.

Further, she contends UP&L is not accurate when it states that during the accident investigation MSHA expressly determined that UP&L was not an operator. During the post-fire investigation, UP&L did not present itself as an operator of the Wilberg Mine but, to the contrary, it presented itself as a somewhat distant owner of the mining rights. UP&L's request to participate in the body recovery, was not as an operator but as a likely party to future tort litigation. While UP&L did not participate in the taking of sworn statements, all information relating to the sworn statements taken, (not confidential), and any equipment or laboratory results were made available to UP&L and the public. UP&L personnel were in charge of the physical recovery and were present during MSHA's most crucial part of its investigation.

The Secretary further argues that UP&L had proper and fair notice that it was cited as an operator at the time of issuance of the original and subsequent citations. The fact that under the modifications it was expressly labeled an owner-operator as well as a successor-in-interest only clarified their prior notice of being an operator under the Mine Act. In both instances, UP&L was named under the "operation" blocks on the citation/order/ subsequent action forms. Modification to clarify previously issued citations and orders are permitted in a proceeding and do not constitute prejudice. See Jim Walters Resources, Inc., 1 FMSHRC 1827, 1979. (Argument from Secretary's response filed August 1, 1988 at 12, 13).

The prejudice to UP&L is as previously stated. The Secretary's suggestions are basically practical reasons why UP&L was not prejudiced. But the fact remains that the Mine Act vests in a cited operator certain rights. They were not provided to UP&L and, because of that failure, I reject the Secretary's position.

For the foregoing reasons the 30 citations and orders, as modified, dated April 25, 1988, should be dismissed as to UP&L.

UP&L's motion to vacate raises additional issues that should be addressed. The issues generally focus on the assertion that the Secretary's change of theories with respect to UP&L constitutes an abuse of her prosecutorial discretion, was vindictive and, as a result, UP&L is entitled to any costs incurred as a result of the modifications. 9/

In support of its position UP&L relies on Thigpen v. Roberts, 468 U.S. 27, 30; U.S. v. Goodwin, 457 U.S. 368; Hardwick v Doolittle, 558 F.2d 292, 5th Cir. 1977, cert. denied, 434 U.S. 1049 (1978) among other cases.

On the other hand, the Secretary argues that the Commission has authorized amendments, corrections and modifications long after citations have been terminated citing Jim Walter Resources, Inc. and Cowen and Co., 1 FMSHRC 1827 (1979); and Ralph Foster and Sons, 3 FMSHRC 1181 (1981). (In the two cases cited by the Secretary the Commission particularly found a lack of prejudice, 1 FMSHRC at 1829 and 3 FMSHRC at 1181.)

Further, the Secretary argues that the law is clear: she has broad authority and discretion to cite parties under the Act. The Secretary relies on Bituminous Coal Operator's Association v. Secretary of the Interior, 547 F.2d 240 (4th Cir. 1977); Harman Mining Corporation v. Federal Mine Safety and Health Review Commission, 671 F.2d 794 at 797 (4th Cir. 1981); and Secretary of Labor v. Cathedral Bluffs Shale Oil, 796 F.2d 533 at 538 (D.C. Cir. 1986).

As a background matter: these cases have certainly been vigorously prosecuted as well as vigorously defended. In fact, to date the Presiding Judge has ruled on ten complex motions for summary decision, two motions to reconsider and one motion in limine. The judge believes the parties have the right under the A.P.A., 5 U.S.C. § 554, 556, and the Mine Act to vigorously pursue their cases if they desire to do so.

9/ UP&L's motion to vacate filed July 12, 1988, at 22 - 32.

The Secretary explains that she did not appeal the Judge's ruling of March 9, 1988 because it was decided that (1) appeal of the order as to paid cases [paid by Emery] was inappropriate and legally unsupportable and (2) if there was an avenue to eliminate the legal concern over the form of the citations and orders still at issue, it should be taken now. And, in fact, it was taken with the modification of the citations and orders filed by the Secretary.

No record of proceedings is available on the issue of an asserted abuse of discretion. But the Secretary's broad enforcement authority and her stated reasons, if established, could constitute persuasive evidence in support of her position that her actions were not an abuse of discretion nor vindictive.

While an order of dismissal is to be entered vacating the 30 modified orders and citations as to UP&L, it is nevertheless appropriate to consider the issues raised by the Secretary in her renewed motion for a summary decision.

The focus of the Secretary's motion is threefold. Initially she asserts the indemnity agreement for the payment of any civil penalties does not nullify UP&L's legal status as an owner-operator. ^{10/} Further, she claims UP&L is liable under the Mine Act as an owner-operator. ^{11/} Finally, she contends UP&L is liable under the Mine Act as a successor-in-interest operator. ^{12/}

I agree the indemnity agreement does not nullify UP&L's legal status. International Union, UMWA v. Federal Mine Safety and Health Commission, et al, 840 F.2d 77, D.C. Cir. 1988). However, the Secretary's argument is misdirected. It is true that any owner can be cited. But UP&L was not so cited and the Secretary's efforts to impose liability at this point in time cannot be sustained.

In arguing that UP&L is liable as an owner-operator the Secretary relies on Section 3(d) of the Act as well as the frequently cited cases of Bituminous Coal Operator's Association v. Secretary of Interior, supra, and Harman Mining Corporation v. Federal Mine Safety and Health Review Commission, supra. She particularly relies on certain asserted facts and newly discovered evidence consisting of the 1979 Coal Mining Agreement between UP&L and the American Coal Company (Emery's predecessor).

^{10/} Secretary's renewed motion, filed May 17, 1988, at 10, 11.

^{11/} Renewed motion, at 14.

^{12/} Renewed motion, at 14.

The Secretary's argument is not persuasive. UP&L does not dispute "that it has been the owner of the coal mineral rights for the Wilberg Mine since 1976; or that it contracted with Emery to operate the mine; or that it had an engineer present at the mine; or that it purchased and owned the major mining equipment; or that it agreed upon production goals for the mine with Emery; or, finally, that it retained many of Emery's employees, including Dave Lauriski, when it eventually took over the operation of the mine in the spring of 1986. Nor does UP&L deny responsibility for the 'Total Cost of Production' for the mine. None of the facts asserted by the Secretary, however, indicate that on a day-to-day basis, UP&L operated, controlled or supervised the production process at the mine. They only demonstrate that UP&L played the ordinary role of a mineral owner that contracts with another company to operate a mine for it." 13/

For the reasons previously discussed UP&L could not be liable as an operator even pursuant to the renewed motion since it was never (until now) cited as an operator, cooperator, or joint adventurer of a joint venture. In any event, the evidence relied on by the Secretary to establish a "close nexus" between UP&L and Emery would have been relevant if UP&L had been originally cited as an operator. But UP&L was not so cited.

Finally, the Secretary reasserts her position that UP&L is liable as a successor-in-interest. The Judge specifically ruled, in his order of dismissal of March 9, 1988, that the successor-in-interest doctrine did not apply to UP&L. Emery Mining Corporation, et al, 10 FMSHRC at 353. It is unnecessary to further review this issue other than to reaffirm the previous holding.

The extensive and excellent briefs filed by the parties have been most helpful in assisting the Judge in his analysis of the issues. However, to the extent that such briefs are inconsistent with this order, they are rejected.

For the reasons stated herein the following order is appropriate:

13/ UP&L's Response to Secretary's Renewed Motion filed July 6, 1988 at 5.

ORDER

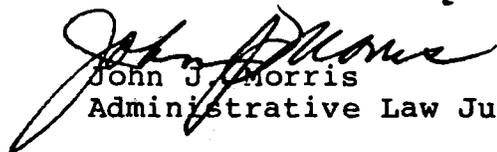
1. Utah Power and Light Company's motion to vacate the 30 modified citations and orders dated April 25, 1988 is granted.

2. The 30 modified citations and orders dated April 25, 1988 are vacated as to Utah Power and Light Company.

3. The Secretary's renewed motion for a summary decision against Utah Power and Light Company filed May 17, 1988 is denied.

4. The Presiding Judge retains jurisdiction for all issues involving Emery Mining Corporation.

5. The hearing on the merits will proceed as scheduled on October 4, 1988 in Price, Utah.


John J. Morris
Administrative Law Judge

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041
703-756-6232

September 1, 1988

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 88-171-D
ON BEHALF OF : MSHA Case No. BARB CD 88-25
PATRICK STANFIELD, : MSHA Case No. BARB CD 88-28
Complainant :
v. : Stinson No. 7 Mine
: :
NATIONAL MINES CORPORATION, :
Respondent :

ORDER

Statement of the Case

This is a discrimination proceeding filed by the Secretary against the respondent pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). On July 25, 1988, the complaining miner, Patrick Stanfield, by and through his private counsel, Tony Oppegard, Appalachian Research & Defense Fund of Kentucky, Inc., Hazard, Kentucky, filed a Notice of Intervention as a party in this case pursuant to Commission Rule 4(b), 29 C.F.R. § 2700.4(b), and requested that he be served with all pleadings, notices, and other papers filed in this matter. The cited rule provides as follows:

2700.4 Parties

* * * * *

(b) Procedure for miners and their representatives to become parties--(1) Generally. Affected miners or their representatives may intervene before hearing by filing a written notice with the Executive Director, Federal Mine Safety and Health Review Commission, 1730 K Street, N.W., Sixth Floor, Washington, D.C. 20006. The Executive Director shall forthwith mail a copy of the notice to all parties. Affected miners or their representatives may intervene after the start of the hearing upon just terms and for good cause shown.

(2) Special procedure for discrimination proceedings. In a proceeding instituted by the Secretary under § 2700.40, the complaining miner, applicant for employment or representative of miners may intervene and present additional evidence on his own behalf.

On July 29, 1988, the Secretary filed an objection to Mr. Stanfield's intervention as a party, and stated that while she does not object to Mr. Stanfield's intervention as provided for by section 105(c)(2) of the Act, and Commission Rule 4(b)(2), 29 C.F.R. § 2700.4(b)(2), she does object to the designation of party status for Mr. Stanfield, and to his participation in this case beyond that which is specifically set out in the cited statutory section and Commission procedural rule.

Section 105(c)(2) of the Act states as follows:

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

Commission Rule 4(b)(2), 29 C.F.R. § 2700.4(b)(2), provides as follows:

Special Procedure for Discrimination Proceedings: In a proceeding instituted by the Secretary under § 2700.40, the complaining miner, applicant for employment or representative of miners may intervene and present additional evidence on his own behalf.

On August 1, 1988, Mr. Oppegard filed a response to the Secretary's objection, and asserted that contrary to the position taken by the Secretary, Commission Rule 4(a), 29 C.F.R. § 2700.4(a), provides party status for an affected miner such as Mr. Stanfield upon intervention. The cited rule provides in relevant part as follows:

(a) Party status. Persons, including the Secretary and operators, who are named as parties or permitted to intervene, are parties. A miner . . . who has filed a complaint with the Secretary or Commission under sections 105(c) or 111 of the Act . . . and an affected miner . . . who has become a party in accordance with paragraph (b) of this section, are parties. (Emphasis added).

Discussion

Although given an opportunity to respond to the party status issue raised by the Secretary and Mr. Stanfield's counsel, the respondent has taken no position on this question. The Secretary's position is that while Mr. Stanfield may intervene in this matter, his participation is limited to the presentation of additional evidence at the hearing on his own behalf.

In a further response received from Mr. Oppegard on August 23, 1988, clarifying his position, he points out that pursuant to the Commission rules, an affected miner such as Mr. Stanfield, may intervene before hearing as a matter of right, and need not move the Court for permission to intervene, as required by parties other than affected miners. Mr. Oppegard seeks an opportunity for a more expansive role by Mr. Stanfield in the pursuit of his discrimination claim, while at the same time recognizing the fact that the Secretary is chiefly responsible for the prosecution of this proceeding.

Mr. Oppegard takes the position that when Congress and the Commission determined that miners are allowed to intervene and to "present additional evidence on their own behalf," they did not intend to deny miners the tools to protect their interests, nor did they intend to deny them due process. Mr. Oppegard points out that party status is critical to Mr. Stanfield because pursuant to the Commission's procedural rules, parties have the right to obtain discovery, to take depositions, to serve interrogatories and requests for production of documents, to subpoena witnesses, and to submit rebuttal evidence and to cross-examine witnesses at the hearing. By limiting Mr. Stanfield's participation to the presentation of additional evidence on his own behalf during any hearing, Mr. Oppegard suggests that Mr. Stanfield's participation will be less than meaningful, and would deny him the full participatory rights afforded other parties in proceedings of this kind. Without these rights, Mr. Oppegard believes that Mr. Stanfield's participation as an intervenor "would be hollow indeed."

CONCLUSION AND ORDER

After careful consideration of the arguments presented by the parties, I conclude and find that Mr. Oppegard's position is correct. Since Mr. Stanfield has intervened in this matter pursuant to Commission Rule 4(b), it seems clear to me that he should be accorded party status pursuant to Commission Rule 4(a), and IT IS SO ORDERED.


George A. Koutras
Administrative Law Judge

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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 7, 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 88-54-M
Petitioner : A.C. No. 33-03990-05521
v. :
: Jonathan Limestone Mine
COLUMBIA PORTLAND CEMENT :
COMPANY, :
Respondent :

ORDER OF APPROVAL AND ORDER TO PAY FOR ONE SETTLEMENT
ORDER OF DISAPPROVAL AND ORDER TO SUBMIT
INFORMATION FOR NINETEEN SETTLEMENTS

Before: Judge Merlin

This case is a petition for the imposition of civil penalties for 20 violations originally assessed at \$20 each for a total of \$400. The proposed settlements are for the original amounts. As set forth herein, I approve one of the recommended settlements based upon information contained in the citation, but I am unable to approve the remaining 19 because the present record contains insufficient information.

Citation No. 3058714

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.14006, because the guard for the self-cleaning tail pulley on the No. 9 auxiliary belt conveyor was not securely in place while the machine was in operation. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury had an incident occurred could result in permanent disability. The operator exhibited moderate negligence in not guarding the belt conveyor."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions. Therefore, I have no basis to accept his representations. Although the citation recites that the belt was not in operation, it

further states the electrical circuit was energized. More information is needed for me to make a determination on gravity. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is permanent disability.

Citation No. 3058715

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.9022, because berms were not provided for the outer banks of the elevated roadway leading to the hopper above the auxiliary No. 9 belt conveyor for a distance of approximately 15 feet. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury had an accident occurred could result in permanent disability. The operator exhibited moderate negligence in not providing a berm for the elevated roadway."

The Solicitor gives no reasons for any of the foregoing conclusions, but the citation states that the roadway was not being used at this time. On this basis I find the violation was non-serious and approve the \$20 settlement.

Citation No. 3059190

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the conduit used as a grounding conductor for the stop switch on the No. 9 auxiliary feed belt located at the finishing mill was broken in two places. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury had an accident occurred could result in lost workdays or restricted duty. The operator exhibited moderate negligence in not providing adequate protection for the grounding conductor."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059192

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12032, because the junction box cover for the tailing screw beside the No. 2 elevator in the basement of the baghouse was missing exposing the conductors to damage. The Solicitor asserts: "The probability of the

occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury had an incident occurred could result in a fatality. The operator was moderately negligent in not adequately covering the junction box."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059193

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the 120 volt fan located at the loading dock door of the bag storage room was not equipped with a grounding conductor. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in permanent disability. The operator exhibited moderate negligence in not equipping the fan with a grounding conductor."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Additionally, the Solicitor incorrectly represents the gravity of this citation. The citation lists gravity as lost workdays or restricted duty, although the Solicitor represents it as permanent disability.

Citation No. 3059194

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the conduit on the alarm switch at the No. 5 packer station in the baghouse was broken. The citation recites that the condition put added strain on the connections in the switch. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury had an accident occurred could have resulted in lost workdays or restricted duty. The operator exhibited moderate negligence in not having repaired the broken conduit."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059196

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the conduit holding the light outside of the car shop was broken. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury had an accident occurred could have resulted in lost workdays or restricted duty. The operator exhibited moderate negligence in not having repaired the broken conduit."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3058720

According to this Solicitor, this citation was issued for a violation of 30 C.R.R. § 56.11001, because a spill of limestone had accumulated on the first landing below the top floor of the raw mill building. The citation recites that the condition put excess weight on the floor. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury had an accident occurred could have resulted in lost workdays or restricted duty. The operator exhibited moderate negligence in not cleaning the spilled limestone."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059385

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12028, because the continuity and resistance of the grounding system for the plants and mine had not been tested on an annual basis. The last date of test was March 10, 1986. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard

is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in not conducting the annual testing in a timely manner."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059386

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12034, because the 110-volt light bulb on the extension light in the machine shop was not guarded. The light was 4 feet above the floor and presented a burn hazard. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in not guarding the light."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059388

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12008, because the 440-volt cables did not enter the metal frame of the No. 3 motor control center through proper bushings and fittings. The motor control center was located on the fourth floor of the raw mill. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in not providing proper insulation."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059422

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.4201(a)(1), because the fire extinguishers located in the raw mill were not inspected on a monthly basis. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in not checking the fire extinguishers on a monthly basis."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Additionally, the Solicitor incorrectly represents the gravity of this citation. The citation lists gravity as no lost workdays, although the Solicitor represents it as lost workdays or restricted duty.

Citation No. 3059392

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12020, because an insulation mat was not provided for the disconnect switches and breaker controls located in the basement of the packhouse. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in not providing an insulation mat."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Additionally, the Solicitor incorrectly represents the gravity of this citation. The citation lists gravity as fatal, although the Solicitor represents it as lost workdays or restricted duty. Finally, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the citation indicates the projected injury is fatal.

Citation No. 3059393

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12034, because guards were not

provided for two light bulbs in the west tunnel of the packhouse. The light bulbs were approximately 5 feet above the walkway. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in not providing guards for the light bulbs."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059394

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the grounding conductor on the motor for the fan in the packhouse was not adequately affixed. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059397

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12020, because an insulation mat was not provided on the concrete floor in the motor control center for the precipitator building. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in not providing an insulation mat."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059398

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12030, because the conduit for the motor for the No. 5 side gather up screw conveyor was broken in two places. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059423

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.4102 because an accumulation of oil on the floor of the compressor room in the basement of the packhouse. The citation recites that the oil had run under and into the 440-volt electrical motor control panel, creating a fire hazard. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Although the citation recites that a fire extinguisher was nearby, more information is needed for me to make a determination on gravity since the oil had spread under the electrical panel.

Citation No. 3059424

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.17001, because illumination was not sufficient to provide safe working conditions in the east tunnel of the packhouse. Light bulbs were either missing or burned out for a distance of approximately 80 feet. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an

accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence for allowing the violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Citation No. 3059404

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12032, because the cover plate on the junction box at the head pulley of the coal incline belt was missing. The citation recites that the condition exposed conductors on the junction box to damage at the head pulley of the incline belt. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations.

Discussion of Settlement Disapprovals

The conclusions which the Solicitor uses each time regarding probability of occurrence are, of course, intended to satisfy the Secretary of Labor's regulation for single penalty assessments (30 C.F.R. § 100.4). In effect, a single penalty assessment of \$20 is available under this rule, if the violation is not "significant and substantial," as that term of art has been interpreted by the Commission in contest cases under section 104(d) of the Act. 30 U.S.C. § 814(d). Due to the absence of any data or reasoning to support his bare assertions, it appears that the Solicitor in this case has not satisfied the Secretary's requirements for imposition of a \$20 penalty.

However, the issue in this case is not whether the Secretary of Labor's regulations are met. It is well established that penalty proceedings before the Commission are de novo. Neither the Commission nor its Judges are bound by the Secretary's regulations or proposed penalties. Rather, they must determine the appropriate amount of penalty, if any,

in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(k). Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). Wilmot Mining Company, 9 FMSHRC 686 (April 1987). U.S. Steel, 6 FMSHRC 1148 (May 1984).

The Commission and its Judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act, 30 U.S.C. § 820(k), which provides:

(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. * * *

The legislative history makes clear Congress' intent in this respect: See S. Rep. No. 95-181, 95th Cong., 1st Sess., 44-45 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978).

In order to support his settlement recommendations, the Solicitor must present the Commission Judge with information sufficient to satisfy the six statutory criteria in section 110(i) with respect to the instant citations. I accept the Solicitor's statistics regarding history and in absence of any evidence to the contrary, I accept his representations regarding good faith abatement and ability to continue in business.

However, the Solicitor's representation of the operator as small in size cannot be accepted on the present record. The Proposed Assessment sheet gives the company's annual hours worked as 1,088,152 and the mine's annual hours worked as 417,735. The Solicitor should explain why he believes the operator is small.

No information is given to support the Solicitor's representation that in all these citations, the operator was guilty of moderate negligence. The Solicitor has merely relied upon the box checked by the inspector on the citation. Accordingly, on the critical statutory criterion of negligence, I have no basis to make the necessary determinations for nineteen of the citations, as set forth above.

So too, in these nineteen citations no information is given for me to make findings on gravity. As already noted,

the Solicitor's unsupported representations relate to "significant and substantial" not "gravity." The Commission has pointed out that although the penalty criterion of "gravity" and the "significant and substantial" nature of a violation are not identical, they are based frequently upon the same or similar factual considerations. Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n. 11 (September 1987). Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2013 (December 1987). Here no factual considerations have been given upon which I can decide gravity. A violation conceivably could possess some degree of gravity, but still not rise to the level of significant and substantial. As a general matter, \$20 would appear to be a nominal penalty appropriate for a non-serious violation, in absence of other unusual circumstances. But here again, the Solicitor has merely relied upon the box checked by the inspector on the citation. Accordingly, for the crucial statutory criterion of gravity, I have no basis to make the necessary determinations.

In light of the foregoing, the recommended settlements for 19 citations cannot be accepted on the present record.

ORDER

Accordingly, it is Ordered that the recommended settlement of \$20 be Approved for the following citation:

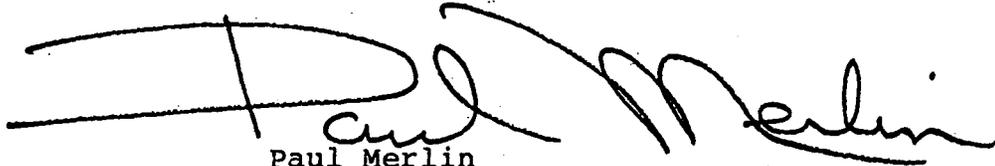
Citation No. 3058715

It is further Ordered the operator pay \$20 for this citation within 30 days from the date of this decision.

It is further Ordered that the recommended settlements be Disapproved and that within 30 days from the date of this order, the Solicitor submit sufficient information for me to make proper settlement determinations under the Act with respect to the following 19 citations:

Citation No. 3058714
Citation No. 3059190
Citation No. 3059192
Citation No. 3059193
Citation No. 3059194
Citation No. 3059196
Citation No. 3058720
Citation No. 3059385
Citation No. 3059386
Citation No. 3059388
Citation No. 3059422

Citation No. 3059392
Citation No. 3059393
Citation No. 3059394
Citation No. 3059397
Citation No. 3059398
Citation No. 3059423
Citation No. 3059424
Citation No. 3059404

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

Paul Merlin
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 7, 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 88-55-M
Petitioner : A.C. No. 33-03990-05522
v. :
: Jonathan Limestone Mine
COLUMBIA PORTLAND CEMENT :
COMPANY, :
Respondent :

ORDER OF APPROVAL AND ORDER TO PAY FOR FOUR SETTLEMENTS
ORDER OF DISAPPROVAL AND ORDER TO SUBMIT
INFORMATION FOR SIXTEEN SETTLEMENTS

Before: Judge Merlin

This case is a petition for the imposition of civil penalties for 20 violations originally assessed at \$20 each for a total of \$400. The proposed settlements are for the original amounts. As set forth herein, I approve four of the recommended settlements based upon information contained in the citations, but I am unable to approve the remaining 16 because the present record contains insufficient information.

Citation No. 3059412

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12008, because the feed cable for the portable reducing transformer located on the burner floor did not enter the metal frame through proper bushings and/or fittings. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059413

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the grounding jumper around the flexible conduit on the motor of the No. 5 separator in the finishing mill was not connected to the frame of the motor. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059414

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12008, because the 440-volt feed cable for the portable welder in the car shop did not enter the metal frame of the welder through proper fittings and/or bushings. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059430

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.14007, because the guard for the V-belt motor for the separator above the No. 3 finish mill was not of substantial construction in that the back of the guard was missing. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in permanent disability."

The operator exhibited moderate negligence in allowing this violation to exist."

The Solicitor gives no reasons for any of the foregoing conclusions, but the citation states the drive was not in operation. On this basis, I find the violation was non-serious and approve the \$20 settlement.

Citation No. 3059431

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.14006, because the guard was not in place for the coupling between the motor and gear drive on the main feed belt for the No. 8 belt feed located in the finish mill. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in permanent disability. The operator exhibited moderate negligence in allowing this violation to exist."

The Solicitor gives no reasons for any of the foregoing conclusions, but the citation states the belt was not in operation. On this basis, I find the violation was non-serious and approve the \$20 settlement.

Citation No. 3059432

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.14006, because the guard was not in place for the coupling between the motor and chain drive for the gyp belt feeder for the No. 7 mill. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in permanent disability. The operator exhibited moderate negligence for allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is permanent disability.

Citation No. 3059434

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.14006, because the guard for the

tail pulley on the main gyp and clinker feet belt conveyor was not in place. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in permanent disability. The operator exhibited moderate negligence in allowing this violation to exist."

The Solicitor gives no reasons for any of the foregoing conclusions, but the citation states the belt was not in motion. On this basis, I find the violation was non-serious and approve the \$20 settlement.

Citation No. 3059435

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.14006, because the guard for the sawblade for the electrical saw located in the car shop was not in place. The Solicitor asserts that "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in permanent disability. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Although the citation recites that the saw was not being used, it further states that the motor was energized. More information is needed for me to make a determination on gravity. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is permanent disability.

Citation No. 3059418

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12020, because the breaker and control box for the pump at the settling pond was not provided with a dry wooden platform or insulation mat. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis

to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059436

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.11001, because safe means of access was not provided for the operator of the haul truck being used to transport dust in that the ladder used to climb in and out of the truck was not substantially constructed so as to provided safe access. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in permanent disability. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is permanent disability.

Citation No. 3059439

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.14006, because a guard was not provided for the chain drive on the dribble belt conveyor. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in allowing this violation to exist."

The Solicitor gives no reason for any of the foregoing conclusions, but the citation state that the belt was not in motion. On this basis, I find the violation was non-serious and approve the \$20 settlement.

Citation No. 3059441

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12020, because a wooden platform or insulation mat was not provided for the controls at the

3 inch water pump. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059442

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the grounding conductor was not connected to the frame of the portable light located in the underground shop. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059445

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12020, because a dry wooden platform or insulation mat was not provided for the controls on the #3250 portable water pump. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis

to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059446

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12020, because a wooden platform or insulation mat was not provided for the controls at the high pressure wash bay located at the underground wash station. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059448

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12030, because the 440-volt feed cable to the main exhaust fan located at the underground crusher station was damaged and had a conductor showing through. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059450

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the conduit used as a grounding conductor for the 110-volt light in the walkway

of the underground bin conveyor was broken. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059452

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the conduit used for a grounding conductor for the 110-volt outlet at the top landing for the underground man lift was broken. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059453

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12032, because the cover plate for the junction box located near the walkway for the 4A belt was missing, thereby exposing the conductor to damage. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis

to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059454

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the conduit used as a grounding conductor was broken on the 4A underground belt conveyor. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Discussion of Settlement Disapprovals

The conclusions which the Solicitor uses each time regarding probability of occurrence are, of course, intended to satisfy the Secretary of Labor's regulation for single penalty assessments (30 C.F.R. § 100.4). In effect, a single penalty assessment of \$20 is available under this rule, if the violation is not "significant and substantial," as that term of art has been interpreted by the Commission in contest cases under section 104(d) of the Act. 30 U.S.C. § 814(d). Due to the absence of any data or reasoning to support his bare assertions, it appears that the Solicitor in this case has not even satisfied the Secretary's requirements for imposition of a \$20 penalty.

However, the issue in this case is not whether the Secretary of Labor's regulations are met. It is well established that penalty proceedings before the Commission are de novo. Neither the Commission nor its Judges are bound by the Secretary's regulations or proposed penalties. Rather, they must determine the appropriate amount of penalty, if any, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i). Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). Wilmot Mining Company, 9 FMSHRC 686 (April 1987). U.S. Steel, 6 FMSHRC 1148 (May 1984).

The Commission and its Judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act, 30 U.S.C. § 820(k), which provides:

(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. * * *

The legislative history makes clear Congress' intent in this respect: See S. Rep. No. 95-181, 95th Cong., 1st Sess., 44-45 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978).

In order to support his settlement recommendations, the Solicitor must present the Commission Judge with information sufficient to satisfy the six statutory criteria in section 110(i) with respect to the instant citations. I accept the Solicitor's statistics regarding history and in absence of any evidence to the contrary, I accept his representations regarding good faith abatement and ability to continue in business.

However, the Solicitor's representation of the operator as small in size cannot be accepted on the present record. The Proposed Assessment sheet gives the company's annual hours worked as 1,088,152 and the miner's annual hours worked as 417,735. The Solicitor should explain why he believes the operator is small.

No information is given to support the Solicitor's representation that in all these citations, the operator was guilty of moderate negligence. The Solicitor has merely relied upon the box checked by the inspector on the citation. Accordingly, on the critical statutory criterion of negligence, I have no basis to make the necessary determination for sixteen of the citations, as set forth above.

So too, in these sixteen citations no information is given for me to make findings on gravity. As already noted, the Solicitor's unsupported representations relate to "significant and substantial" not "gravity." The Commission has pointed out that although the penalty criterion of "gravity" and the "significant and substantial" nature of a violation are not identical, they are based frequently upon the same or similar factual considerations. Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n. 11 (September 1987). Youghiogheny and

Ohio Coal Company, 9 FMSHRC 2007, 2013 (December 1987). Here no factual considerations have been given upon which I can decide gravity. A violation conceivably could possess some degree of gravity, but still not rise to the level of significant and substantial. As a general matter, \$20 would appear to be a nominal penalty appropriate for a non-serious violation, in absence of other unusual circumstances. But here again, the Solicitor has merely relied upon the box checked by the inspector on the citation. Accordingly, for the crucial statutory criterion of gravity, I have no basis to make the necessary determinations.

In light of the foregoing, the recommended settlements for 16 citations cannot be accepted on the present record.

ORDER

Accordingly, it is Ordered that the recommended settlements of \$20 be Approved for the following four citations:

Citation No. 3059430
Citation No. 3059431
Citation No. 3059434
Citation No. 3059439

It is further Ordered the operator pay \$80 for these four citations within 30 days from the date of this decision.

It is further Ordered that the recommended settlements be Disapproved and that within 30 days from the date of this order, the Solicitor submit sufficient information for me to make proper settlement determinations under the Act with respect to the following 16 citations:

Citation No. 3059412
Citation No. 3059413
Citation No. 3059414
Citation No. 3059432
Citation No. 3059435
Citation No. 3059418
Citation No. 3059436
Citation No. 3059441
Citation No. 3059442
Citation No. 3059445
Citation No. 3059446
Citation No. 3059448
Citation No. 3059450

Citation No. 3059452
Citation No. 3059453
Citation No. 3059454

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

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 7, 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 88-58-M
Petitioner : A.C. No. 33-03990-05524
v. :
 : Jonathan Limestone Mine
COLUMBIA PORTLAND CEMENT :
COMPANY, :
Respondent :

DECISION DISAPPROVING SETTLEMENTS
ORDER TO SUBMIT INFORMATION

This case is a petition for the imposition of civil penalties for twenty citations originally assessed at \$2603. Recommending very substantial reductions for all the violations, the Solicitor's proposed settlements total \$1463.80. As set forth herein, I am unable to approve the suggested settlements based upon the present record.

Citation No. 3059195

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12030, because the door on the signal light located at the water pump across from the bag house would not close, thus exposing energized parts. The citation further recites that employees walk and travel in the affected area. The original assessment for this citation was \$157 and the proposed settlement is \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be fatal. The operator was moderately negligent in allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059197

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12030, because the outlet located on the bottom of the 110-volt breaker box in the bag house was broken off and hanging by the conductors. The original assessment for this citation was \$157 and the proposed settlement is for \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be fatal. The operator was moderately negligent in allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059199

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12034, because the 110-volt light bulb located 3 feet from the drill press in the machine shop was not guarded. The original assessment for this citation was \$98 and the proposed settlement is for \$55.10. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could result in lost workdays or restricted duty. The operator was moderately negligent in allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$55.10. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059382

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12030, because the 110-volt light bulb located 3 feet above the drill bit and bolt bins and near the big shears was broken. The citation further recites that employees work in the affected area. The original assessment for this citation was \$98 and the proposed settlement is for \$55.10.

The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could result in lost workdays or restricted duty. The operator was moderately negligent in allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$55.10. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059383

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12030, because the bulb was missing from the light fixture located on the I-beam near the small drill press and approximately 4 feet above the floor. The citation further recites that employees were exposed to 110-volt energized parts. The original assessment for this citation was \$98 and the proposed settlement is for \$55.10. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could result in lost workdays or restricted duty. The operator was moderately negligent in allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$55.10. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059421

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.11002, because an 8 foot section of handrail for the walkway at the top of the steps in the compressor room was not in place. Employees were exposed to falls of 8 feet. The original assessment for this citation was \$126 and the proposed settlement is for \$70.85. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury in the event of an accident could result in permanent disability. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$70.85. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be permanent disability and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059395

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12030, because two light bulbs were missing in the walkway of the east tunnel of the packhouse. The light bulbs were approximately six feet above the walkway. The citation further recites that employees were exposed to the 110-volt energized equipment because they had to work in this area. The original assessment for this citation was \$98 and the proposed settlement is \$55.10. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be lost workdays or restricted duty. The operator was moderately negligent in allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$55.10. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059396

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12023, because grids and energized parts were not guarded on the controls for the elevator for the store rooms. The citation further recites that the voltage was 440. The original assessment for this citation was \$157 and the proposed settlement is \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably

likely the cited condition will occur and that if it does, the result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059399

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12030, because the thermostat box located in the precipitator control room was broken off the hanger and the cover was missing. The original assessment for this citation was \$98 and the proposed settlement is for \$55.10. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could result in lost workdays or restricted duty. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$55.10. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059425

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.11001, because safe means of access was not provided or maintained from the east to west sides of the third floor of the feedhouse in that employees were walking an 8 inch beam to get from one side to the other. The citation further recites that if people fell while using this beam, they could fall 10 feet. The original assessment for this citation was \$126 and the proposed settlement is for \$70.85. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be permanently disabling. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$70.85. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be permanent disability and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059427

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.9002, because the Pettibone Crane, equipment #29, operating in the coal mill area had a hydraulic oil leak. The citation recites that the oil was leaking off the boom, running down onto the hot exhaust and motor, creating a fire hazard. The original assessment for this citation was \$157 and the proposed settlement is for \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could result in lost workdays or restricted duty. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059405

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12030, because the junction box on the brake relay of the man lift located on the top floor of the finish mill was damaged. The original assessment for this citation was \$157 and the proposed settlement is for \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be fatal. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059406

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12023, because the 440-volt electrical connection on the second floor of the crane was not

guarded. The citation further recites that employees could make contact with the connection. The original assessment for this citation was \$157 and the proposed settlement is for \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be fatal. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059407

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12023, because the 440-volts grids on the third floor of the crane were not guarded. The citation further recites that employees could make contact with the grids. The original assessment for this citation was \$157 and the proposed settlement is for \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be fatal. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059408

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12034, because the light bulb on the north side of the crane and approximately three feet above the floor was not guarded. The original assessment for this citation was \$98 and the proposed settlement is for \$55.10. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could result

in lost workdays or restricted duty. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$55.10. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059409

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12030, because the breaker handle for the motor of the separator in the No. 7 finish mill had been removed and could not be locked out. The original assessment for this citation is \$157 and the proposed settlement is for \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be fatal. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059410

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12030, because the back panels for the No. 25808 control panel in the burner control room were missing, exposing employees to 110-volt connections. The original assessment for this citation was \$157 and the proposed settlement is for \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be fatal. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the

result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059428

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.11001, because safe access was not provided for the walkway on the fourth floor of the finish mill building in that a coal spill was blocking the walkway. The citation further recites that employees had to travel the walkway and that the spill was about 6 feet by 8 feet and 5 feet high. The original assessment for the citation was \$98 and the proposed settlement is for \$55.10. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could result in lost workdays or restricted duty. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$55.10. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059433

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.14006, because the guard for the tailpulley on the main gyp and clinker feed belt conveyor in the No. 7 finish mill was not in place. The citation further recites that the belt was in motion, and that one person per day travels the walkway adjacent to the belt. The original assessment for this citation was \$126 and the proposed settlement is for \$70.85. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be permanent disability. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$70.85. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be permanent disability and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059437

According to the Solicitor, this citation was for a violation of 30 C.F.R. § 56.9003, because the primary brakes for the Caterpillar 992 front end loader, equipment No. 2314, were not adequate in that the loader could not stop within a safe distance when tested. The citation further recites that the right rear wheel cylinder had a very heavy leak with fluid running down onto the wheel and tire, and that the loader was being used to load trucks in the quarry. The original assessment for this violation was \$126 and the proposed settlement is for \$70.85. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be permanent disability. The operator was moderately negligent in allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$70.85. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be permanent disability and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Discussion of Settlement Disapprovals

It is well established that penalty proceedings before the Commission are de novo. Neither the Commission nor its Judges are bound by the Secretary's regulations or proposed penalties. Rather, they must determine the appropriate amount of penalty, if any, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i). Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). Wilmot Mining Company, 9 FMSHRC 686 (April 1987). U.S. Steel, 6 FMSHRC 1148 (May 1984).

The Commission and its Judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act, 30 U.S.C. § 820(k), which provides:

(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except which the approval of the commission. * * *

The legislative history makes clear Congress' intent in this respect: See S. Rep. No. 95-181, 95th Cong., 1st Sess.,

44-45 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978).

In order to support his settlement recommendations, the Solicitor must present the Commission Judge with information sufficient to satisfy the six statutory criteria in section 110(i) with respect to the instant citations. I accept the Solicitor's statistics regarding history and in absence of any evidence to contrary, I accept his representations regarding good faith abatement and ability to continue in business.

However, the representation of the operator as small in size cannot be accepted on the present record. The Proposed Assessment sheet gives the company's annual hours worked as 1,088,152 and the mine's annual hours worked as 417,735. MSHA assigned the mine 7 points and the entity 3 points which is not small. Cf. 30 C.F.R. § 100.4. The Solicitor should explain why he believes the operator is small.

No information is given to support the Solicitor's representation that the operator was guilty of moderate negligence in these citations. The Solicitor merely relies upon the box checked by the inspector on the citations. Accordingly, on the critical statutory criterion of negligence, I have no basis to make the necessary determinations.

As already set forth, the representations given by the Solicitor with respect to the gravity of each violation do not appear to support the low recommended settlement amounts. The Solicitor's conclusions relate to "significant and substantial", as that term of art has been interpreted by the Commission in contest cases under section 104(d) of the act. 30 U.S.C. § 814(d). The Commission has pointed out that although the penalty criterion of "gravity" and the "significant and substantial" nature of a violation are not identical, they are based frequently upon the same or similar factual considerations. Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n. 11 (September 1987). Youghioghny and Ohio Coal Company, 9 FMSHRC 2007, 2013 (December 1987). The Solicitor does not discuss the factual considerations for any of the subject citations. But the conclusions he offers do indicate a high degree of gravity which, at least on the present record, is at variance with his insubstantial penalty suggestions. And, as noted above, in some instances the citations contain additional facts, not included in the settlement motion, which apparently add to gravity. I am of course, not bound by the original assessments. However, it must be noted that the Solicitor has cut the original assessments almost in half without explanation.

In light of the foregoing, the recommended settlements cannot be accepted on the present record.

ORDER

It is Ordered that the recommended settlements be Disapproved and that within 30 days from the date of this order, the Solicitor submit sufficient information for me to make proper settlement determinations under the Act.

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

Paul Merlin
Chief Administrative Law Judge

Distribution:

Christopher J. Carney, Esq., U.S. Department of Labor, Office of the Solicitor, 881 Federal Office Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

Michael M. Roman, Vice President, Industrial Relations, Columbia Portland Cement Company, P.O. Box 1531, Zanesville, OH 43701 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 7, 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 88-59-M
Petitioner : A.C. No. 33-03990-05525
v. :
 : Jonathan Limestone Mine
COLUMBIA PORTLAND CEMENT :
COMPANY, :
Respondent :

DECISION DISAPPROVING SETTLEMENTS
ORDER TO SUBMIT INFORMATION

This case is a petition for the imposition of civil penalties for six citations originally assessed at \$831.00. Recommending very substantial reductions for all the violations, the Solicitor's proposed settlements total \$467.50. As set forth herein, I am unable to approve the suggested settlements based upon the present record.

Citation No. 3059438

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.3200, because loose material was observed along the highwall in the quarry for a distance of 200 feet thereby creating a fall of material hazard to employees working in the area. The original assessment for this citation was \$136 and the proposed settlement is \$76.50. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be permanent disability. The operator was moderately negligent in allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$76.50. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be permanent disability and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059440

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.11001, because safe means of access was not provided for those persons who worked with the pump located in front of the mine portal in that access to the area had been cut off. The citation further recites that if employees fell, they would fall into about five feet of water. The original assessment for this citation was \$98 and the proposed settlement is \$55.10. The Solicitor asserts: "The probability of occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be lost workdays or restricted duty. The operator exhibited moderate negligence for allowing the violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$55.10. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059443

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12032, because the cover for the junction box of the hydraulic press was missing. The original assessment for this citation was \$157 and the proposed settlement is \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be fatal. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059447

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12032, because the cover plate

for the 110-volt light switch at the entrance to the underground crusher station was missing. The citation further recites employees were exposed to 110 volt energized parts. The original assessment was \$157 and the proposed settlement is \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be fatal. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059451

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12030, because two light bulbs at the top of the man lift were missing, thereby exposing employees to energized parts. The original assessment for this citation was \$157 and the proposed settlement is \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be fatal. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059461

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.14006, because the guard for the tailpulley on the #6 belt conveyor was not in place. The citation further recites it was reasonably likely employees would contact the pinch point while travelling. The original assessment for this citation was \$126 and the proposed settlement is \$71. The Solicitor asserts: "The probability

of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be permanent disability. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$71.00. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be permanent disability and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Discussion of Settlement Disapprovals

It is well established that penalty proceedings before the Commission are de novo. Neither the Commission nor its Judges are bound by the Secretary's regulations or proposed penalties. Rather, they must determine the appropriate amount of penalty, if any, in accordance with the six criteria set forth in section 110(i) of the act. 30 U.S.C. § 820(i). Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). Wilmot Mining Company, 9 FMSHRC 686 (April 1987). U.S. Steel, 6 FMSHRC 1148 (May 1984).

The Commission and its Judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act, 30 U.S.C. § 820(k), which provides:

(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except which the approval of the commission. * * *

The legislative history makes clear Congress' intent in this respect: See S. Rep. No. 95-181, 95th Cong., 1st Sess., 44-45 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978).

In order to support his settlement recommendations, the Solicitor must present the Commission Judge with information sufficient to satisfy the six statutory criteria in section 110(i) with respect to the instant citations. I accept the Solicitor's statistics regarding history and in absence of

any evidence to contrary, I accept his representations regarding good faith abatement and ability to continue in business.

However, the representation of the operator as small in size cannot be accepted on the present record. The Proposed Assessment sheet gives the company's annual hours worked as 1,088,152 and the mine's annual hours worked as 417,735. MSHA assigned the mine 7 points and the entity 3 points which is not small. Cf. 30 C.F.R. § 100.4. The Solicitor should explain why he believes the operator is small.

No information is given to support the Solicitor's representation that the operator was guilty of moderate negligence in these citations. The Solicitor merely relies upon the box checked by the inspector on the citations. Accordingly, on the critical statutory criterion of negligence, I have no basis to make the necessary determinations.

As already set forth, the representations given by the Solicitor with respect to the gravity of each violation do not appear to support the low recommended settlement amounts. The Solicitor's conclusions relate to "significant and substantial", as that term of art has been interpreted by the Commission in Contest cases under section 104(d) of the Act. 30 U.S.C. 814(d). The Commission has pointed out that although the penalty criterion of "gravity" and the "significant and substantial" nature of a violation are not identical, they are based frequently upon the same or similar factual considerations. Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n. 11 (September 1987). Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2013 (December 1987). The Solicitor does not discuss the factual considerations for any of the subject citations. But the conclusions he offers do indicate a high degree of gravity which, at least on the present record, is at variance with his insubstantial penalty suggestions. And, as noted above, in some instances the citations contain additional factors not included in the settlement motion, which apparently add to gravity. I am of course, not bound by the original assessments. However, it must be noted that the Solicitor has cut the original assessments almost in half without explanation.

In light of the foregoing, the recommended settlements cannot be accepted on the present record.

ORDER

It is Ordered that the recommended settlements be Disapproved and that within 30 days from the date of this order, the Solicitor submit sufficient information for me to make proper settlement determinations under the Act.

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

Paul Merlin
Chief Administrative Law Judge

Distribution:

Christopher J. Carney, Esq., U.S. Department of Labor, Office of the Solicitor, 881 Federal Office Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

Michael M. Roman, Vice President, Industrial Relations, Columbia Portland Cement Company, P.O. Box 1531, Zanesville, OH 43701 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 7, 1988

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 88-62-M
Petitioner : A.C. No. 33-03990-05526
v. :
: Jonathan Limestone Mine
COLUMBIA PORTLAND CEMENT :
COMPANY, :
Respondent :

ORDER OF APPROVAL AND ORDER TO PAY FOR ONE SETTLEMENT
ORDER OF DISAPPROVAL AND ORDER TO SUBMIT INFORMATION
FOR FOUR SETTLEMENTS

This case is a petition for the imposition of civil penalties for five violations. Two of the violations were originally assessed at \$20 each and the proposed settlements are for the original amounts. As set forth herein, I approve the recommended settlement for one of the \$20 penalties, but am unable to do so for the other.

The remaining three citations were originally assessed at \$371 and the Solicitor recommends reduced settlements for them totaling \$208.70. Based upon the present record, I cannot approve these suggested settlements.

Citation No. 3060309

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12030, because a 110-volt light bulb socket was not provided with a bulb, thus exposing employees to energized parts. The citation further recites that one employee was stationed in this area and travelled it frequently. This socket was located in the east tunnel. The original assessment for this citation was \$112 and the proposed settlement is \$63. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be lost workdays or restricted duty. The operator was moderately negligent in allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$63. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably

likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent. Under such circumstances the original assessment looks modest indeed.

Citation No. 3060310

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12016, because an employee was working on the wilfley pump in mill #46 without deenergizing the electrical controls. There was no warning notice at the power switch. The citation further recites that several employees work in the affected area. The original assessment for this citation was \$147 and the proposed settlement is \$82.70. The Solicitor asserts: "The probability of occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be permanent disability. The operator was moderately negligent in allowing the violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$82.70. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be permanent disability and that the operator was negligent. Under such circumstances the original assessment looks modest indeed.

Citation No. 3060311

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12030, because the control switch box door on the #47 wilfley pump could not be closed. The citation recites that the conductors inside the box were 440 volts and were energized and that several employees work in that section of the mill. The original assessment for this citation was \$112 and the proposed settlement is \$63. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be lost of workdays or restricted duty. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$63. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably

likely the cited condition will occur and that if it does, the result will be a lost workdays or restricted duty and that the operator was negligent. Under such circumstances the original assessment looks modest indeed.

Citation No. 3060312

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.12025, because the equipment grounding conductor for the west screw in the basement of the packhouse was broken off the drive motor. The original assessment for this citation was \$20 and the proposed settlement is \$20. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury had an accident occurred could be fatal. The operator exhibited moderate negligence for allowing this violation to exist."

Using the pro forma language he employs in all cases of \$20 settlements, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059478

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. § 56.16005, because a compressed gas cylinder located in the underground maintenance shop was not secured in any manner. The original assessment for this citation was \$20 and the proposed settlement is \$20. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury had an accident occurred could be lost workdays or restricted duty. The operator was moderately negligent in allowing this violation to exist."

The Solicitor gives no reason for any of the foregoing conclusions, but the citation states that the cylinder had a protective cap in place. On this basis, I find the violation was non-serious and approve the \$20 settlement.

Discussion of Settlement Disapprovals

It is well established that penalty proceedings before the Commission are de novo. Neither the Commission nor its Judges are bound by the Secretary's regulations or proposed penalties. Rather, they must determine the appropriate amount of penalty, if any, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i). Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). Wilmot Mining Company, 9 FMSHRC 686 (April 1987). U.S. Steel, 6 FMSHRC 1148 (May 1984).

The Commission and its Judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act, 30 U.S.C. § 820(k), which provides:

(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except which the approval of the commission. * * *

The legislative history makes clear Congress' intent in this respect: See S. Rep. No. 95-181, 95th Cong., 1st Sess., 44-45 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978).

In order to support his settlement recommendations, the Solicitor must present the Commission Judge with information sufficient to satisfy the six statutory criteria in section 110(i) with respect to the instant citations. I accept the Solicitor's statistics regarding history and in absence of any evidence to contrary, I accept his representations regarding good faith abatement and ability to continue in business.

However, the representation of the operator as small in size cannot be accepted on the present record. The Proposed Assessment sheet gives the company's annual hours worked as 1,088,152 and the mine's annual hours worked as 417,735. MSHA assigned the mine 7 points and the entity 3 points which is not small. Cf. 30 C.F.R. § 100.4. The Solicitor should explain why he believes the operator is small.

No information is given to support the Solicitor's representation that the operator was guilty of moderate negligence in these citations. The Solicitor merely relies upon the box checked by the inspector on the citations. Accordingly, on the critical statutory criterion of negligence, I have no basis to make the necessary determinations.

As already set forth, the representations given by the Solicitor with respect to the gravity of each violation do not appear to support the low recommended settlement amounts. The Solicitor's conclusions relate to "significant and substantial", as that term of art has been interpreted by the Commission in Contest cases under section 104(d) of the Act. 30 U.S.C. 814(d). The Commission has pointed out that although the penalty criterion of "gravity" and the "significant and substantial" nature of a violation are not identical, they are based frequently upon the same or similar factual considerations. Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n. 11 (September 1987). Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2013 (December 1987). The Solicitor does not discuss the factual considerations for any of the subject citations. The conclusions he offers for the three citations where he recommends penalty reductions indicate a high degree of gravity which, at least on the present record, is at variance with his insubstantial penalty suggestions. And as noted above, in some instances the citations contain additional factors not included in the settlement motion which apparently add to gravity. I am of course, not bound by the original assessments. However, it must be noted that in these cases the Solicitor has cut the original assessments almost in half without explanation.

With respect to the recommended settlement of \$20, it must be noted that as a general matter, \$20 would appear to be a nominal penalty appropriate for a non-serious violation, in absence of other unusual circumstances. The Solicitor has merely relied upon the boxes checked by the inspector on the citations. Accordingly, for the crucial statutory criterion of gravity, I have no basis to make the necessary determinations.

In light of the foregoing, the recommended settlements for four of the citations set forth above, cannot be accepted on the present record.

ORDER

Accordingly, it is Ordered that the recommended settlement of \$20 be Approved for the following citation:

Citation No. 3059478

It is further Ordered the operator pay \$20 for this citation within 30 days from the date of this decision.

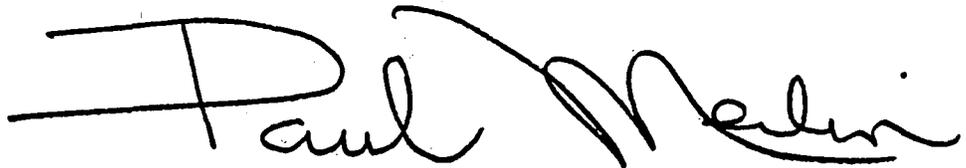
It is further Ordered that the recommended settlements be Disapproved and that within 30 days from the date of this order, the Solicitor submit sufficient information for me to make proper settlement determinations under the Act with respect to the following 4 citations:

Citation No. 3060309

Citation No. 3060310

Citation No. 3060311

Citation No. 3060312

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive style with a large, sweeping initial "P" and a long, horizontal flourish at the end.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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