

SEPTEMBER 1989

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

Secretary of Labor, MSHA v. Flaget Fuels, Inc., Docket No. KENT 89-115.
(Judge Merlin, Order of Default, August 31, 1989.)

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

Secretary of Labor, MSHA v. Dillingham Construction, International,
Docket Nos. SE 88-59-M, SE 89-23-M. (Judge Koutras, July 31, 1989.)

Secretary of Labor on behalf of Jack Winninghoff v. Black Pine Mining Co.,
Docket No. WEST 89-79-D. (Petition for Interlocutory Review of Judge
Cetti's August 9, 1989 Order.)

Arnold Sharp v. Big Elk Creek Coal Company, Docket No. KENT 89-70-D.
(Judge Koutras, August 22, 1989.)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 20, 1989

LOCAL UNION 1261, DISTRICT 22 :
UNITED MINE WORKERS OF :
AMERICA (UMWA) :
v. : Docket No. WEST 86-199-C
CONSOLIDATION COAL COMPANY :

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

DECISION

BY: Ford Chairman; Doyle and Nelson, Commissioners

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"), the primary issue is whether miners normally scheduled to work on a particular day are entitled to compensation under the first and second sentences of section 111 of the Mine Act, when the operator has voluntarily closed the mine two shifts earlier for safety reasons. 1/

1/ Section 111 states in part:

Entitlement of miners to full compensation

[1] If a coal or other mine or area of such mine is closed by an order issued under section [103] ..., section [104] ..., or section [107] of this [Act], all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rate of pay for the period they are idled, but for not more than the balance of such shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for

The United Mine Workers of America ("UMWA") seeks compensation from Consolidation Coal Co. ("Consol") for 62 miners that the UMWA alleges were idled by a withdrawal order issued pursuant to section 103(k) of the Act. ^{2/} Commission Administrative Law Judge John Morris held that the miners were entitled to compensation and granted the UMWA's complaint. 9 FMSHRC 1799 (October 1987)(ALJ). The judge reasoned that, although the miners were voluntarily withdrawn by Consol prior to issuance of the section 103(k) control order, the order officially closed the mine and idled the miners for compensation purposes. 9 FMSHRC at 1802. For the reasons explained below, we conclude that the claimants are not entitled to compensation under the first and second sentences of section 111 since none of the claimants were "working

not more than four hours of such shift. [3] If a coal or other mine or area of such mine is closed by an order issued under section [104] ... or section [107] of this [Act] for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. [4] Whenever an operator violates or fails or refuses to comply with any order issued under section [103] ..., section [104] ..., or section [107] of this [Act], all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated....

30 U.S.C. § 821 (sentence numbers added).

^{2/} Section 103(k), which grants the Secretary flexible authority to issue such orders as are necessary to insure the safety of any person in a mine in the event of an accident, states in part:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine....

30 U.S.C. § 813(k). An order issued pursuant to section 103(k) is commonly referred to as a "control order."

during the shift when [the] order was issued" or were on "the next working shift". Therefore, we reverse the judge's decision.

I.

The facts were stipulated by the parties. Briefly, Consol's Emery Mine operates three eight hour shifts per day: the daylight shift, the afternoon shift, and the graveyard shift. On April 16, 1986, during the afternoon shift, Consol voluntarily removed its afternoon shift employees from the mine because of rising gas levels. Consol informed the miners that the mine would be closed until further notice because of the gas levels. Immediately thereafter, Consol notified the UMWA and officials of the Secretary of Labor's Mine Safety and Health Administration ("MSHA") of its action. Consol also called miners scheduled to work the graveyard and daylight shifts and advised them that the mine would be closed until further notice. Consol paid the afternoon shift miners for the 4-1/2 hours that they had worked on April 16 before being withdrawn. Consol did not pay any of the miners scheduled to work on April 17 who had been notified not to report.

On the morning of April 17, MSHA personnel arrived at the mine to investigate the conditions that had caused Consol to remove its miners. Based on the analysis of the air samples taken by Consol, an MSHA inspector issued a section 103(k) control order at 7:14 a.m. The order, which did not allege that Consol had violated any mandatory safety standards, stated in part:

Based on the results of air samples taken by the Company ... this mine has experienced a possible fire, therefore, all persons has [sic] been removed from the mine by Company order to insure their safety and no person shall enter inby the mine portal without modification of this order, after consultation with appropriate persons selected from Company officials, State officials, the miners representative and other persons.

After the withdrawal order was issued, no miners could enter the mine nor could mining activities resume until MSHA modified or terminated the order. On April 20, 1986, MSHA modified the order to allow mining to resume, and on May 16, 1986, MSHA terminated the order. 9 FMSHRC at 1800-01.

Because Consol did not pay any miners for April 17, the UMWA filed its compensation complaint. The complaint, as amended, requested eight hours of pay, pursuant to the first sentence of section 111 of the Act, for each of 36 miners scheduled to work the day shift on April 17 and four hours of pay, pursuant to the second sentence of section 111, for each of 26 miners scheduled to work the afternoon shift on April 17.

Before the judge, Consol argued that the UMWA's complaint should fail because it did not meet the requirements of section 111. Consol noted that section 111 specifically provides that, if a section 103(k) withdrawal order has been issued, those entitled to compensation are

"... all miners working during the shift when such order was issued who are idled by such order ..." and, in the event the order is not terminated prior to "... the next working shift, all miners on that shift who are idled by such order" The judge rejected Consol's argument and focused instead upon his conclusion that the complainants were "officially idled" by the withdrawal order. The judge stated that he was persuaded by decisions of our predecessor, the Interior Board of Mine Operations Appeals ("Board"), and two Commission judges holding in sum "that an MSHA withdrawal order is more extensive in scope than a voluntary withdrawal by the operator" and "regardless of the sequence of events or the method by which the miners were originally withdrawn" the withdrawal order may be the basis for compensation. 9 FMSHRC at 1802. ^{3/} Therefore, the judge awarded compensation to the complainants.

Both Consol and the UMWA filed petitions for discretionary review, both of which the Commission granted. Consol seeks review of the judge's conclusion that the complainants are entitled to compensation. The UMWA seeks review of the judge's failure to assess prejudgment interest on the compensation he awarded.

II.

The question of the claimants' entitlement to compensation centers around the meaning of the phrases "working during the shift when such order was issued" in the first sentence of section 111 of the Act and the phrase "the next working shift" in the second sentence. The importance of the phrases as prerequisites to section 111 first and second sentence compensation is apparent when they are viewed in the context of the Mine Act's overall scheme of compensation. Section 111 is remedial in nature and was intended by Congress to reduce the economic impact on miners idled by withdrawal orders. ^{4/} Miners idled as the result of specified withdrawal orders are entitled to compensation that varies in amount according to the type of withdrawal order issued and the conduct of the operator giving rise to the order. The first and second sentences of section 111 provide that, when an order is issued under sections 103, 104, or 107, miners working during that shift are entitled to full compensation for the balance of the shift during

^{3/} The judge cited UMWA, Dist. 31 v. Clinchfield Coal Co., 1 IBMA 33 (1971); UMWA, Loc. 1993 v. Consolidation Coal Co., 1 MSHC 1668 (1978)(ALJ Broderick); and UMWA, Loc. 2244 v. Consolidation Coal Co., 1 MSHC 1674 (1978)(ALJ Fauver) in which complainants were awarded compensation despite the fact that they were voluntarily withdrawn by the operator prior to the issuance of the withdrawal order upon which compensation was based.

^{4/} The word "idled" generally has been recognized in the statutory compensation context to include both a physical removal from the proscribed mine or area, and a prohibition from entering the proscribed mine or area. See UMWA, Dist. No. 31 v. Clinchfield Coal Co., 1 IBMA 33, 41 (1971); Roscoe Page v. Valley Camp Coal Co., 6 IBMA 1, 6-7 (1976); Loc. Un. 1670, Dist. 12, UMWA v. Peabody Coal Co., 1 FMSHRC 1785, 1790 (November 1979).

which the order is issued and, where an order has not been terminated prior to the next working shift, miners on that shift are entitled to up to four hours compensation. First and second sentence compensation is commonly referred to as "shift compensation" and entitlement to shift compensation exists even where there is no culpability on the part of the operator for the conditions leading to the issuance of the order. The third sentence of section 111 provides that, if an order is issued under sections 104 or 107 "for the failure of the operator to comply with any mandatory standard," miners are entitled to compensation for the actual time that they are idled for up to one week. Finally, the fourth sentence of section 111 provides that, if an operator fails to comply with a withdrawal order issued under sections 103, 104, or 107, miners who otherwise would have been withdrawn are entitled to full compensation at their regular rates of pay, in addition to pay received for work performed after issuance of the order, until such time as the order is complied with, vacated, or terminated. This graduated scheme of increasing compensation commensurate with increasingly serious operator conduct reflects the limited nature of compensation and represents a careful and deliberate balancing by Congress of the competing interests of miners and mine operators. See Rushton Mining Co. v. Morton, 520 F.2d 716, 721-722 (3rd Cir. 1975).

The facts of this case are not in dispute. We are called upon to decide whether, based on those facts, the claimants are entitled to shift compensation under the first two sentences of section 111. It is a fundamental rule of statutory construction that "the primary dispositive source of information is the wording of the statute itself." Association of Bituminous Contractors v. Andrus, 581 F.2d 853, 861 (D.C. Cir. 1978). If the meaning of that language is plain, the statute is to be enforced according to its terms unless it can be established that Congress clearly intended the words to have a different meaning. See, e.g., Caminetti v. United States, 242 U.S. 470, 485 (1916); Chevron, U.S.A. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 842-43 (1984); Matala v. Consolidation Coal Co., 647 F.2d 427, 429-30 (4th Cir. 1981). See also Western Fuels-Utah, Inc., 11 FMSHRC 278 (March 1989), appeal docketed, No. 89-1258 (D.C. Cir. April 20, 1989).

The meaning of the first two sentences of section 111 is clear. If a specified withdrawal order has been issued, "all miners working during the shift when such order was issued who are idled by such order" are entitled to compensation for the remainder of their shift. (Emphasis added). If the order is not terminated prior to "the next working shift", all miners on that shift who are idled by such order" are entitled to compensation for up to four hours. (Emphasis added.) The language is in nowise qualified. Thus, to be entitled to shift compensation, a miner must either be working during the shift when the specified order was issued and have been idled by the order or, if the order is not terminated prior to the next working shift, must be on the next working shift.

Here, the preconditions for entitlement to shift compensation were not met. At the time the order was issued, no miners were working nor had they been since the previous evening at which time Consol had voluntarily withdrawn all miners in order to guarantee their safety.

Therefore, none of those for whom compensation is claimed were "working during the shift when ... [the] order was issued." Further, Consol advised miners on the other two shifts that "the mine is idle until further notice." 9 FMSHRC at 1800. Therefore, none of those for whom compensation is claimed were on "the next working shift." (Emphasis added.) 5/ We therefore hold that the claimants, not having met these plainly stated prerequisites, were not eligible to be compensated.

Apart from the plain wording of the statute, there are also practical considerations. A statute should not be construed in a way that is foreign to common sense or its legislative purpose. Sutherland Statutory Construction §§ 45.09, 45.12 (4th ed. 1985). As discussed, the Mine Act involves a balancing of the interests of mine operators and miners, with safety being the preeminent concern. Section 2 of the Mine Act specifies at the outset that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource -- the miner," and section 2(e) adds that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in such mines." The Mine Act was not intended to remove from an operator the right to withdraw miners from a mine for safety reasons. While MSHA has the authority to order such withdrawal, it does not have that power exclusively.

Here, the record shows immediate action on the part of a mine operator to remove all afternoon shift employees from the mine because of rising gas levels -- clearly a threat to the health and safety of the miners. The wisdom of this action was attested by the action of MSHA inspectors who, after being summoned by the operator, issued a control order on the following morning, officially closing the mine and thereby confirming the evacuation order issued during the previous evening by the mine operator. Thus, apart from the fact that no miners were present in the mine when the MSHA closure order was issued, it is apparent that the safety first edict of section 2 was observed conscientiously by the mine operator here and that it would be a departure from the clear intent and purpose of the Mine Act to penalize the operator for voluntarily idling miners for their own protection. To impose such liability could conceivably encourage less conscientious operators in similar circumstances to continue production, at risk to the miners, until the MSHA inspectors arrived to issue a control order idling the miners. We do not believe that the Mine Act was intended to stifle such safety conscious actions by operators, as Consol took here. 6/

5/ It should be noted that the compensation claimed by the UMWA is not for the remainder of the afternoon shift of April 16 (those actually withdrawn and sent home by Consol) and those on the next shift due at the mine (the graveyard shift) but rather for the day shift of April 17 (during which time the inspector arrived and issued the order) and for the first four hours of the afternoon shift on that day.

6/ We also note that this case does not involve an attempt to avoid section 111 liability by withdrawing miners in anticipation of

The purpose and scope of shift compensation can also be determined by another important concern expressed by Congress in adopting section 111 in its specific terms: insulating the mine inspector from any repercussions that might arise from his withdrawing miners and temporarily depriving them of their livelihood. A key passage from the Report of the Senate Committee setting forth the rationale for the miners' compensation provision concludes by stating, "[t]his provision will also remove any possible inhibition of the inspector in the issuance of closure orders." Leg. Hist. at 635. This convinces us that Congress intended shift compensation rights to arise only when the physical removal of miners is effectuated by the inspector himself so that the inspector in carrying out his enforcement duties is not inhibited or distracted by workplace considerations wholly extraneous to the protection of miners. Here, however, the operator unilaterally and voluntarily withdrew its own miners and notified all shifts that the mine would be closed until further notice. Obviously, under such circumstances, no inhibitions would have attached to the inspector's enforcement actions taken twelve hours later when the mine was empty. The need to insulate the inspector from any purported miner animus had by then evaporated.

III.

The Commission has previously focused on the meaning of the term "idled" and has adopted the Board's interpretation (see n.4 supra) for Mine Act compensation purposes. It has held that a miner who has been previously withdrawn from a mine can still be "idled" by a subsequently issued withdrawal order in the sense that the miner is barred by the order from returning to work and that miners so idled may be entitled to compensation.

We do not disavow the Commission's earlier interpretation of "idled" and simply hold today that to be entitled to first and second sentence compensation, miners, in addition to being idled by an order of withdrawal, must also be working during the shift when the subject order was issued or, if the order is not terminated prior to the next working shift, be on that shift. Thus, in view of our disposition of this case by resort to the plain meaning of the first two sentences of section 111, the claimants' and the judge's reliance upon UMWA, Dist. 31 v. Clinchfield Coal Co., 1 IBMA 33 (1971) and two unreviewed administrative law judge decisions (fn. 3, supra) is misplaced. The decisional rationale in those cases centered on the fact that the withdrawal orders at issue "officially idled" the miners but did not take into consideration the meaning and effect of the phrases "working during the shift when such order was issued" and "on [the next working] shift," Indeed, in Clinchfield, first and second sentence shift compensation was not even at issue. (The miners had already been paid shift compensation by the operator. 1 IBMA at 36). Rather, the miners were actually seeking the equivalent of third sentence compensation (up to one week's

withdrawal action by MSHA. Compare UMWA, Loc. 1993 v. Consolidation Coal Co., 1 MSHC 1668 (October 1979)(ALJ). On the contrary, immediately after taking the prudent action of withdrawing the miners, Consol notified MSHA of the conditions it was experiencing at the mine.

pay) by attempting to establish that the subject withdrawal order was based upon a violation caused by the operator's unwarrantable failure to comply with the standards. 7/ As discussed above, third sentence compensation does not involve "working" or "working shift" prerequisites. Likewise, the Commission's decisions in Loc. U. 1889, Dist. 17 v. Westmoreland Coal Co., 8 FMSHRC 1317, 1327 (September 1986); Loc. U. 2274, Dist. 17, UMWA v. Clinchfield Coal Co., 8 FMSHRC 1310, 1313 (September 1986); Loc. U. 1609, Dist. 2, UMWA v. Greenwich Collieries, 8 FMSHRC 1302, 1306-07 (September 1986) are all markedly distinguishable because they involved claims for compensation under the third sentence of section 111.

For similar reasons, we find little guidance in the Commission's decision in Peabody Coal Co., 1 FMSHRC 1785 (November 1979), a case arising under the 1969 Coal Act. In that case, the Commission concluded that shift compensation was properly awarded where, as the result of being withdrawn due to a previously issued non-compensable order, no miners were working when the compensable withdrawal order was issued. The Commission "disagreed" with Peabody's contention that since no miners were actually working when the second order was issued no compensation was due because it found that the miners were idled within the meaning of the compensation provision at the time the order was issued. 1 FMSHRC at 1790. Factually, the Peabody case was very different. Miners were, in fact, working at the time the initial non-compensable withdrawal order was issued. The MSHA inspector was present when the hazardous condition was detected and he initiated the withdrawal action. Further, the Commission, like the Board, did not address the language "working during the shift" nor did it set forth its reasons for not giving that statutory phrase its plain meaning. The Commission appears to have based its decision solely upon the fact that the miners were idled by issuance of the second order.

In contrast, our decision addresses the existence of the phases "working during the shift when such order was issued" and "the next working shift" and ascribes them their intended place in the Act's compensation scheme. 8/ Recognition of the phrases as prerequisites for shift compensation eliminates the roulette wheel effect that results from basing shift compensation solely upon idlement, wherein shift compensation is awarded to those not actually working and is based upon the chance timing of the inspection and the order's issuance rather than upon the claimants' actual deprivation of work. Our decision, interpreting section 111 as written by Congress, corrects this capricious result. To hold otherwise in the face of the words of the first two sentences of section 111 would be to usurp the legislative

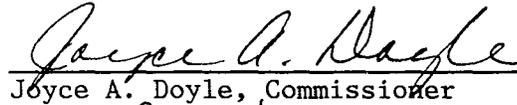
7/ On the ground that evidence of an operator's unwarrantable failure to comply was inadmissible in a compensation proceeding, the case was ultimately dismissed. ALJ Decision on Remand, Docket No. HOPE 70-120 (June 4, 1971).

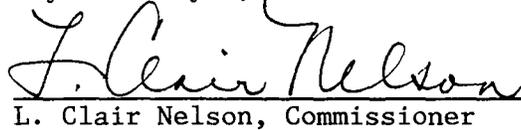
8/ This case does not require us to define all contours of the meaning of "working during the shift," and we leave such questions for future cases in which they are actually presented.

function.

Accordingly, the decision of the judge is reversed. 9/


Ford B. Ford, Chairman


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

9/ In view of our reversal of the judge's decision, we need not reach the issue raised by the UMWA of whether the judge erred in failing to award the complainants prejudgment interest. We note, however, that subsequent to the judge's decision the Commission held that interest may properly be included in a compensation award and that it should include interest accruing from the date that the compensable pay would normally have been paid until the date that the compensation is actually tendered. Loc. U. 2274, Dist. 28, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493, 1500-03 (November 1988).

Commissioners Backley and Lastowka, dissenting:

In its decision, the majority denies compensation under section 111 of the Mine Act to miners idled by a withdrawal order issued pursuant to section 103(k) of the Act on the basis that the mine operator, Consol, had itself withdrawn the miners from the mine prior to the MSHA inspector's issuance of the withdrawal order. Because we believe that Consol's withdrawal of the miners does not negate the effect of the withdrawal order issued pursuant to section 103(k), we would affirm the administrative law judge's decision awarding compensation. Accordingly, we dissent.

The facts in this case were stipulated by the parties. On April 16, 1986, Consol discovered that the level of explosive gas was rising behind the North seals at its Emery Mine. Out of concern for safety, Consol withdrew its miners from the Emery Mine at 7:00 p.m. and notified them that the mine was "idled until further notice because of the rising gas levels." 9 FMSHRC at 1801. Consol also notified miners scheduled to work the next two shifts that "the mine is idle until further notice." *Id.* Consol further notified MSHA and the UMWA that it had removed the miners from the mine. It is not disputed that Consol's decision to withdraw the miners in the face of the hazard was commendable mining practice intended to eliminate the potential of death or serious injury in the event the gas ignited.

After conducting an investigation, the MSHA inspector issued a withdrawal order under section 103(k) closing the mine based on the samples taken by Consol of the air behind the seals. ^{1/} The withdrawal order, issued at 7:14 a.m. on April 17, stated that the "mine has experienced a possible fire," and referenced the fact that the miners had been removed from the mine by Consol to insure their safety. 9 FMSHRC at 1801. The withdrawal order further prohibited any person from entering the mine until the order was modified by MSHA. *Id.* Thus, the effect of the order was to deny the miners entry into the mine until such time as MSHA believed that the danger had been eliminated.

There is no doubt therefore that the miners were prevented from working because of hazardous gas levels and that the withdrawal order was issued by the MSHA inspector to keep miners away from this danger. The majority nevertheless denies compensation because the mine operator had removed the miners from the hazard before the MSHA inspector arrived to issue the withdrawal order officially closing the mine. Our colleagues base their conclusion on the fact that, due to Consol's previous withdrawal of its miners, there were no miners "working during

^{1/} Section 103(k), 30 U.S.C. § 813(k), provides:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine....

the shift" at the time the withdrawal order was issued, and there was no "next working shift" after the order was issued because Consol had already advised the miners to stay home until further notice. This reasoning, however, is contrary to well-established precedent correctly relied upon by the judge in awarding compensation.

It has long been recognized that a withdrawal order issued by a federal mine inspector: (1) officially closes a mine for compensation purposes notwithstanding a voluntary withdrawal of miners by the operator; (2) prohibits miners from reentering the mine until such time as an MSHA inspector determines that the mine is safe; and (3) officially idles the miners for the purposes of the compensation provision of the Mine Act. As early as 1971, the Department of Interior's Board of Mine Operations Appeals ("Board") held that an order of withdrawal issued by a federal inspector not only removes miners from a mine, but also empowers the Secretary to prohibit reentry until the hazardous conditions have been eliminated. UMWA, Dist. 31 v. Clinchfield Coal Co., 1 IBMA 33 (1971). In Clinchfield, an explosion had occurred and the operator had immediately withdrawn all personnel from the mine. Not until the following shift did a federal inspector arrive to issue a withdrawal order. 1 IBMA at 35. In rejecting the operator's argument that the miners had not been "idled" by the inspector's order in light of their previous withdrawal from the mine by the operator, the Board explained:

...an Order of Withdrawal is more extensive than the mere withdrawal of miners -- it also confers jurisdiction ... to prohibit reentry until an authorized representative of the Secretary determines that '... imminent danger no longer exists' ... or '... that the violation has been abated'.... Thus the purpose of a withdrawal order is not only to remove the miners but also to insure that they remain withdrawn until the conditions or dangers have been eliminated. Regardless of the sequence of events, or the method by which the miners were originally withdrawn, a mine ... is officially closed upon the issuance of [a withdrawal order], and the miners are officially idled by such order.

1 IBMA at 41 (emphasis added)(citations omitted). Accord, Roscoe Page v. Valley Camp Coal Co., 6 IBMA 1 (1976).

This Commission has also previously considered the specific issue raised in this case and adopted the rationale of the Clinchfield decision. In Loc. Un. 1670, Dist. 12, UMWA v. Peabody Coal Company, 1 FMSHRC 1785 (November 1979), a mine fire was discovered by the operator and a federal inspector, who was in the mine at the time, issued a withdrawal order pursuant to section 103 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977). Section 110 of the Coal Act did not provide for the compensation of miners withdrawn pursuant to section 103 of that Act, but it did provide compensation to miners "working during the shift" or "the next working

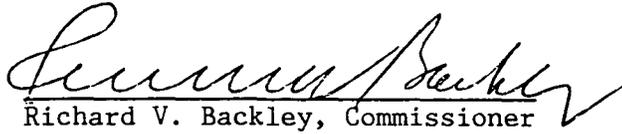
shift" when an imminent danger withdrawal order was issued. After conducting an investigation, the inspector issued such an imminent danger order. Because of their previous withdrawal pursuant to the section 103 withdrawal order, no miners were working "during the shift" when the imminent danger withdrawal order was issued or on "the next working shift." The miners who had been scheduled to work those shifts filed for compensation under section 110 of the Coal Act.

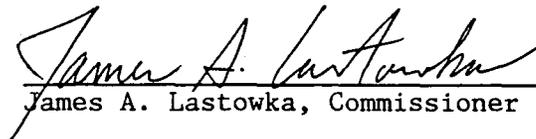
The Commission expressly rejected the operator's argument that the shift compensation provisions of section 110 of the Coal Act limited an award of compensation to miners who are actually "'working during the shift' when a withdrawal order is issued." 1 FMSHRC at 1790. The Commission held that the operator was required to pay compensation under the first two sentences of section 110 of the Coal Act to the "miners normally scheduled to work" during the shift that was idled by the withdrawal order despite the fact that these miners had been previously withdrawn and were not working during the shift when such order was issued. 1 FMSHRC 1790. The Commission further held that compensation was also due the miners normally scheduled to work the "next working shift" even though "the miners were notified several days beforehand not to report for work." 1 FMSHRC at 1791. Thus, the issue raised by Consol in the present case was, in fact, squarely addressed by the Commission in Peabody and the construction of section 111 now adopted by the majority was expressly rejected. Despite their insistence that Peabody offers "little guidance" in this case (slip op. at 7), the holding is squarely applicable and the majority here effectively overrules Peabody.

In Loc. Un. 1889, Dist. 17, UMWA v. Westmoreland Coal Co., 8 FMSHRC 1317, 1323 (September 1986), the Commission noted that "section 111 is remedial in nature and was not intended by Congress to be interpreted and applied narrowly." The majority here ignores this admonition and instead narrowly interprets the phrases "working during the shift" and "next working shift." Miners who are scheduled to work a particular shift, but who are prevented from working as a result of a withdrawal order, are no less idled than miners who are working in a mine at the time a withdrawal order is issued. In both instances miners are prevented from working by a withdrawal order issued by a federal inspector as a result of hazardous conditions existing in the mine. In both these circumstances, the provisions of section 111 awarding limited compensation to idled miners were intended to be triggered. Accord, Loc. Un. 2274, Dist. 28, UMWA v. Clinchfield Coal, 10 FMSHRC 1493 (November 1988), appeal docketed, No. 88-1873 (D.C. Cir., December 16, 1988); Loc. Un. 1609, Dist. 2, UMWA v. Greenwich Collieries, 8 FMSHRC 1302 (November 1988).

With respect to the issue of prejudgment interest on the award of compensation, the Commission has held that prejudgment interest may properly be awarded in compensation cases and we would remand to the judge for consideration of this issue. Loc. Un. 2274 v. Clinchfield, supra, 10 FMSHRC at 1500-03.

In sum, we conclude that the prerequisites for shift compensation were met in this case because the miners were prevented from working their shift as a result of the closure of the mine by an order of withdrawal issued under section 103 of the Mine Act. We would affirm the administrative law judge's award of compensation and remand for determination of the interest due.


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 25, 1989

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket Nos. WEST 86-43-RM
 : WEST 86-45-RM
FMC WYOMING CORPORATION : WEST 86-110-M

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

DECISION

BY: Ford, Chairman; Backley, and Lastowka, Commissioners

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)(the "Mine Act"), is whether FMC-Wyoming Corporation's violation of 30 C.F.R. § 57.5002 was significant and substantial in nature and caused by its unwarrantable failure to comply with the mandatory safety standard. 1/ Also at issue is whether FMC violated 30 C.F.R. § 57.18002 by failing to designate a "competent person" to examine a working place at least once each shift for conditions which may adversely affect safety or health, or by failing to keep a record of such examinations. 2/ Commission Administrative Law

1/ 30 C.F.R. 57.5002 provides:

Dust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures.

2/ 30 C.F.R. § 57.18002 provides in part:

(a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such

Judge August F. Cetti answered these questions in the negative. 10 FMSHRC 822 (June 1988)(ALJ). For the reasons explained below, we vacate that portion of the judge's decision concerning the significant and substantial nature of the violation of section 57.5002 and remand the matter to the judge for further consideration. In addition, we reverse the judge's unwarrantable failure finding and his conclusion that FMC did not violate section 57.18002.

The material facts are not in controversy. FMC operates a trona mine located near Green River, Sweetwater County, Wyoming. At an adjacent plant FMC processes trona into various products. The "Sesqui" powerhouse, which is part of the processing plant, houses three turbines that generate electricity for the plant. FMC overhauls the turbines every five years. The No. 3 turbine was scheduled for overhaul in November 1985, and on November 4, 1985 a work crew began to dismantle the turbine. It took three days to remove insulation from the turbine, and the debris lay scattered about the immediate area and on the floors of the powerhouse for approximately two weeks while the overhaul was completed.

To overhaul the turbine, the work crew first removed the turbine cover. Underneath the cover was blanket-type insulation containing asbestos. This insulation was removed in pieces and the blankets were dropped over a handrail near the turbine for temporary storage. Next, the crew disassembled the halves of the turbine. In order to gain access to the bolts holding the halves together, the workers removed two other types of insulation containing asbestos. The first layer of insulation was mortar-like and was imbedded in chicken wire. It had to be chipped away and the chicken wire had to be cut. As it was removed, pieces of the insulation fell down either side of the turbine to the ground floor of the powerhouse.

Underneath this mortar-like insulation were "bricks" of additional insulation held in place by baling wire. The bricks were soft and "chalky." As the baling wire was cut, the bricks fell to the ground floor of the powerhouse.

When the mortar-like insulation was being removed by the workers, dust was created as the workers used hammers and chisels to break up and loosen the material. Tr. 168, 214-216, 232, 243-44. Further, when pieces of the insulation fell to the floor more dust was created. In addition, when members of the work crew walked through the debris, dust was stirred up, and when the powerhouse doors were opened for ventilation purposes, the wind created a literal "dust storm." Tr. 174, 198, 233, 241. 10 FMSHRC at 824-25. Members of the work crew asked their foreman, John Wilfong, if the insulation they were handling contained asbestos and whether it was safe to handle. Tr. 80, 220-235,

conditions.

(b) A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.

245-246. Wilfong responded that "he didn't believe there was," (Tr. 80) that there was "not enough to worry about," (Tr. 220) and that "there was no problem, there was no asbestos in it." Tr. 177.

Previously FMC had analyzed the insulation. In July 1985, FMC had determined that the blanket wrap insulation contained 90 percent asbestos and the non-blanket wrap insulation contained 35 percent asbestos. Pet. Exh. M-5, Tr. 278-283. The results of this analysis were recorded in a memorandum dated July 1, 1985. The memorandum was authored by FMC's industrial hygienist, Carl Watson, and was circulated to FMC's supervisors, including Mike Hruska, who supervised the work crew's foreman, John Wilfong. Pet. Exh. M-5. In an earlier memorandum dated, June 11, 1985, Watson had reported similar results from analysis of other samples of the insulation.

FMC did not conduct dust surveys at any time during the overhaul of the turbine. 10 FMSHRC at 824. Nor was an FMC industrial hygienist on hand to observe the work and to recommend protective equipment as required by FMC's policy. 3/ On November 18, 1985, FMC's industrial hygienist, Carl Watson, visited the work area. Watson came to the powerhouse to check on the work of another crew removing asbestos-containing insulation from a different area of the powerhouse. When Watson noticed the blanket insulation draped over the handrail and the other insulation lying on the floor, he gave his opinion to the crew foreman that the insulation could contain asbestos and that it should be properly bagged and protective measures taken.

On November 19, 1985, an inspector of the Secretary of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection of the powerhouse. The inspector observed a clean-up crew at the turbine wearing protective clothing and masks. In addition, he observed Watson collecting samples of the insulation. The inspector collected samples of the bagged material. Subsequent analysis of the inspector's samples established that the insulation contained asbestos. 10 FMSHRC at 825.

3/ An FMC memorandum dated May 17, 1985, states the following regarding degrees of exposure to asbestos and commensurate protective measures.

(b) Moderate exposure. Examples would be grinding asbestos impregnated gaskets off pipe flanges, removing asbestos containing insulation from boilers, pipes and turbines, removing or installing asbestos containing packing glands, replacing or repairing brakes or brake drums or lining, and drilling or cutting transite pipe. Anytime these jobs are being performed, the Industrial Hygienist should be called to observe the job and to recommend protective equipment.

Pet. Exh. 4 (emphasis added).

On November 23, 1985, the inspector took two enforcement actions that are contested here. The inspector issued to FMC a citation pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), stating that FMC's failure to make surveys to determine if the workers were over-exposed to asbestos violated section 57.5002. This citation included the inspector's findings, made pursuant to section 104(d), that the violation was of a significant and substantial nature and resulted from unwarrantable failure by the operator.

In addition, the inspector issued to FMC an order of withdrawal pursuant to section 104(d)(1) of the Act alleging that FMC violated section 57.18002. See n.2, supra. The order stated that FMC management failed to notify the workmen that they would be working with asbestos and that there was no record of examinations of the work area. Again, the inspector made associated significant and substantial and unwarrantable failure findings.

FMC contested the validity of the citation and order, the special findings associated with the section 104(d)(1) citation, and the civil penalties proposed by the Secretary for the alleged violations. FMC argued that it had not violated section 57.5002, that the standard's requirement to conduct exposure surveys "as frequently as necessary to determine the adequacy of control measures" should be read in conjunction with the regulatory exposure limits for contaminants. ^{4/} FMC asserted that because the Secretary did not establish that the exposure limit for asbestos dust had been exceeded during the asbestos removal operation, the Secretary had not established the violation of section 57.5002.

FMC also argued that to prove a violation of section 57.18002 the Secretary must establish either that no competent person inspected the working place or that no record of the examination was made. FMC asserted that the Secretary had proven neither.

The judge concluded that FMC had violated section 57.5002. The judge, noting that without dust surveys having been performed while the work was in progress there was no way to determine whether an employee in the work area actually was overexposed to contaminants, rejected FMC's argument that proof of a violation is conditioned on establishing an exposure to airborne contaminants in excess of the regulatory limits. 10 FMSHRC at 826-27. The judge found that a reasonably prudent person would have conducted dust surveys to determine what control measures would be adequate to prevent the possible overexposure of the workers to asbestos during the three days the maintenance crew removed the insulation from the turbine. 10 FMSHRC at 826. The judge further found, without explanation, that the violation was not of a significant and substantial nature.

Regarding the inspector's unwarrantable failure finding, the judge concluded that because FMC had a policy at the time the citations were issued regarding asbestos identification and cleanup and because workers

^{4/} See 30 C.F.R. § 57.5001.

in another part of the plant had taken protective measures while removing asbestos-containing insulation, FMC was not indifferent to the hazards of airborne asbestos and its failure to comply with section 57.5002 was due to ordinary negligence. 10 FMSHRC at 828. The judge therefore modified the section 104(d)(1) citation to a citation issued pursuant to section 104(a) of the Act, 39 U.S.C. § 814(a), and assessed a civil penalty of \$600 for the violation.

Finally, the judge found that FMC had not violated section 57.18002 because the Secretary failed to prove that there was no examination of the working place by a competent person or that no records of the examinations were made. 10 FMSHRC at 830. The judge therefore vacated the section 104(d)(1) withdrawal order in which the violation was alleged.

On review, the Secretary argues that the judge erred in three respects: (1) in concluding that FMC's violation of section 57.5002 was not of a significant and substantial nature; (2) in concluding that the violation was not due to FMC's unwarrantable failure to comply with the standard; and (3) in concluding that FMC did not violate section 57.18002. We consider each of these challenges in turn.

I.

A violation is properly designated as being of a significant and substantial nature if, based on 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, 3 FMSHRC 822, 825 (April 1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). In Consolidation Coal Co., 8 FMSHRC 890, 897-98 (June 1982), aff'd, 824 F.2d 1071 (D.C. Cir. 1987), the Commission explained that adapting the National Gypsum/Mathies test to a violation of a mandatory health standard results in the following formulation of the elements necessary to support a significant and substantial finding:

(1) The underlying violation of a mandatory health standard; (2) a discrete health hazard -- a measure of danger to health contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature.

The administrative law judge cited the general applicability of this test, but provided no justification for his conclusion that the violation was not of a significant and substantial nature. Compare FMC Wyoming Corp., 8 FMSHRC 264, 275-276 (February 1986)(ALJ Lasher) (applying all elements of significant and substantial test to mandatory health standard involving asbestos exposure).

Commission Procedural Rule 65, 29 C.F.R. § 2700.65, requires that a judge's decision include findings of fact, conclusions of law, and

supporting reasons. 5/ Compliance with these requirements is essential to the fulfillment of our statutorily mandated review function. Without some explanation and justification for conclusions reached by a judge, we cannot effectively perform our function. See Youghioghney & Ohio Coal Co., 7 FMSHRC 1335 (September 1985); The Anaconda Co., 3 FMSHRC 299 (February 1981). In view of the total lack of explanation in support of the judge's conclusion that the violation of 30 C.F.R. § 57.5002 was not significant and substantial, we vacate the judge's decision with regard to his significant and substantial finding and remand the matter for the entry of a decision that accords with Commission Procedural Rule 65. In so doing, we express no opinion regarding the merits of the significant and substantial issue.

II.

"Unwarrantable failure" means "aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act." Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghioghney & Ohio Coal Co., 9 FMSHRC 2007, 2015 (December 1987). In concluding that FMC did not unwarrantably fail to comply with section 57.5002, the judge found that FMC was not indifferent to the health hazards associated with airborne asbestos in that it had in place at the time of issuance of the citation a policy regarding asbestos identification and cleanup and that in another part of the powerplant a different work crew removing asbestos-containing insulation had protective clothing and equipment. 10 FMSHRC at 828.

These facts are overwhelmed by other evidence of record establishing FMC's aggravated conduct regarding its failure to provide dust surveys during the overhaul of the turbine. FMC's written asbestos policy expressly identified the asbestos-containing nature of all three types of insulation in the turbine being overhauled, as well as the need to take steps to prevent workers' exposure to asbestos. Pet. Exhs. 4, 5, 6. FMC's policy specifically called for the presence of an industrial hygienist and protective equipment when asbestos-containing insulation was removed from a turbine. Pet. Exh. 4. During the removal of the insulation, however, a hygienist was not present and the workers were afforded no protection. Watson, FMC's industrial hygienist, apparently did not become aware that insulation was being removed from the turbine until he inadvertently observed the work on November 18, 14 days after the crew had begun dismantling the turbine.

Further, the maintenance supervisor, Mike Hruska, stated that he

5/ Procedural Rule 65 states in part:

(a) Form and content of the Judge's decision.

The judge shall make a decision that constitutes his final disposition of the proceedings. The decision shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record....

had been told by the FMC maintenance superintendent to suspect that all insulation at the plant contained asbestos. Tr. 317; see also Pet. Exh. M-7 ("when in doubt, assume a material to be, or contain asbestos"). Yet, Hruska ordered no surveys to be taken in the work area. In addition, and importantly, despite the recognition by FMC of the potential asbestos hazard associated with the removal of the insulation from the turbine, the supervisor of the work crew, Wilfong, when asked by a member of the crew if there was asbestos in the insulation, without any apparent further inquiry into the legitimate and serious concerns raised by the work crew, erroneously responded that asbestos was not present. Tr. 220, 235, 246.

In light of the egregious nature of this evidence, we find no substantial support for the judge's contrary conclusion that the violation was not the result of FMC's unwarrantable failure to comply. In fact, that FMC had a policy in place regarding asbestos identification and cleanup and that another crew in a different part of the plant was protected while engaging in similar work, in our view heightens, rather than excuses, FMC's lack of care with respect to this violation. We therefore conclude that FMC exhibited aggravated conduct exceeding more than ordinary negligence regarding the violation and the judge's finding of no unwarrantable failure is accordingly reversed.

III.

Finally, the Secretary asserts that the judge erred in concluding that she did not prove that FMC had violated section 57.18002. The pertinent requirements of 30 C.F.R. § 57.18002 are three-fold: (1) daily workplace examinations are mandated for the purpose of identifying workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record of the examinations must be kept by the operator. The judge concluded that the Secretary failed to prove that there was no examination of the working place by a competent person or that no records of the examinations were made. The judge noted that FMC had introduced into evidence an MSHA program directive clarifying the record keeping requirements of the standard and requiring that the record of examinations include: (a) the date and shift; (b) the person(s) conducting the examination; and (c) the working place examined. The directive states that "citations of violations of this standard are to be issued only where there has been a failure to conduct an examination of a work place or a failure to record that an examination was done." 10 FMSHRC at 830. The judge further noted that FMC also introduced into evidence a log of the examinations of the powerhouse for safety or health hazards during the period of the turbine's overhaul and that the log complied with the directive by showing the date and shift on which the examinations were conducted and the names of the persons conducting the examinations and the work places examined. Id.

The Secretary contends, however, that by focusing on the directive and the record of the examinations, the judge ignored the question of whether the person conducting the examination was competent, and we agree. According to the Secretary, the program directive concerns the requirements for the recording of the examinations required by section

57.18002; it does not concern the competence of the person designated to conduct the examinations. We agree.

30 C.F.R. § 57.2 defines "competent person" as "a person having the abilities and experience that fully qualify him to perform the duty to which he is assigned." As with many safety and health standards, sections 57.18002(a) and 57.2 are drafted in general terms in order to be broadly adaptable to the varying circumstances of a mine. Kerr-McGee Corp., 3 FMSHRC 2496,97 (November 1981). We conclude that the term "competent person" within the meaning of sections 57.18002(a) and 57.2 must contemplate a person capable of recognizing hazards that are known by the operator to be present in a work area or the presence of which is predictable in the view of a reasonably prudent person familiar with the mining industry. See e.g., Ozark-Mahoning Co., 8 FMSHRC 190, 191 (February 1986); U.S. Steel Corp., 6 FMSHRC 1908, 1910 (August 1984); Compare, 29 C.F.R. § 1926.32(f). The question is whether FMC designated such a person to examine the turbine workplace. We find the evidence overwhelming in the record that it did not.

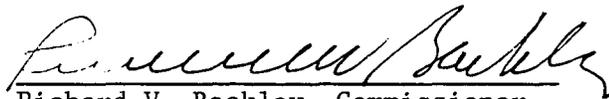
The hazard posed by the turbine's asbestos-containing insulation was well known to FMC. FMC's policy stated as much. Yet, Wilbur Hastings, the only FMC employee designated as an examiner under this standard who testified, stated that he had not seen FMC's memorandum regarding the presence of asbestos in turbine insulation, that he was unaware of the presence of asbestos-containing material in the turbine, and that he had no training in asbestos recognition. Tr. 520-23. Thus, although FMC knew that asbestos was present in the turbine insulation it nonetheless designated as a shift examiner a person to whom this knowledge had not been communicated, nor had Hastings been trained to suspect that asbestos reasonably might be present. Without this knowledge, Hastings cannot be said to have had the ability and experience fully qualifying him to examine the work place around the turbine for conditions which might adversely affect safety and health.

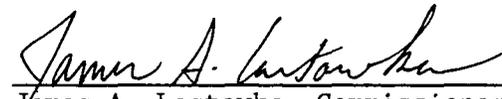
In sum, we conclude that Hastings was not a "competent person" within the meaning of section 57.18002(a), that substantial evidence does not support the judge's conclusion that FMC complied with the regulation, and that FMC, by assigning Hastings to examine the workplace, violated the regulation.

IV.

Accordingly, we vacate the judge's decision regarding the finding that the violation of section 57.5002 did not significantly and substantially contribute to a mine health hazard and we remand the matter for reconsideration and entry of new findings, conclusions and the reasons for them. In addition, we reverse the judge's conclusion that the violation of section 57.5002 was not the result of FMC's unwarrantable failure to comply and remand for reassessment of the penalty. Finally, we reverse the judge's conclusion that FMC did not violate section 57.18002 and we remand to the judge for the assessment of an appropriate civil penalty. 8/


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


James A. Lastowka, Commissioner

8/ Commissioner L. Clair Nelson did not participate in the consideration of this matter.

Commissioner Doyle, concurring in part and dissenting in part:

In its decision, the majority vacates the judge's finding that the violation of section 57.5002 did not significantly and substantially contribute to a mine health hazard and remands the matter for further analysis by the judge. I concur with that part of the decision.

I must respectfully dissent, however, from the majority's finding that FMC unwarrantably failed to comply with section 57.5002 because I find substantial evidence in the record to support the judge's conclusion to the contrary. In addition, I would affirm the judge's determination that FMC did not violate section 57.18002.

In addressing whether FMC's conduct amounted to an unwarrantable failure to comply with section 57.5002's requirement that dust surveys be conducted as frequently as necessary in order to determine the adequacy of control measures, the judge took notice of and applied the Commission's explication of that term in Emery Mining Corp., 9 FMSHRC 1997 (December 1987). The judge correctly concluded that indifference or aggravated conduct beyond ordinary negligence must be present for a finding of unwarrantable failure. Emery, supra, 9 FMSHRC at 2003-2004.

The judge, in rejecting a finding that unwarrantable failure was involved, cited several considerations that led him to conclude that FMC was not indifferent to the hazard of asbestos at its plant. Among these considerations were the fact that FMC had shown an awareness and attention to the hazard and had undertaken a program for its identification and cleanup. FMC had analyzed various samples to determine where asbestos might exist, including samples of the insulation on the turbine involved in this case. The judge noted that FMC's industrial hygienist had distributed to senior management a memorandum identifying the plant's asbestos hazards. The judge also cited the absence of knowledge on the maintenance foreman's part of an asbestos hazard with respect to the turbine and the lack of evidence that, had the industrial hygienist been aware of the work being done on the turbine, the policy would not have been implemented. 10 FMSHRC at 828. The judge weighed the evidence presented and articulated his reasons for finding that FMC's conduct did not reach the level of unwarrantable failure.

The Commission has previously acknowledged that a judge's findings are not to be lightly overturned and that reversal of those findings requires a conclusion that there is either no evidence or dubious evidence to support the challenged findings. Secretary v. Consolidation Coal Company, 11 FMSHRC 966 at 974, (June 1989). In my view, the evidence cited above and relied upon by the judge constitutes "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion" and, accordingly, I would affirm the judge's finding that FMC did not

unwarrantably fail to comply with the standard, See Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); Chaney Creek Coal Corp. v. FMSHRC, 866 F.2d 1424, 1431 (D.C. Cir. 1989). 1/

The majority also concludes that the judge erred in finding that FMC did not violate section 57.18002 and its requirement that a competent person examine each working place at least once each shift. The judge based his determination on an MSHA Program Directive dated November 20, 1979 (the "Program Directive"), that addresses the recordkeeping requirements of the standard. The Program Directive provides that citations were to be issued under the standard only where there was a failure to conduct an examination or a failure to record its occurrence. Significantly, the directive provides that violations of the standard were not to be cited where a hazard is already covered by another standard, thus avoiding a situation wherein an operator is cited for the violation of a safety standard and also cited for violation of section 57.18002, based on the examiner's failure to identify the violative condition. The judge found that the Secretary's Program Directive correctly interpreted the standard and that there was no failure either to make an examination or to record the fact thereof. Thus, he concluded that there was no violation of section 57.18002. 10 FMSHRC at 830. Because of that conclusion, the judge did not reach the question of, and made no findings of fact as to, the competence of any of those charged by FMC with making the shift examinations in question.

The Secretary's Petition for Discretionary Review did not challenge the judge's determination that the Program Directive represents a correct interpretation of the standard. Neither did it challenge his conclusion, based on that interpretation, that there is no violation of section 57.18002 where an inspection is performed and the hazard in issue is addressed by another standard, as it was in this case by section 57.5002. Absent a challenge by the Secretary to these conclusions reached by the judge, I believe that the judge's decision, based on those conclusions, must stand. 2/

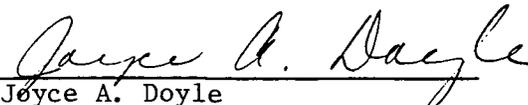
1/ The majority uses FMC's own company policy addressing the handling of asbestos hazards as a basis for heightening the degree of care FMC owed, thus suggesting that operators are less accountable if they do nothing with regard to asbestos than if they attempt to identify its presence and deal with it. I believe such an approach discourages, rather than encourages, responsible conduct.

2/ The Commission did not order review of this determination, sua sponte, pursuant to section 113(d) of the Mine Act, 30 U.S.C. 823 (d) (1982).

The Secretary's Petition for Discretionary Review argues only that FMC failed to designate a competent person to examine the work place. The majority addresses the Secretary's argument and makes its own factual determination that a competent person was not assigned. This finding was based, in part, on the fact that Wilbur Hastings testified that he had no training in asbestos recognition and it was made despite the testimony of the Secretary's own expert witness that there is no such training and that, in many instances, asbestos cannot be identified by visual observation alone. Tr. 159, 160, 555, 556.

When the dismantling of the turbine was begun, FMC's awareness of asbestos in the plant should have triggered testing by means of a dust survey pursuant to section 57.5002. It did not, and FMC was properly cited for violating section 57.5002. The majority concludes, however, that since "FMC knew that asbestos was present in the turbine insulation," it should have designated only examiners who were "trained to suspect that asbestos reasonably might be present." (slip op. at 8) (emphasis added). The majority's conclusion would suggest that operators could, depending on the type and conditions of their mine, be required to train pre-shift and on-shift examiners to recognize everything from quartz dust to radon daughters. The Mine Act and the regulations issued pursuant to it recognize that some hazards, such as airborne contaminants, are not susceptible to accurate visual identification. Rather than rely on examiners to recognize these hazards, specific technical testings requirements are set forth. I am of the opinion that the inability of an examiner to visually recognize those types of hazards does not necessarily make the examiner incompetent within the meaning of section 57.18002.

For the reasons set forth above, I would affirm the judge's conclusions that FMC did not unwarrantably fail to comply with section 57.5002 and that it did not violate section 57.18002.


Joyce A. Doyle
Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 27, 1989

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. KENT 89-115
 :
FLAGET FUELS, INCORPORATED :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka 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 31, 1989, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding Flaget Fuels, Inc. ("Flaget") in default for failure to answer the Secretary of Labor's Proposal for Assessment of Civil Penalty and the judge's Order to Show Cause. The judge assessed a civil penalty of \$500, the amount proposed in the Secretary's penalty proposal. On September 13, 1989, Flaget filed with the Commission a Motion to Set Aside Default Judgment asserting that on June 19, 1989, it had paid the Secretary's proposed penalty of \$500. For the reasons set forth below, we deem this motion to constitute a timely petition for discretionary review, which we grant. We vacate the judge's default order and remand for further proceedings.

In November 1988, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Flaget ten citations pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging violations of various surface coal mining mandatory safety standards. In February 1989, MSHA notified Flaget that it proposed civil penalties of \$500 for the alleged violations. In March 1989, in response to this notification, Flaget filed a "Blue Card" request for a hearing. See 29 C.F.R. §§ 2700.25 & .26. On April 10, 1989, the Secretary filed with the Commission a Proposed Assessment of Civil Penalty, proposing assessment of a \$500 penalty and certifying that a copy of the proposal had been mailed to the operator.

Flaget did not file an answer to the Secretary's penalty proposal within 30 days, as it was required to do in order to maintain its contest. See 29 C.F.R. § 2700.28. However, on or about June 16, 1989, Flaget tendered to the Secretary payment in full of the proposed penalty of \$500. On July 5, 1989, the Secretary submitted to the Commission a Motion for Default Judgment. Although the motion states that Flaget had tendered to the Secretary payment of the proposed \$500 penalty (Motion at 2), it nonetheless requests entry of a default judgment on the grounds that no settlement agreement had been entered into by the parties. On July 21, 1989, the judge issued an Order to Show Cause directing Flaget to file its answer to the Secretary's penalty proposal or show cause why it should not be found in default. No response to the show cause order was filed with the Commission.

On August 31, 1989, the judge entered an order finding Flaget in default and ordering it to pay the penalty of \$500 immediately. Neither the judge's show cause order nor his default order acknowledges Flaget's full payment of the proposed penalty. On September 13, 1989, Flaget filed with the Commission its Motion to Set Aside Default Judgment, asserting its June 16, 1989, payment of the penalty at issue.

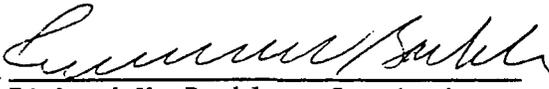
The judge's jurisdiction in this matter terminated when his default order was issued on August 31, 1989. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Here, Flaget's September 13 motion seeks vacation of, and relief from, the judge's default order and we will treat it as a timely-filed petition for discretionary review. See, e.g., L&L Gravel, 11 FMSHRC 803, 803-04 (May 1989).

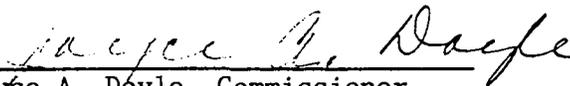
It appears both from Flaget's present motion and from the Secretary's default motion that Flaget's payment of the penalty was tendered to MSHA prior to issuance of the judge's show cause order. */ Under these circumstances, we vacate the judge's default order directing Flaget to pay the \$500 penalty and remand for appropriate proceedings. Cf. L&L Gravel, supra.

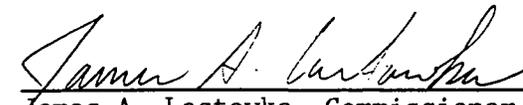
*/ Under circumstances similar to those presented in this case, MSHA informed the Commission of an apparent post-"Blue Card" payment of a proposed penalty and the Commission judge entered a dismissal order. See Coal Junction Coal Co., 11 FMSHRC 502, 503 (April 1989).

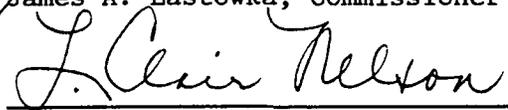
Accordingly, upon consideration of Flaget's motion, we grant its petition for discretionary review and vacate the default order. This matter is remanded to the judge for further appropriate proceedings.


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, 1989

ROBERT SIMPSON :
 :
 v. : Docket No. KENT 83-155-D
 :
 KENTA ENERGY, INC. :
 :
 and :
 :
 ROY DAN JACKSON :

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act" or "Act"). Following remand from the United States Court of Appeals for the District of Columbia Circuit, the Commission issued its final decision on May 11, 1989, concluding, in relevant part, that respondents Kenta Energy, Inc., and Roy Dan Jackson had discriminatorily discharged and refused to rehire complainant Robert Simpson. 11 FMSHRC 770 (May 1989). No party filed a petition for review of this decision in the United States courts of appeals. 30 U.S.C. § 816(a)(1). On June 16, 1989, however, counsel for Simpson filed with the Commission a Motion to Remand, seeking remand to the Commission administrative law judge who had presided at the hearing in this matter for purposes of determining additional amounts of back pay and attorney's fees that counsel asserts are owing to Simpson. No response to this motion has been filed by respondents. For the following reasons, this proceeding is remanded to Commission Administrative Law Judge James A. Broderick.

The relevant factual and procedural background of this matter has been set forth in our prior decisions and need not be repeated in detail here. Briefly, in his original decision on the merits and in a supplemental decision with respect to remedy, Judge Broderick concluded that Simpson had been discriminated against in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), and ordered Simpson reinstated with back pay, interest, attorney's fees, and litigation expenses. 6 FMSHRC 1454 (June 1984)(ALJ); 7 FMSHRC 272 (February

1985)(ALJ). Specifically, in his remedial decision, the judge awarded Simpson \$36,557.29 in back pay and interest through December 17, 1984, and, in addition, back wages at the rate of \$425.60 per week with interest, less interim earnings, from December 17, 1984, until Simpson's reinstatement. 7 FMSHRC at 278-80, 286. Interest was to be calculated according to the principles announced in Secretary on behalf of Bailey v. Arkansas Carbona Co., 5 FMSHRC 2042 (December 1983). 7 FMSHRC at 278. The judge further awarded Simpson \$54,462.50 in attorney's fees and \$2,616.72 in litigation expenses. 7 FMSHRC at 280-86.

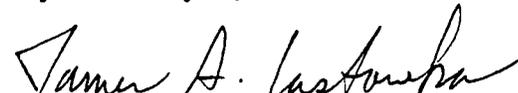
In his present motion, counsel for Simpson alleges that Simpson was never offered reinstatement by respondents and "has not yet received any of the relief due him." Motion at 5. Counsel requests proceedings before Judge Broderick for purposes of determining (1) the additional amounts of back pay and interest owed Simpson for the period from December 17, 1984, to the present, based on the formula in the judge's remedial decision, and (2) the amount of attorney's fees due for counsel's representation of Simpson during the review proceedings before the Commission as well as during the appellate proceedings before the United States Court of Appeals for the District of Columbia Circuit.

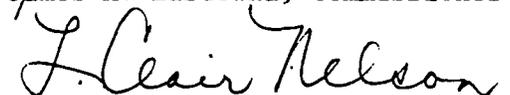
Upon consideration of the motion, we reopen this case for the limited purpose of disposing of the present motion. This matter is remanded to Judge Broderick for resolution of whether the attorney's fees being sought for administrative and court appeal proceedings are properly awardable under the Mine Act and, if so, for all appropriate findings of fact relevant to determination of the amount to be awarded. With respect to back pay and interest, in general, both are normally deemed due and owing under Commission precedent until time of reinstatement or the occurrence of an event tolling the reinstatement obligation. See, e.g., Arkansas Carbona, supra, 5 FMSHRC at 1049-55. Counsel is advised that, given the back pay formula in the judge's remedial order and the principles announced in Clinchfield, infra, the precise amounts of back pay and interest may be determined in any tribunal of competent jurisdiction and it is not necessary to return to the Commission for periodic updatings of these amounts if collection difficulties are encountered. In light of our remand on the attorney's fees issue, however, we find it appropriate also to determine at this time the amount of additional back pay due since December 17, 1984, with the amount of interest due thereon, calculated according to the procedures set forth at 54 Fed. Reg. 2226 (January 19, 1989). See Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (November 1988), pet. for review filed, No. 88-1873 (D.C. Cir. December 16, 1988).

Accordingly, this proceeding is remanded to the judge. */


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

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Administrative Law Judge James A. Broderick
Federal Mine Safety & Health Review Commission
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Falls Church, Virginia 22041

*/ Chairman Ford did not participate in the consideration or disposition of this matter.

ADMINISTRATIVE LAW JUDGE DECISIONS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
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DENVER, CO 80204

SEP 1 1989

LOCAL 1769, DISTRICT 22,	:	COMPENSATION PROCEEDING
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	Docket No. WEST 87-86-C
Complainant	:	
	:	Deer Creek Mine
v.	:	
	:	
UTAH POWER & LIGHT COMPANY,	:	
MINING DIVISION,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Morris

The United Mine Workers of America, (UMWA), complainant herein, filed a complaint against Utah Power & Light Company, (UP&L), seeking compensation on behalf of certain members of Local Union 1769 by virtue of Section 111 1/ of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act").

1/ "Sec. 111. If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. Whenever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of

Issues

The issues are whether the settlement agreement entered into between the parties should be enforced. If so, UP&L's motion to dismiss the complaint should be granted.

On the other hand, if UP&L's motion to dismiss is denied, and the case goes to a hearing should the miners be required to refund the monies UP&L paid under the terms of the settlement agreement?

Evaluation of the Issues

After the UMWA filed its complaint herein discovery followed and in due course the parties submitted a settlement agreement to the judge. ^{2/} In accordance with the settlement agreement UP&L paid in excess of \$25,000 to various miners at the Deer Creek Mine.

The settlement agreement included compensation for 147 miners. However, the UMWA now seeks to abrogate the agreement and it claims that 14 ^{3/} miners were not included in the settlement.

Remedies Sought

UP&L requests that the settlement agreement be enforced. It argues it paid the amount due under the agreement. Accordingly, the complaint should be dismissed.

If the complaint is not dismissed, then UP&L contends that before the settlement agreement can be rescinded the miners must

footnote #1 continued

such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of title 5, United States Code.

^{2/} The extended procedural history of this case is attached to this order of dismissal.

^{3/} The file indicates possibly 15 miners may have been involved. (See Hanula affidavit paragraphs 16, 17).

refund to UP&L the amounts paid by virtue of the settlement with interest.

On the other hand, the UMWA argues that granting UP&L's motion to dismiss would result in the enforcement of a settlement agreement that would erroneously exclude fifteen miners.

The UMWA states that some of the issues to be considered at an evidentiary hearing are whether the parties reached an agreement and whether the document as filed reflects that agreement and, if not, what is the appropriate remedy in the case.

The UMWA opposes UP&L's position that if the settlement agreement is rescinded the miners must repay UP&L. In short, the UMWA asks that the settlement agreement be reformed to reflect the actual agreement reached by the parties. The UMWA claims the actual agreement was for UP&L to pay all idled miners 50 percent of their lost wages.

If the UMWA's position is denied then the UMWA suggests the fifteen miners who were excluded from the settlement be allowed to continue to prosecute their Section 111 claims.

Affidavits

The affidavits of the representatives of the parties, the settlement agreement and certain uncontroverted evidence on file herein are depositive of the issues. The affidavits read as follows:

AFFIDAVIT OF JOYCE A. HANULA 4/

Upon pain of prejury, I state the following:

I, Joyce A. Hanula, am a paralegal at the United Mine Workers of America's (UMWA) Legal Department located at 900 15th Street, NW, Washington, DC 20005. I have been employed as a paralegal for the UMWA for approximately 13 years.

1. In the course of my duties, I regularly investigate cases and prepare pleadings in matters arising under the Federal Mine Safety and Health Act (the Act). On several occasions I have filed cases under section 111 of the Act and have either litigated such cases or reached settlement agreements.

4/ This affidavit was filed and amended by letter on April 24, 1989.

2. I prepared the UMWA's Complaint for Compensation filed on January 27, 1987, in the above-captioned case. I also prepared the UMWA's First Set of Interrogatories to Utah Power & Light (UP&L) filed on February 11, 1987.

3. Interrogatories 5a-c and 6a-c concerned the identity of miners scheduled to work from November 3 to 10, 1986, the identity of miners who reported unavailable to work during this period and the hourly or daily rate of pay of each miner. UP&L responded to these Interrogatories with lists identified as Exhibits A, B, and C. (See attached exhibits marked Exhibit A through C).

4. Upon receipt of UP&L's answers to the Union's interrogatories, I called Tim Means, counsel for UP&L and informed him that the photocopy of Exhibit A attached to UP&L's answers was not legible. Mr. Means informed me that his copy of Exhibit A was in the same condition and that he would contact UP&L and attempt to get a clearer copy. I never did receive another copy of Exhibit A. Mr. Means then referred me to Exhibit C and stated that it was the best list to look at since it had the miners' names and hourly rates of pay.

5. UP&L's Exhibit B is a work schedule for November 5, 6, 7, and 10, 1986, but does not cover November 3 and 4.

6. UP&L's Exhibit C is a payroll record covering the period from November 3 to 10, 1986, which is the period of time covered by the withdrawal order which gave rise to this case.

7. On September 28, 1988, on the basis of the payroll record, I sent John Scott, counsel for UP&L a list of the names of miners employed at the Deer creek Mine in November 1986 and their daily rates of pay. I informed Mr. Scott that "I cannot determine from the information obtained from you through discovery what shift each miner was scheduled to work ... and to provide this information to me as soon as possible in order to calculate the amount of entitlement for miner." (See cover letter attached as Exhibit D and list identified as Exhibit E).

8. On September 29, 1988, Mr. Scott returned the list and marked beside each miner's name the initial G (for graveyard shift), D (for day shift), and A (for afternoon shift), which represented what shift each individual worked. A note was also attached from Mr. Scott requesting that I call

him upon receipt of the list. (See attached Exhibit E). 5/ I called Mr. Scott and we discussed the list and I informed him that the names were taken off of the payroll list and he agreed that the payroll list was the best list from which to extract the names of each of the idled miners as well as their hourly rates of pay. Mr. Scott also indicated that he was not certain of what shifts some individuals worked and he would check with the company and let me know.

9. A few days later Mr. Scott suggested that UP&L might offer to settle the case by compensating only the miners who would have been scheduled to work in the specific area described in the Order: the 3rd South belt entry and adjacent areas. Mr. Scott said that this was only a suggestion and not an offer. On October 6, 1988, I transmitted this information to Robert Jennings, UMWA Health & Safety Representative in Utah, along with Exhibit E which I had previously submitted to Mr. Scott. Mr. Jennings forwarded the same to George Baker, President of Local Union 1769. (See Exhibit F attached).

10. On November 9, 1988, in preparation for the December 15, 1988, hearing date, I sent Mr. Jennings a list of the names of miners who I believed were entitled to compensation should the Union prevail in the case. The list included the miners' daily rate of pay, the number of days each miner was idled and the amount of compensation due each miner. I also sent Mr. Jennings a photocopy of Exhibit C. (See Exhibit G and attached list). 6/

11. Mr. Scott and I continued to discuss the list of miners I had sent him in September and he advised me that certain miners on my list would not be entitled to compensation, even if the Union prevailed in its claim. He supported his contention by directing me to UP&L's payroll list (attached as Exhibit C) and showing me that certain miners had been fully compensated during the period of time for which the Union was claiming compensation. That is how the list

5/ The affidavit footnote reads:

Exhibit E as sent to Mr. Scott included only the names of the employees and their hourly rates of pay. The handwritten information regarding daily rates of pay, number of days idled and amount due each claimant was added after Mr. Scott indicated what shift each miner worked.

6/ The affidavit footnote reads:

The attachment to Exhibit G as sent to Mr. Jennings did not include my handwritten figures.

attached to the Settlement Agreement (entitled Members of Local Union 1769 Who Are Not Entitled to Compensation) was arrived at. (See Exhibit H). Both parties looked at the payroll list and determined who actually worked and who didn't during the period in question.

12. On November 18, 1988, Mr. Scott and Ms. Chetlin came to the UMWA headquarters to meet with Mary Lu Jordan and myself, to discuss the case. Mr. Scott and Ms. Chetlin had a map of the mine and explained the belt system of the Deer Creek Mine and which areas of the mine UP&L believed were affected by the withdrawal order. Mr. Scott then proposed a settlement offer of compensating each idled miner one shift of pay, which he said amounted to approximately \$20,000. I responded by saying that the offer would not be equitable because there were some miners who were idled for the week whereas others only lost a shift or two of pay and that it might create problems if we paid everyone one shift. However, I told Mr. Scott that I would present the offer to the Local Union.

13. After the meeting with Scott and Chetlin, I called Messrs. Jennings and Baker and informed them of UP&L's offer. With the company's permission, the Local held a meeting, between shifts, at the bathhouse to discuss the case. It was the consensus of the Local to reject UP&L's offer and go for everything. Mr. Baker advised me of the Local's decision. Messrs. Baker and Jennings and I discussed a counter proposal. What we came up with was a counter-offer of paying each miner who was idled during the week of November 3-10, 1986, one-half of what they would get if they prevailed in the case, i.e., if a miner was idled four days he would get paid for two days.

14. On December 5, 1988, I sent Mr. Scott a letter outlining the Union's counter proposal and attaching a list of what I believed to be the names of the miners who would be entitled to compensation if the Union prevailed. (See Exhibit I). This list incorporated corrections that Mr. Scott and I had discussed after he had received the earlier list (Exhibit E) and compared it to the payroll list. Exhibit I therefore had deleted certain people who had not lost any wages and adjusted amounts of pay for others. Mr. Scott called me and we reviewed Exhibit I while we were on the phone, by again comparing it to the payroll record. On the basis of the payroll record he again pointed out that certain individuals should be removed, and certain information regarding rates of pay, period of idlement, and amount due should be adjusted. I noted the requested changes and, after referring to the payroll record, confirmed my agreement while we were on the phone. (See handwritten changes to Exhibit I).

15. On December 8, 1988, Mr. Scott hand-delivered a letter confirming UP&L's acceptance of the Union's counter proposal. (Exhibit H). I signed the agreement believing that all miners affected by the order were listed.

16. In late December 1988, I received a call from George Baker, President of Local Union 1769, informing me that there were four miners who were not on the list (Exhibit H) but who were entitled to compensation. I called Mr. Scott and informed him of this matter and he said "okay we will pay these four miners but no more." Simultaneously, George Baker approached Dave Lauriski, management personnel at UP&L, and told him four people had been omitted from the list. Mr. Lauriski told Mr. Baker that he would pay them provided he didn't come up with any other names. Mr. Baker informed Mr. Lauriski that he would not agree to sign anything because more names could have been left off the list. Later in the week, Mr. Baker discovered that 10 more names had been omitted and again approached Mr. Lauriski. Mr. Lauriski informed Mr. Baker that he would not pay any of them.

17. On January 10, 1989. I informed Mr. Scott of the omission of the 14 miners and requested that these miners be paid. ^{7/} These miners had been mistakenly omitted from Exhibit H because I had relied on the payroll list (Exhibit C) to compile the list of claimants. I had no reason to believe the payroll list (Exhibit C) would not provide me with all the names of people who would have been scheduled to work during the week in question. The list is not limited to people who received payment that week, it also contains the names of individuals who received no payment and were therefore idled for the week. Moreover, in our discussions Mr. Scott and I referred to the payroll list to verify whether an individual should be removed as a claimant, or to determine how much a particular individual was owed. In these discussions, Mr. Scott never mentioned nor referred me to Exhibits A or B.

18. When I signed Exhibit H it was my understanding that all the miners who had been idled during the time the closure order was in effect would be compensated for one-

^{7/} The affidavit footnote reads:

Since I informed Mr. Scott that 14 miners were omitted from the list, another miner informed Mr. Baker that his name was omitted from the Settlement Agreement. Therefore the total number of miners omitted from the payroll list is 15 not 14. The reason why Mr. Scott was not informed earlier of the omissions is that the UMWA headquarters were closed for the Christmas holidays from December 26, 1988 to January 2, 1989.

half of the lost wages claimed. I believed UP&L was operating under the same assumption when we signed the agreement.

AFFIDAVIT OF JOHN T. SCOTT, III

JOHN T. SCOTT, III, having been duly sworn, deposes and says:

1. I am a member of the law firm of Crowell & Moring where I have practiced law since 1979.
2. As of June 28, 1988, I became the lawyer at Crowell & Moring responsible for handling the above-captioned case.
3. During the course of settlement negotiations, the United Mine Workers of America ("UMWA") was to compile a list of miner complainants.
4. I told Joyce Hanula of the UMWA that, in calculating the amount of each miner's claim, the payroll list (Exhibit C to Attachment 1 to UP&L's Brief) could be used to show which miners had already been paid and the miners' rates of pay.
5. Once the UMWA had compiled its list, I used the payroll list to verify that miners identified by the UMWA had not already been paid in the normal course.
6. Aside from the statement described in Paragraph 4, supra, I made no further representations to anyone at the UMWA about how the data furnished in UP&L's interrogatory answers (Attachment 1 to UP&L's Brief) should be evaluated, what the lists of names attached to those interrogatory answers (Exhibits A, B and C to Attachment 1 to UPL's Brief) represented, the interrelationship of the three lists, or whether the UMWA should rely on any one list as a basis for identifying claimants.

Further affiant sayeth naught.

AFFIDAVIT OF THOMAS C. MEANS

THOMAS C. MEANS, having been duly sworn, deposes and says:

1. I am a member of the law firm of Crowell & Moring where I have practiced law since 1978.
2. From the time this compensation claim was filed until June 28, 1988, I was the lawyer at Crowell & Moring responsible for handling the above-captioned case.
3. On March 23, 1987, I served on Joyce Hanula of the United Mine Workers of America a copy of Respondent's Answers to Complainants' First Set of Interrogatories.

4. I have reviewed Attachment 1 to UP&L's Brief in Support of Motion to Dismiss. With the exception of the red circles around certain names, which have been subsequently added to illustrate the points made in the UP&L Brief, which this affidavit accompanies, Attachment 1 is a true and correct copy of the interrogatory responses which I served on Ms. Hanula on March 23, 1987.

5. Attachment 1 contains three separate lists of miners which were supplied to the UMWA in response to specific interrogatories. Beyond the terms of the interrogatory answers, I made no further representations to anyone at the UMWA about how the data should be evaluated, what these lists represented, the interrelationship of these lists, or whether the UMWA should rely on any one list as a basis for identifying claimants or otherwise.

6. During the Spring of 1987, in a telephone conversation, I requested Ms. Hanula to identify for me the miners whom she claimed were entitled to compensation in order to evaluate the claim for settlement purposes. She advised me that she would have to consult with the Local and get back to me, but she never did.

Further affiant sayeth naught.

SETTLEMENT AGREEMENT

The settlement agreement is in the form of a letter from Mr. John T. Scott, III, counsel for UP&L to Ms. Joyce Hanula, representative of the UMWA. The letter, dated December 8, 1988, was signed the same date by Ms. Hanula. The letter agreement (filed with the Commission on December 15, 1988) reads as follows:

Dear Joyce:

This letter sets forth the terms of the agreement between the United Mine Workers of America ("UMWA") on behalf of Local Union 1769 and Utah Power & Light Company, Mining Division ("UP&L") to settle and terminate this compensation proceeding.

1. Attached as Exhibit A is a list of all claimants in this proceeding. UP&L shall pay to each listed claimant the amount of compensation specified for that claimant.

2. UP&L shall endeavor to make the payments to claimants by December 25, 1988, and in any event shall do so by December 31, 1988. UP&L shall deduct from the amount paid to each claimant the amount UP&L is required by local, state or federal law and any collective bargaining agreement to withhold from such payment.

3. Payments to the claimants shall terminate any obligations of UP&L, and the UMWA shall, after receiving notice from UP&L that payments have been made, immediately file a motion with the Commission to withdraw its complaint.

4. This agreement is entered into for purposes of settlement, in order to permit the parties to conserve resources and to avoid the expense of protracted litigation. UP&L's agreement to make the specified payments does not constitute any admission of liability to the UMWA or to any claimant under Section 111 of the Federal Mine Safety and Health Act of 1977.

If you accept these terms, please sign this letter below and return it to me. I will then communicate the settlement to ALJ Morris, and advise UP&L to make the necessary arrangements to see the miners are paid.

Sincerely,

//s// John T. Scott, III

Agreed: /s/ Joyce A. Hanula

Date: 12/8/88

Attached to the letter is a seven page list containing the names of 147 miners who are identified by name. Further, a daily rate is shown for each miner as well as the days idled (ranging from 1 to 5 days). A further column shows the amount due each miner.

Jurisdiction

The undersigned judge has jurisdiction to consider the issues presented herein by virtue of Sections 111 and 113(d)(1) of the Act, 30 U.S.C. §§ 821, 823(d)(1).

Discussion

Pending herein is UP&L's motion for the judge to reconsider his ruling denying UP&L's motion to dismiss the compensation complaint.

The Commission has recently restated its view that the oversight of proposed settlements is an important aspect of the Commission's adjudicate responsibilities under the Mine Act, and such discretion is, in general, committed to the Commission's

sound discretion. Secretary of Labor, Mine Safety and Health Administration (MSHA) and United Mine Workers of America v. Birchfield Mining Company, WEVA 87-272, August 21, 1989 slip. op. at 3.

It is apparent in this case that the dispute between the parties arose after a settlement agreement had been executed and after UP&L had paid the miners in accordance with the terms of the agreement.

The UMWA argues that the parties intended that all claimants would receive 50 cents on the dollar in settlement of the case. In support of its position the UMWA relies on the affidavit of Ms. Hanula and supporting exhibits.

Contrary to the UMWA's views UP&L expressly denied that any miner was entitled to any compensation under Section 111 (Pleadings filed in the case and paragraph 4 of settlement agreement).

According to the UMWA: the Union and UP&L realized that there would be a factual dispute in this case as to the area of the mine that was idled as a result of the order. The Union maintained that the order had the effect of idling the entire mine, while UP&L contended that any idlement under Section 111 was limited only to the area described in the order.

UP&L's initial approach to settling the case was to offer to pay only those miners who had been assigned to work in the area described in the Order. (Hanula affidavit at para. 9). Upon further discussion between the parties, however, and consideration of the payroll records, UP&L and the Union realized that under that approach, the people who had lost little or no wages as a result of the order would be the only ones to receive payment.

Upon realization of that fact, the settlement discussions shifted toward the possibility of providing some payment to all the idled miners, no matter which area of the mine they had been assigned. UP&L proposed paying all the affected miners one shift of pay, which UP&L calculated would amount to approximately \$20,000. (Hanula affidavit para. 9). The Union rejected that proposal and pointed out that paying everybody one shift would mean that some miners would be made almost completely whole, while some miners would receive only a small portion of the amount of wages they had lost. The Union proposed instead that everyone receive 50¢ on the dollar. (Hanula affidavit at para. 13 and 14). This was agreed to by UP&L. Unfortunately, when the parties reduced their agreement to writing they did not include 14 (or 15) of the miners who would have been scheduled to work

during the period in question, but who did not work, and were therefore entitled to a settlement. The UMWA asserts the omission of the miners was due to a mutual mistake in the compilation of the list of claimants.

The UMWA argues: because the parties reached an agreement that all the idled miners would be paid 50 cents on the dollar, but failed to express it properly in the written document, the appropriate remedy is for the Commission to reform the document to express the agreement of the parties.

In support of its position the UMWA relies on Restatement, Second, Contracts § 155, § 157, § 158, National Presto Industries, Inc., v. United States, 338 F.2d 99 (U.S. Court of Claims 1964, cert. denied 380 U.S. 962 (1965)).

I reject the UMWA's position. The cases relied on by the UMWA generally involve contract cases. However, a more specific body of law addresses settlement agreements. Such agreements can only be rescinded if they are based on mutual mistake, Callen v. Pennsylvania R.R., 332 U.S. 625, 630 (1948).

In this case there was no mutual mistake. If a mistake occurred it was unilateral on the part of Local 1769 or the UMWA. A unilateral mistake forms no basis for a rescission. Mid-South Towing Co. v. Har-Win, Inc., 733 F.2d 386 (5th Cir. 1984); Cheyenne-Arapaho Tribes of Indians v. United States, 671 F.2d 1305, (Ct. Cl 1982); In Re Sand N'Surf, Inc., 13 B.R. 384 (E.D. Pa. 1981).

Further, there can be no mutual mistake as to the number of miners entitled to compensation because on this issue the parties compromised.

It has been noted by Corbin in Contracts as follows:
[W]here the parties are consciously disputing an issue and agree upon a compromise in order to settle it, they are making no mistake as to the matter at issue and thus settled. There must be a mistake as to matters that were not at issue and were not compromised in order that the settlement may be avoidable on the grounds of mistake, 6 Corbin, Contracts § 1292 (1963)

Finally, compromise means that both sides make concessions to arrive at an enforceable agreement "without regard to what the result might, or would have been, had the parties chosen to litigate rather than settle. Swift Chemical Co. v. Usamex Fertilizers, Inc., 490 F. Supp. 1343, 1355-56 (E.D. La. 1980).

The UMWA has requested that the judge hold a hearing and order that the 14 excluded miners be compensated.

Even if a misrepresentation or mutual mistake occurred then the remedy is to rescind the settlement agreement, not rewrite it. This is because the agreement is in effect nullified. See Midwest Petroleum Co., v. United States Department, 760 F.2d 287 (Temp Emer. Ct. App. 1985); Saunders v. General Services Corp., 659 F.Supp 1042 (E.D. VA. 1986).

Since UP&L has already performed its side of the agreement it necessarily follows that the monies it paid out would have to be returned with interest. Litigation could then be resumed over whether any miner is entitled to compensation. In short, the judge cannot declare the 14 (or 15) miners must be paid without imposing an entirely new and different settlement agreement on UP&L. In sum, the miners of Local 1769 cannot retain the fruits of the settlement agreement and at the same time seek additional compensation.

The UMWA also asserts that the scope of the hearing should also address the issues of why UP&L failed during discovery to disclose the names of 14 (or 15) miners excluded from the answers to interrogatories.

A strident dispute has arisen over this issue. UP&L vigorously asserts it properly answered the interrogatories and it demonstrates the veracity of its position by circling the names of said miners in its answers to interrogatories.

The judge declines to convene a hearing for an irrelevant issue. Even if the judge assumes UP&L did not disclose the names of all miners it is nevertheless apparent that the UMWA did not rely on UP&L's answers to interrogatories. Specifically, in its proper representation of Local 1769 it asked the local union "regarding any changes, additions, etc. on the list" (See UMWA letter and attached list of November 9, 1988 attached to this order; same as Exhibit G in Hanula affidavit).

Prior thereto, on October 6, 1988 the UMWA also requested Local 1769 to verify the names of miners who worked in the 3rd south belt entry and adjacent areas on the date in question. (See letter of October 6, 1988 attached to this order; same as Exhibit F in Hanula affidavit).

Subsequently the UMWA also submitted to UP&L its list of the individuals entitled to compensation (See letter of September 28, 1988 attached to this order; same as Exhibit D in Hanula affidavit).

The law is clear and no citation of authorities is necessary to establish that the courts favor compromise of disputed claims. This case was settled when Ms. Hanula signed the settlement agreement on December 8, 1988.

Sanctions

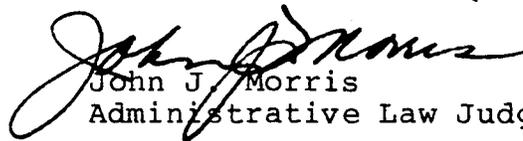
UP&L asserts ^{8/} that the UMWA's conduct violates Commission Rule 6, 29 C.F.R. § 2700.6. Accordingly, UP&L seeks an award of expenses and attorneys fees in defending UMWA's baseless effort to abrogate the settlement agreement.

UP&L's motion to impose sanctions is denied. See Rushton Mining Company, 11 FMSHRC 759 (May 1989).

For the reasons stated herein the following order is appropriate:

ORDER

1. Respondent's motion to reconsider the order of May 12, 1989 (denying respondent's motion to dismiss the complaint) is granted.
2. Upon reconsideration and for the reasons stated herein respondent's motion to dismiss is granted.
3. The complaint for compensation herein is dismissed.


John J. Morris
Administrative Law Judge

Distribution:

Mary Lu Jordan, Esq., United Mine Workers of America, 900 Fifteenth Street, N.W., Washington, D.C. 20005 (Certified Mail)

John T. Scott, III, Esq., Crowell & Moring, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2505 (Certified Mail)

/bls

^{8/} The request is contained in Footnote 6 of UP&L's brief filed April 11, 1989.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

LOCAL UNION 1769, DISTRICT 22, : COMPENSATION PROCEEDING
UNITED MINE WORKERS OF :
AMERICA (UMWA), : Docket No. WEST 87-86-C
Complainant :
v. :
Deer Creek Mine :
UTAH POWER & LIGHT COMPANY, :
MINING DIVISION, :
Respondent :

Procedural History

The UMWA filed this case on behalf of Local Union 1769 on January 29, 1987.

A review of the history of these extended proceedings is necessary.

This case was filed January 29, 1987.

On February 12, 1987 the UMWA filed interrogatories directed to respondent.

On February 27, 1987, Utah Power and Light (UP&L) Company, respondent filed its answer herein.

On March 5, 1987 the case was assigned to the presiding judge.

On March 13, 1987 the case was scheduled for a hearing in Denver, Colorado for April 21, 1987.

On March 25, 1987 UP&L filed answers to the UMWA interrogatories.

On April 6, 1987 UMWA's second set of interrogatories were filed.

On April 15, 1987 the parties filed a joint motion for a continuance until such time as the judge ruled on two motions in limine (not then filed).

On April 16, 1987 the hearing set for April 21, 1987 was cancelled and the hearing was rescheduled for August 11, 1987.

On May 4, 1987 UP&L filed its response to the UMWA's second set of interrogatories.

On June 18, 1987 UMWA requested the case be stayed. In support of the motion UMWA states that the issue controlling in this case was pending before the Commission in Local Union 2333 v. Ranger Fuel Corporation, Docket No. WEVA 86-439-C.

On July 20, 1987 the hearing previously scheduled for August 11, 1987 was cancelled and the case was stayed pending the issuance of the Commission decision.

On May 13, 1988, the Commission issued its decision in Ranger Fuel Corporation.

On May 25, 1988 the presiding judge forwarded a copy of the Commission decision to the parties and granted them 10 days to state whether the pending case could be disposed of without a hearing.

The parties advised the judge they needed additional time; they were granted an additional 10 days (Order, June 9, 1988).

On June 14, 1988 the parties sought an indefinite stay until the parties reach an agreement regarding entitlement.

On June 17, 1988 the judge denied the request for an indefinite stay and directed the parties to advise the judge of a convenient location for the hearing.

On June 28, 1988 UP&L requested a hearing in Price, Utah.

On July 29, 1988 UP&L moved for a summary decision. On the same date the judge granted UMWA 15 days to reply to UP&L's motion.

On August 5, 1988 the UMWA responded to UP&L's motion.

On August 22, 1988 UP&L filed its reply.

On September 20, 1988 the parties moved for a continuance (from October 13, 1988 to October 27, 1988).

On October 3, 1988 complainant moved for leave to file a motion for summary decision.

On October 4, 1988 the judge denied the UMWA's motion for leave to file for a summary decision.

On October 5, 1988 the judge rescheduled the location of the hearing on December 15, 1988 from Denver, Colorado to Salt Lake City, Utah.

On November 29, 1988 the parties requested that the hearing of December 15, 1988 be rescheduled "to permit the parties to negotiate over a specific settlement proposal currently under consideration" (UP&L's letter of November 29, 1988).

On December 6, 1988, the judge rescheduled the hearing date to March 1, 1989.

On December 8, 1988 the hearing of March 1, 1989 was cancelled as the parties had reached an "amicable settlement". Further, they were granted 15 days to file their proposed settlement agreement.

On December 12, 1988 UP&L forwarded a copy of the proposed settlement agreement. Under the agreement once UMWA received notice that the miners have been paid the UMWA would move to withdraw its complaint of discrimination.

On February 6, 1989 the judge ordered the UMWA to state whether it had received notice in accordance with the settlement agreement.

On February 23, 1989 UP&L moved to dismiss the complaint filed herein.

In support of its motion UP&L states it fully complied with the terms of the settlement agreement and paid the miners.

For its part the UMWA alleges that certain payroll records supplied by UP&L were incomplete. UP&L disagrees. Specifically, 147 miners have been paid but UMWA now asserts that an additional 14 miners should be paid.

In its response filed March 10, 1989 to UP&L's motion to dismiss the UMWA requests the Commission conduct an evidentiary hearing to determine why UP&L failed during discovery to disclose the names of miners working or scheduled to work during the idled period.

On May 12, 1989 the presiding judge denied UP&L's motion to dismiss the complaint and scheduled the case for a hearing on July 11, 1989 in Price, Utah. The judge's order further required the parties to file certain pretrial information.

Prior to the hearing UP&L filed its motion for reconsideration and clarification of the judge's order of May 12, 1989. UMWA, in its motion also requested a clarification of the judge's order.

On June 13, 1989 UMWA filed a response to the UP&L motion of May 12, 1989.

On June 13, 1989 in order that he might have sufficient time to consider the pending issues the presiding judge cancelled the hearing of July 11, 1989.

United Mine Workers of America

LEGAL DEPARTMENT



TELEPHONE
AREA CODE (202) 842-7200

UNITED MINE WORKERS' BUILDING
900 FIFTEENTH STREET, N. W.
Washington, D.C.
20005

September 28, 1988

VIA HAND DELIVERY

John T. Scott, III, Esquire
Crowell & Moring
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505

Re: Local Union 1769 v. Utah Power & Light

Dear John:

I am currently attempting to gather the names of miners who are entitled to compensation in the above-captioned section 111 case. Attached is a list of the names of miners employed at the Deer Creek Mine in November, 1986, and their daily rate of pay. I cannot determine from the information obtained from you through discovery what shift each miner was scheduled to work. It would be helpful if you could provide this information to me as soon as possible in order to calculate the amount of entitlement for each miner. Once I receive this information I will send you the Union's complete list of each individual entitled to compensation and the amount due.

Sincerely,


Joyce A. Hanula

Attachment

United Mine Workers of America

LEGAL DEPARTMENT



TELEPHONE
AREA CODE (202) 842-7200

UNITED MINE WORKERS' BUILDING
900 FIFTEENTH STREET, N. W.
Washington, D.C.
20005

October 6, 1988

Mr. Robert Jennings
UMWA Health & Safety Representative
P.O. Box 783
Price, UT 84501

Re: Local Union 1769 v. UP&L

Dear Bob:

Attached is a list of the names of the miners and their hourly rate of pay who are entitled to compensation in the captioned case. Please arrange to have someone from the Local review the list for accuracy. A hearing has been scheduled on December 15, 1988, in Salt Lake City, Utah.

The 107(a) Order issued on November 3, 1986, which we are relying on in this case, idled the 3rd South belt entry from #20 crosscut including crosscuts and adjacent 1st Right entry from #34 to 3rd West number 1 drive. As you know, in our Complaint we asked for compensation for the entire mine. Yesterday, I spoke to UP&L's attorney who suggested that UP&L may offer to settle the case by compensating the miners who worked on the 3rd South belt entry and adjacent areas as described in the Order. This is not an offer from UP&L -- it is only a suggestion by their attorney. You should discuss this "possibility" with the Local and let me know what they think. In the meantime, let me know the names of the miners who worked on the 3rd South belt entry and adjacent areas on November 3, 1986. Hopefully all their names are included on the attached list.

If you have questions, call.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Joyce".

Joyce A. Hanula
Paralegal

Attachment

1659

- Exhibit F

0764H

LOCAL UNION 1769, DISTRICT 22, UMWA
V. UTAH POWER & LIGHT CO.,
DOCKET NO. WEST 87-86-C

(33) - NOT
entitled

<u>Employee</u>	<u>Daily Rate</u>	<u>Days Idled</u>	<u>Amount Due</u>
Russell Jensen (SAT.) (SUN)	123.32	5	616.60 308 30
Reid Leamaster (SAT.)	120.50	4	482.00 241.00
Earl Callum (SAT.)	122.90	4	491.60 245.80
Bryce Brashear (SAT.) (SUN)	122.90	2 1/2	307.25 153 63
John Oliver	110.35	0	0
Glen Nelson (SAT)	123.70	4	494.80 247 40
Dewitt Cotner (SAT)	106.99	4	427.96 213 98
Harold R. Hansen (SAT)	107.45	1	107.45 53 73
Bernie Morris (SAT)	109.63	0	0
Frank Oviatt (SAT)	114.78	0	0
Vernon Jensen (SAT)	107.45	2	214.90 107 45
Gary Motte	114.74	4	344.22 172 11
B. Pat Allred (SAT)	115.58	3	346.74 173 37
Randy Thayn (SAT)	111.38	3	334.14 167 07
James Baker	110.35	0	0
Merland Jensen (SAT) (SUN)	120.08	4	480.32 240 16
Larry Smith (SUN)	107.45	2	214.90 107 45
Marvin Thayn	109.21	2	218.42 109 21
Kent Oviatt (SAT)	112.90	3	338.70 169 35
Willas Cook (SAT) (SUN)	114.74	3	344.22 172 11
Thomas Rhodes	123.70	4	494.80 247 40

before Xmas

<u>Employee</u>	<u>Daily Rate</u>	<u>Days Idled</u>	<u>Amount Due</u>	
P. Reeve Cook (SAT)	120.08	0	0	
Gerald Powell	104.81	4	419.24	207.62
Phillip Heaps (SAT)(SUN)	123.32	4 1/2	554.94	277.47
Melvin Larsen (SAT)	114.74	0	0	
Dennis Spensko	114.78	3	344.34	172.17
Scott Mathis	111.38	3	334.14	167.07
Melvin Hale	123.32	3	369.96	184.98
Delmar Nilsen	123.32	3	369.96	184.98
Kirk Hansen	114.74	2 1/2	286.85	143.42
Stuart Jensen (SAT)(SUN)	117.94	0	0	
Melvin Johnson	109.21	4	436.84	218.42
Kevin Wilson (SAT)	120.08	2	240.16	120.08
Gregory Powell (SAT)(SUN)	123.32	1	123.32	61.66
Parly C. Jones	120.92	4	483.68	241.84
Phillip Baca	112.38	0	0	
William Heaps	120.92	1	120.92	60.46
Jack Jones	123.32	4	493.28	246.64
Laroy Erickson (SUN)	120.92	1	120.92	60.46
Kenneth Gunter	123.32	3	369.96	184.98
George Baker (SAT)	114.78	1	114.78	57.39
Gordon Larsen (SAT)	124.12	0	0	
Sam Crawford	120.08	0	0	
Johnnie Downard	117.14	0	0	
Sheron Housekeeper	112.38	4 1/2	505.71	252.86

<u>Employee</u>	<u>Daily Rate</u>	<u>Days Idled</u>	<u>Amount Due</u>	
William K. Farrer	123.32	4	493.28	246.64
Robert Maki	123.32	4 1/2	554.94	277.47
Dale Christensen	117.68	1	117.68	58.84
David Johnson (SAT)(SUN)	120.88	0	0	
Larry Brown (SAT)(SUN)	123.32	3	369.96	184.98
James Gunter (SAT)	120.92	2 1/2	302.30	151.15
Thomas Holdaway	123.32	3	369.96	184.98
Sheldon Oviatt	120.92	3	362.76	181.38
Michael Atwood	120.92	3	362.76	181.38
Dennis Campbell (SAT)(SUN)	124.12	2	248.24	124.12
Don Johnson (SAT)	124.12	4	496.48	248.24
Charles Westbrook (SAT)	120.88	0	0	
Stewart Foster	124.12	3	372.36	186.18
Patrick Sampien	120.92	4	483.68	241.84
Curtis Taylor	123.32	4	493.28	246.64
Freddy Walters	120.92	4	483.68	241.84
Michael Mortensen	117.68	0	0	
Monte Tucker (SAT)	117.68	0	0	
William Leverton (SAT)(SUN)	117.68	0	0	
Duron Hunter, Jr. (SAT)	120.88	0	0	
Victor Zavala	120.92	3	362.64	181.32
Lawrence Devereaux	124.12	2	248.24	124.12
Allen Hyatt	120.92	4	483.68	241.84
Paul Larsen	124.12	4	496.48	248.24

<u>Employee</u>	<u>Daily Rate</u>	<u>Days Idled</u>	<u>Amount Due</u>	
John Ciores	114.78	4	459.12	229.56
Lloyd Huntington (SAT)(SUN)	123.32	3	369.96	184.98
James Pendelton	120.92	4	483.68	241.84
Michael Juggert	120.88	0	0	
Steven Rowley	120.92	3	362.76	181.38
Bobby Emery	124.12	2	248.24	124.12
Brad Timothy (SUN)	124.12	4 1/2	558.54	279.27
Daniel Black	120.92	4	483.68	241.84
Daniel Bittick (SAT)(SUN)	114.74	3	344.22	172.11
Ron Prettyman (SAT)(SUN)	124.12	4	496.48	248.24
Jerry Shepherd (SAT)(SUN)	123.32	3	369.96	184.98
Kenneth Kay	106.99	3	320.97	160.48
Barrett Lemmon (SAT)(SUN)	124.12	0	0	
Kelly Leroy (SUN)	120.92	1	120.92	60.46
Ted Larsen ←	117.14	3	351.42	175.71
Randolph Winder (SAT)	114.78	2	229.56	114.78
James Caye	117.68	3	470.72	235.36
Mark Winn	115.58	4	462.30	231.15
Brent Pierce	114.74	4	458.96	229.48
Michael Shannon (SAT)(SUN)	114.74	4	458.96	229.48
Thomas Kay (SAT)(SUN)	114.74	1	114.74	57.37
Russell Labrum (SAT)(SUN)	109.63	1	109.63	54.82
Tommy Dixon (SAT)(SUN)	117.68	4	470.72	235.36
Gary Stephenson (SAT)	114.78	0	0	

<u>Employee</u>	<u>Daily Rate</u>	<u>Days Idled</u>	<u>Amount Due</u>	
Ferrill Wayman	114.78	0	0	
Kevin Tucker (SAT)	120.88	0	0	
Ivan Anderson (SAT)	111.38	1	111.38	55.69
Gary Anderson	124.12	2	248.24	124.12
Jack Batt	117.68	4	470.72	235.36
Robert Llewelyn	117.68	4	470.72	235.36
J. Mower	123.32	4	493.28	246.64
Bob Olson	117.68	4	470.72	235.36
Joe Collard	117.14	4	468.56	234.28
Lennie Gammon	124.12	4	496.48	248.24
James G. Gordon (SAT)	111.38	1	111.38	55.69
Scott Johnson	114.74	2	229.47	114.74
Allen Wiswell (SAT)(SUN)	120.88	0	0	
Eugene Griffin	112.38	2	224.76	112.38
Brent Bailey (SAT)(SUN)	120.08	3	360.24	180.12
Jay Oviatt	117.14	3	351.42	175.71
Glade Booth (SAT)	114.78	0	0	
Billy Dase	112.38	1 1/2	168.57	84.28
Kenneth Wilson (SAT)(SUN)	117.68	2	235.36	117.68
Indalesio Frutos SA	123.32	2	246.64	123.32
Edward Barnett (SAT)(SUN)	112.38	2	224.76	112.38
Floyd Anderson	117.68	4	470.72	235.36
John Blackham	120.92	4	483.68	241.84
Lamar Dyches	117.68	3	353.04	176.52

<u>Employee</u>	<u>Daily Rate</u>	<u>Days Idled</u>	<u>Amount Due</u>	
Wallace Frandsen (SAT)(SUN)	120.92	2 1/2	302.30	151.15
Stan Densley	112.38	1	112.38	56.19
Tom Gonzales	112.38	0	0	
Gerald Zabriskie (SUN)	120.92	3 1/2	423.22	211.61
Robert Jensen	112.38	4	449.52	224.76
Thomas Memmott	117.68	4	470.72	235.36
Richard Richart	112.38	0	0	
Jeffrey Nielson	117.68	2	235.36	117.68
Max Whiting	112.38	0	0	
Don Allred (SUN)	114.74	1	114.74	57.37
Max Nichols	112.38	0	0	
Fred Sanchez (SAT)(SUN)	117.68	4	470.72	235.36
Richard Rigby	120.88	4	483.52	241.76
David Peterson	112.38	1	112.38	56.19
Dennis Peterson (SAT)(SUN)	117.68	0	0	
Elmer Jones	124.12	4	496.48	248.24
Larry Turner (SAT)(SUN)	112.38	2	224.76	112.38
Boyd Johnson (SAT)(SUN)	120.88	2	241.76	120.88
Jim Malmgren (SAT)	120.88	2	241.76	120.88
Darrel Butler (SAT)	124.12	4	496.48	248.24
Karl Bessey	123.32	1	123.32	61.66
Gary Butler (SUN)	124.12	1	124.12	62.06
David Monk (SAT)	112.38	0	0	
Samuel R. Dye (SAT)	124.12	2	248.24	124.12

<u>Employee</u>	<u>Daily Rate</u>	<u>Days Idled</u>	<u>Amount Due</u>
Gary W. Olsen (SAT)	120.88	1	120.88 60.44
Sheran Dyches	112.38	3 1/2	393.32 196.66
Gary Garlick	120.88	0	0
Kevin Wells (SUN)	124.12	4	496.48 248.24
Kirk Christensen (SAT)(SUN)	120.92	2	241.84 120.92
Don R. Jensen (SAT)(SUN)	120.92	2	241.84 120.92
Harold Sparks (SAT)	114.78	3	344.34 172.17
Joel Erickson (SAT)	120.92	4 1/2	544.14 272.07
Leslie Hammond (SAT)(SUN)	112.38	2	224.75 112.38
Guy Gordon Young (SAT)(SUN)	120.08	3	360.24 180.12
David Mackay (SAT)(SUN)	120.88	2	241.76 120.88
Brady Miller	120.92	4 1/2	544.14 272.07
Ronald Nunley (SAT)(SUN)	123.32	2 1/2	308.30 154.15
Jerald Schadel	109.21	4 1/2	491.44 245.72
Don Shelley (SAT)(SUN)	124.12	0	0
Arnold Moosman (SAT)(SUN)	124.12	2	248.24 124.12
Calvin Ross (SAT)(SUN)	124.12	2	248.24 124.12
Kendall Bartholomew	120.92	4 1/2	544.14 272.07
Evan Johnson (SAT)(SUN)	120.92	0	0
David Anderson (SAT)	120.92	4 1/2	544.14 272.07
Kim Cooley	120.92	4	483.68 241.84
Jimmy Nay	124.12	3	372.36 186.18
Bart Norton (SAT)(SUN)	124.12	4	496.48 248.24
Charles Olsen	124.12	4	496.48 248.24

<u>Employee</u>	<u>Daily Rate</u>	<u>Days Idled</u>	<u>Amount Due</u>	
Benjamin Dicaro (SAT)(SUN)	120.92	1 1/2	181.38	7269
Jeffrey Anderson	124.12	4	496.48	24824
Gary Birch (SAT)	109.21	1	109.21	5461
Linda Jensen	120.92	4 1/2	544.14	27207
Robert Davis	120.92	3	362.76	18138
Randy Mellor (SAT)	123.32	0	0	
Keldon Mann (SAT)(SUN)	123.32	4 1/2	554.94	27747
Gary Boyd	123.70	4	494.82	24741
Dennis Seely (SAT)	120.92	4	483.68	24184
Jeffrey Farmer	124.12	2	248.24	12412
Kelly Duke (SAT)	123.32	2	246.64	12332
Robert Farrer (SAT)	123.32	2	246.64	12332
Ralph Keele	124.12	4	496.48	24824
T. Curtis (SAT)	124.12	2	248.24	12412
Dee Laws (SAT)	123.32	2	246.64	12332
James Holt	120.92	1	120.92	6046
Rudy Metelko	120.92	1	120.92	6046

2796164

3

United Mine Workers of America

LEGAL DEPARTMENT



TELEPHONE
AREA CODE (202) 842-7200

UNITED MINE WORKERS' BUILDING
900 FIFTEENTH STREET, N. W.
Washington, D.C.
20005



November 9, 1988

Mr. Robert Jennings
UMWA Health & Safety Representative
UMWA District 22 Office
525 East 100 South
Price, UT 84501

Re: Local Union 1769 v. UP&L

Dear Bob:

Enclosed is a photocopy of the list of the names of miners, his/her daily rate of pay, number of days idled and the amount of compensation due in the above-captioned section 111 compensation case. I gathered this information from the payroll records obtained from UP&L (see enclosed photocopy of payroll records). We are seeking compensation for the following:

Each miner who worked the 8:00 a.m. to 4:00 p.m. shift on November 3, 1986 -- 4 hours of compensation.

Each miner who was scheduled to work the 4:00 p.m. to midnight shift on November 3, 1986 -- 8 hours of compensation.

Each miner who was scheduled to work the midnight to 8:00 a.m.; 8:00 a.m. to 4:00 p.m. and 4:00 p.m. to midnight shifts on November 4, 5, 6 and 7, 1986 -- 8 hours of compensation.

A hearing in this matter is scheduled on December 15, 1988, in Salt Lake City, Utah. It is imperative that I am contacted by the Local or you by November 21,

1988, regarding any changes, additions, etc. on the list. If I am not contacted by you or the Local by November 21, 1988, I will assume the list is accurate and forward a copy to the company.

If you have any questions concerning the list please contact me at (202) 842-7345.

Sincerely,



Joyce A. Hanula
Paralegal

Enclosures

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 89-82
Petitioner	:	A. C. No. 01-01401-03745
	:	
v.	:	No. 7 Mine
	:	
JIM WALTER RESOURCES, INC.,	:	Docket No. SE 89-99
Respondent	:	A. C. No. 01-01322-03735
	:	
	:	No. 5 Mine
	:	
	:	Docket No. SE 89-101
	:	A. C. No. 01-00758-03737
	:	
	:	No. 3 Mine
	:	
JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 89-45-R
	:	Citation No. 3188139; 12/20/88
	:	
v.	:	
	:	No. 5 Mine
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID 01-01322
Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, for Petitioner; Robert Stanley Morrow, Esq., Jim Walter Resources Inc., Birmingham, Alabama, for Respondent/Contestant.

Before: Judge Merlin

When the above-captioned cases came on for hearing counsel for both parties advised that settlements had been reached. With the permission of the bench these settlements were placed upon the record. Other cases scheduled for hearing at the same time were heard on the merits.

Citation No. 3012311 was issued for a violation of 30 C.F.R. § 75.203(b) because the projected direction of mining was not being followed. The painted mark on the mine roof showing the center of the entry was not being used resulting in some off-site cuts. The original assessment was \$311 and the proposed settlement was for this amount. According to advice received at the hearing the violation was serious and the operator was negligent. On this basis the proposed settlement was approved.

Citation No. 3012027 was issued for a violation of 30 C.F.R. § 75.1725(c) which directs that repairs and maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion. The original assessment was \$2,000 and the proposed settlement is for \$800. At the hearing the Solicitor advised that the longwall coordinator stepped inside a stage loader while bolts on the conveyor chain were being tightened by a laborer. In addition, the longwall coordinator failed in his responsibility to lock out the conveyor chain while it was being repaired. Since the lock out device was not operative, the laborer started the conveyor chain. As a result the longwall coordinator was caught by the chain and injured. At the hearing the Solicitor described the circumstances in detail. In particular, he advised that the longwall coordinator was fully trained and that his conduct in this instance was unpredictable and aberrational. Accordingly, the degree of negligence attributable to the operator was far less than originally thought. The recommended settlement was approved from the bench.

Order No. 3188139 was issued for violation of 30 C.F.R. § 75.202(a) because the operator failed adequately to support a rib. As a result a miner was injured from a rib roll. The original assessment was for \$2,500 and the proposed settlement is for that amount. Clearly, this violation was very serious and the operator was negligent. I approved the recommended settlement because it is a substantial amount suitable for the degree of gravity and negligence involved. In addition, I note that the subject order which was issued under section 104(d)(1) with its attendant sanctions, remains in effect. The operator's notice of contest with respect to the subject order is dismissed.

ORDER

Accordingly, it is ORDERED that the operator's notice of contest in Docket No. SF 89-45-R is DISMISSED.

It is further ORDERED that the recommended settlements be APPROVED and the operator is ORDERED TO PAY the following amounts within 30 days from the date of this decision:

<u>Docket No.</u>	<u>Citation No.</u>	<u>Amount</u>
SE 89-82	3012311	\$ 311
SE 89-99	3188139	\$2,500
SE 89-101	3012027	\$ 800
Total		<u>\$3,611</u>



Paul Merlin
Chief Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Suite 201, 2015 Second Avenue North, Birmingham, AL 35203 (Certified Mail)

Harold D. Rice, Esq., Robert Stanley Morrow, Esq., Jim Walter Resources, Inc., Post Office Box 830079, Birmingham, AL 35283-0079 (Certified Mail)

H. Gerald Reynolds, Esq., Jim Walter Corporation, 1500 N. Dale Mabry Highway, Tampa, FL 33607 (Certified Mail)

Mr. Carl W. Poe, UMWA, Route 2, Box 793, Adger, AL 35006 (Certified Mail)

Willie Jean McCrary, UMWA, Route 1, Box 369-B, Wilsonville, AL 35186 (Certified Mail)

Mr. Dan Green, Local 2368, P. O. Box 578, West Blocton, AL 35184 (Certified Mail)

Ms. Joyce Hanula, UMWA, 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

Lawrence Beeman, Director, Office of Assessments, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Handcarried)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 89-91
Petitioner : A. C. No. 01-00323-03614
: :
v. : Chetopa Mine
: :
DRUMMOND COMPANY, INC., :
Respondent :

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor,
U. S. Department of Labor, Birmingham,
Alabama, for Petitioner.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary under section 110 of the Federal Mine Safety and Health Act of 1977. When the matter came on for hearing the Solicitor advised that the parties had agreed to a settlement of all the violations. With approval from the bench the appearance of operator's counsel was excused and the Solicitor made the joint settlement recommendations upon the record. Other cases were heard on the merits at the same time.

Citation No. 3015760 was issued for a violation of 30 C.F.R. § 75.400 because of an accumulation of loose coal dust and float coal dust. The original assessment was \$213 and the proposed settlement was \$150. Gravity was less than originally thought because some of the cited areas were wet and the belt was touching coal in only two locations. The foregoing representations were accepted from the bench and the settlement was approved.

Citation No. 3017898 was issued for a violation of 30 C.F.R. § 75.1105 because metal fire proofing was missing from the right coal rib in a battery charging area. The original assessment was \$119 and the proposed settlement was \$100. The Solicitor advised that the fire proofing had been in place previously but apparently had been inadvertently struck by a ram car which had knocked it out of position. Gravity and negligence were less than originally thought because the violation had been in existence for only a short period of time. The foregoing representations were accepted from the bench and the settlement was approved.

Citation No. 3019641 was issued for a violation of 30 C.F.R. § 75.400 because of an accumulation of loose coal, coal dust and grease on a scoop. The original assessment was \$119 and the proposed settlement was for \$100. Negligence was less than originally thought because the scoop which was subject to the operator's regular clean up program was frequently used and indications were that the condition had not existed for any appreciable period of time. The foregoing representations were accepted from the bench and the proposed settlement was approved.

Citation No. 3019642 was issued for a violation of 30 C.F.R. § 75.503 because an opening in excess of .005 inches was present in the cover plate of a main breaker panel. The original assessment was \$119 and the proposed settlement was for \$100. Negligence was less than originally thought because the condition had existed for a very short period of time and resulted from the fact that the one small bolt apparently had not been sufficiently tightened for permissibility purposes. The operator has had very few permissibility violations. The foregoing representations were accepted from the bench and the settlement was approved.

The operator agreed to pay the original assessments for the remaining two violations. The circumstances of these violations were explained on the record and I accepted the proffered amounts from the bench.

In light of the foregoing the recommended settlements are APPROVED and the operator is ORDERED TO PAY \$914 within 30 days from the date of this order.

A handwritten signature in black ink that reads "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Suite 201, 2015 Second Avenue North, Birmingham, AL 35203 (Certified Mail)

J. Fred McDuff, Esq., Drummond Company, Inc., 530 Beacon Parkway West, Birmingham, AL 35209 (Certified Mail)

Ms. Joyce Hanula, UMWA, 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 6 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 89-16-M
Petitioner	:	A.C. No. 16-00509-05569
	:	
	:	Avery Island Mine
v.	:	
	:	
INTERNATIONAL SALT COMPANY,	:	
Respondent	:	

DECISION

Appearances: Mary Witherow, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas for Petitioner; James M. Day, Esq., Cotten, Day & Selfon, Washington, D.C. for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging the International Salt Company (International) with one violation of the regulatory standard at 30 C.F.R. § 57.19024(d). The general issue before me is whether International violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation 3270248 issued pursuant to section 104(a) of the Act alleges a "significant and substantial" violation and charges as follows:

The South skip rope was not removed from service at the production shaft. A nondestructive test was conducted on the 1 7/8 inch 6 by 27 Type H bright purple plus extra improved plow steel flattened strand right lang lay rope. The rope strength now showed a loss of 10 percent. The rope along its length contained pitting showing advanced stages of corrosion and erosion between the pits. The pits could be seen with the naked eye. The type instrument used for the test was Model No.

LMA-250 manufactured by NDT Technology. The employees on 3-shifts ride the North skip and the South skip rope due to its strength loss could snap exposing personnel to the broken rope and skip.

The cited standard provides, as relevant herein, as follows:

Unless damage or deterioration is removed by cutoff, wire ropes shall be removed from service when any of the following conditions occurs: ...
(d) Rope deterioration from corrosion... (h) Loss of more than 10 percent of rope strength as determined by nondestructive testing.

Subsection (h) of the above standard sets forth at least one purportedly objective measure to determine when a wire rope must be retired i.e. when there is a loss of more than 10 percent of rope strength as determined by nondestructive testing. In a nondestructive test performed on the subject rope including the area deemed to be in the worst condition by the Secretary, the Respondent's expert witness, David Hall, President of Halkin Services, Inc., found the loss of strength in the subject rope to have been no greater than 9.1 percent.

The Secretary's principle expert on the issue, Dennis Poffenroth, an MSHA electronic engineer, also performed a nondestructive test on the rope and found a maximum "loss of metallic cross sectional area" of 9.75 percent. According to Poffenroth however the finding of loss of metallic content cannot accurately be correlated to determine the loss of strength in a rope. Indeed, according to Poffenroth, loss of strength in a wire rope cannot, under the current state of the science, be accurately determined by nondestructive testing. He believed therefore that subsection (h) did not provide a valid standard for wire rope testing.

In any event the Secretary does not disagree that the subject rope did not at any point suffer a loss of strength of as much as 10 percent. It is apparent from the credible evidence that since the Secretary could not prove under the objective standard of subsection (h) that the rope should have been retired that she then resorted to the subjective and essentially arbitrary provisions of subsection (d), i.e. that the rope should be retired from service upon the existence of "rope deterioration from corrosion."

In order to pass constitutional muster, the interpretation to be given such a vague, indefinite and

uncertain regulation must appropriately be measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts particular to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. See Alabama By-Products Corporation, 4 FMSHRC 2128 (1982). In this case the expert witnesses, all of whom may be considered to be reasonably prudent persons familiar with the factual circumstances surrounding the allegedly hazardous condition, sharply disagreed over the extent of the alleged corrosion.

MSHA Inspector Benny Lara testified that he observed pitting and erosion which he said was due to corrosion between the pits on the cited South rope. MSHA expert Dennis Poffenroth visually examined the area found to be the worst section of the South rope through nondestructive testing and observed pitting in the outer surface of the crown wires and erosion between the pits evidencing, what he believed to be "advanced corrosion". According to Poffenroth no one can safely predict when a corroded wire rope will fail and in his opinion with the amount of pitting he found the rope should have been removed from service immediately.

Poffenroth also cited texts in the subject area supporting his view that the pitting of wire ropes is a cause for immediate removal from service. He also referred to the "Roebbling Wire Rope Handbook" which at page 132 states that "where corrosion is present all the known methods for estimating the remaining strength of a wire rope become useless."

International's expert witnesses, not surprisingly, disagreed with the MSHA experts. David Hall, President of Halkins Services, Inc., disagreed with Poffenroth's conclusion that you could not interpolate from loss of metallic area in a wire rope to obtain a reliable and valid determination of loss of rope strength. He has found his formula for determining loss of strength from loss of metallic area to be reliable and valid. According to Hall's findings of loss of metallic area and his computations, he found the actual maximum loss of strength in the cited wire rope to be 9.1 percent. Hall also found however "well established moderate corrosion" throughout the rope and found that the corrosion was "indicative of internal corrosion". Hall performed his test on the rope on June 18, 1988, and recommended on June 20, 1988, as follows: "due to the trend and the ELMA and loss of

strength over the past two tests conducted by 'Rotesco' and the ELMA and strength loss depicted in this test it is recommended that this rope be replaced within the next 30 days following this test." (See Exhibit R-4).

In his report and at hearing, Hall did not however find that the subject rope met any of the retirement criteria under 30 C.F.R. Part 57, and concluded that the rope was in satisfactory condition at the time of the test.

Another expert witness for International, Dennis Weaver, a graduate civil engineer and former employee of the Bethlehem Steel Wire Rope Division testified concerning destructive tests he performed in July 1988 on a portion of the subject rope. In his report Weaver stated as follows:

The ultimate failure of the returned sample was 356,000 pounds. The catalog rated strength for new rope is 372,000 pounds. Our records show the as--manufacturer breaking strength was 377,000 pounds. Therefore, it appears the actual loss of strength is approximately 5.5%.

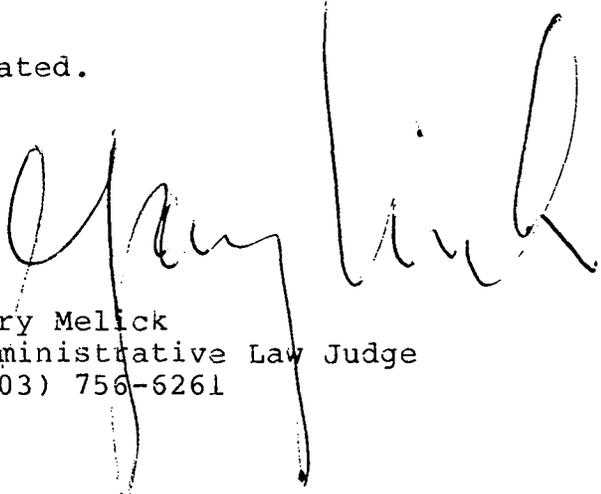
This test was allegedly performed on a section of the wire rope deemed worst by the MSHA inspection. According to Weaver there was only "scattered rust" on the outer surface of the wire rope and he acknowledged that this could have been the "moderate corrosion" that Hall had found.

While the experts may have therefore disagreed over the extent of rope deterioration from corrosion in this case the Secretary did not disagree that there was no need to then remove the subject rope from service. Indeed I find that the Secretary's claim of a violation in this case is completely undermined by the fact that after Inspector Lara issued the citation at bar (charging a violation of the standard at 30 C.F.R. § 57.19024 which mandates that wire ropes be removed from service under the prescribed conditions) he nevertheless allowed the rope to remain in service for a week thereafter. In addition, in spite of the regulatory requirement for the mandatory retirement of ropes meeting the prescribed criteria another MSHA official granted an additional week's extension of time in which to replace the cited rope. Thus the Secretary allowed the cited rope to remain in service for two weeks after the proffered regulation would have mandated its retirement and in the face of her own representations that up to 30 miners were thereby exposed to the reasonable likelihood of fatal injuries.

These actions by the Secretary are inconsistent with her simultaneous claim that the subject rope was so corroded that it met the criteria for immediate retirement. At the same time these actions are consistent with the findings of independent expert David Hall who opined that the cited rope would not further deteriorate to meet the regulatory retirement criteria, including the criteria under subsection (h), for another 30 days from the date of his test. Under these circumstances I accord the greater weight to the opinions of the operators' independent experts and conclude that the subject rope did not in fact on the date of this citation, June 16, 1988, meet the retirement criteria under the provisions of 30 C.F.R. § 57.19024(d) or (h). Within this framework of evidence I conclude that the Secretary has failed to sustain her burden of proving the violation as charged and the citation must accordingly be vacated.

ORDER

Citation No. 3270248 is vacated.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Mary Witherow, Esq., Office of the Solicitor, U.S.
Department of Labor, 525 Griffin Street, Suite 501, Dallas,
TX 75202 (Certified Mail)

James M. Day, Esq., Cotten, Day & Selfon, 12th Floor, 1899
L Street, N.W., Washington, D.C. 20036 (Certified Mail)

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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 6 1989

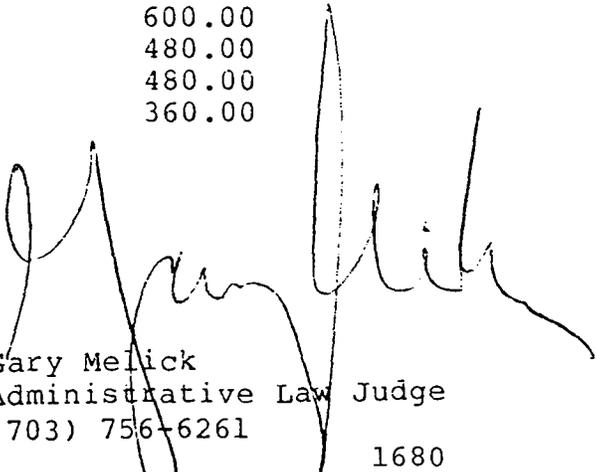
MIKE STEVENS, ET AL., : COMPENSATION PROCEEDING
Complainants :
 : Docket No. VA 89-30-C
v. :
 : No. 1 Mine
CHAPARAL COAL COMPANY, INC., :
Respondent :

DECISION AND ORDER

On July 13, 1989, an Order was issued in this case finding Respondent in default and accepting the allegations in the Complaints herein to be true. Subsequently on July 26 and July 31, 1989, the Complainants submitted claims of damages with service upon Respondent. No response has been filed to these claims and accordingly they are accepted as correct.

Wherefore Chaparal Coal Company is directed to pay the following amounts of compensation to the noted miners within 30 days of the date of this decision with interest computed in accordance with this Commission's decision in United Mine Workers of America (UMWA) v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988):

Darrell Dotson	\$480.00
Curtis Perkins	480.00
Steve Mays	480.00
Johny Brewster	480.00
Marty Owens	480.00
Leo Chapman	480.00
Barry Owens	480.00
Danny Clevinger	480.00
Donald Patton	480.00
Rodney Wimmer	660.00
Carl Rowe	480.00
William Byrd	420.00
Mike Stevens	600.00
Jerry Allen	480.00
Bernice Coleman	480.00
Michael A. Smith	360.00


Gary Mellick
Administrative Law Judge
(703) 756-6261

Distribution:

Mr. Mike Stevens, P.O. Box 653, Big Rock, VA 24603
(Certified Mail)

Mr. James C. Ball, President, Chaparal Coal Company, Inc.,
Box 209, Vansant, VA 24656 (Certified Mail)

nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 7 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 88-121-M
Petitioner	:	A. C. No. 15-00112-05516
v.	:	
	:	Docket No. KENT 88-123-M
M. A. WALKER COMPANY, INC.,	:	A. C. No. 15-00111-05515
Respondent	:	
	:	Docket No. KENT 88-205-M
	:	A. C. No. 15-00112-05520
	:	
	:	Clover Bottom Underground

DECISION

Appearances: Mary Sue Ray, Esq., for the Secretary of Labor;
Mr. David Riley, Office Manager, for Respondent

Before: Judge Fauver

These cases were brought by the Secretary of Labor for civil penalties under § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

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 and additional findings in the Discussion below.

FINDINGS OF FACT

1. At all times pertinent, Respondent operated two underground mines, known as the Indian Creek Underground Mine and the Clover Bottom Underground Mine, which produced crushed limestone sold in or substantially affecting interstate commerce.

Citation 2861521

2. This citation, issued on December 2, 1987, alleges a violation of 30 C.F.R. § 57.12028. Respondent failed to perform the required annual continuity and resistance tests of the mine grounding system. The last tests performed by Respondent at the cited mine were on November 18, 1986.

3. This was the third year that Respondent failed to perform the required tests in a timely fashion. Respondent did not have its own grounding bed at this mine until one was installed in 1985 by the Technical Support Unit (Tech Support) of the Mine Safety and Health Administration. The testing of the adequacy of the ground bed was performed for the operator by Tech Support as a part of the setting up of the bed. At that time, it was explained to the operator that the ground bed would have to be tested on an annual basis. After this initial setup, Respondent was cited in November 1986, for the failure to perform the required tests on the mine's grounding system.

4. The continuity test is designed to detect any breaks in the grounding system, to determine whether there is a continuous path from the electrical equipment to the ground bed.

5. The resistance test measures the impedance of the ground bed (metal rods in the earth) from one point to another. The integrity of the ground bed may be affected by various conditions, e.g., acids in the dirt, vehicles running over the surface, or a broken wire. If the ground bed is broken, then in the event of an electrical fault the current may shock any person who touches the equipment or is standing in close proximity to it.

Citation 2861527

6. This citation, issued on January 26, 1988, alleges a violation of 30 C.F.R. § 57.12016. A mine foreman, Glenn Brewer, and two mine employees were performing repair work on the primary jaw crusher, about 100 feet underground, without locking out the equipment or taking other measures which would prevent the machine from being energized without the knowledge of the men working on it. The miners had removed some guards from the machine. One miner was down on the conveyor belt, the other was at the base of the crusher, and the foreman was on the landing on top of the jaw crusher.

7. The power switch to energize or de-energize the primary jaw crusher was in a control building above ground. No one was in the control building at the time. There was a lock in the hasp of the door to the control building, but the hasp was not closed and the lock was not fastened, nor did it give an appearance that the building was closed to personnel. When the mine inspector entered the building, he did not have to remove the lock. There was power available at the control building.

8. There were start-stop switches at the jaw crusher. However, these were not a reliable means of de-energizing the machine.

Order-Citation 2861528

9. This order-citation, issued on January 26, 1988, alleges a violation of 30 C.F.R. § 57.15002. Two employees, who were working under the direction of the mine foreman and in view of the foreman, were not wearing hard hats. Both miners were at the primary jaw crusher, below the level where tools were located and would be handed down. They were underground, where there was a danger of falling rock from the roof or sides of the pillars. Roof and pillar conditions in limestone mining change from day to day. The protection of hard hats is basic to mining as demonstrated by the dents in miners' and mine inspectors' hard hats caused by falling objects or bumping into objects underground.

Order-Citation 2861529

10. This order-citation, issued on January 26, 1988, alleges a violation of 30 C.F.R. § 57.4161. An open fire heater was burning underground on a platform at the primary jaw crusher where two miners and mine foreman Glen Brewer were working. The heater, which was a diesel fuel heater known as a salamander, was on the platform of the primary jaw crusher, about eight feet off the ground. A salamander is a metal cone-shaped heater. The base is 18-20 inches high, and the exhaust stack is about nine inches high. Salamanders can easily be turned over and spread a liquid fire. In addition, they emit a high level of carbon monoxide which may accumulate due to the confined space and confined ventilation underground.

11. Respondent was cited in December 1986, for having a salamander burning underground at the primary jaw crusher. When the citation was issued, the mine inspector discussed the prohibition against having open flames underground with Glenn Brewer, mine foreman. Also, before the subject order-citation was issued, Vernon Denton, field office supervisor, MSHA, held a conference with three representatives of Respondent: Lyle Walker, Glenn Brewer, and Dave Riley, safety director. Mr. Denton explained in detail to all three individuals the prohibition against the operation of a salamander underground.

Order-Citation 2861909

12. This order-citation, issued on April 13, 1988, alleges an imminent danger and violations involving the mine exhaust fan. The mine fan was a mobile fan on a trailer base with rubber tire wheels. The fan had eight-foot propeller type blades, driven by a 20 horse power, 480 volt motor. The fan was sitting at ground level. The blades were not adequately guarded. The fan was behind a storage trailer and adjacent to the dump area of the mine. The area was well traveled by foot traffic as indicated by footprints around the base of the fan. The fan was turned on and off daily by a miner walking up to the fan. The order-citation contains four citations, each having No. 2861909, and identified as No. (1), (2), (3), or (4):

(1) This citation alleges that the fan propeller blades were not adequately guarded, in violation of 30 C.F.R. § 57.14001. The bottom five feet of the fan had a loosely constructed wire fence material as a guard. The mesh in the material was so large that someone could stick his hand through it. The guard had deteriorated due to the vibration of the fan and left exposed moving parts accessible to persons traveling in the area. The fan blades were completely exposed at the top three feet of the fan.

(2) This citation alleges that the 480 volt motor for the fan was not grounded, in violation of 30 C.F.R. § 57.12025. The fan had three wire circuits (three phase), and a ground wire was not provided.

(3) This citation alleges that the 20 horsepower motor for the fan was not provided with a lead make-up box cover, in violation of 30 C.F.R. § 57.12032. There was no cover plate on the lead make-up box.

(4) This citation alleges that there were several poorly insulated splices in the 480 volt power cable to the fan, in violation of 30 C.F.R. § 57.12013. The splices in the cable were not properly insulated, and left the three conductors exposed to contact, damage, moisture, dust, and dirt.

Citation 286135

At the hearing, the parties moved for approval of a settlement of this citation, with payment of the \$85 penalty originally proposed. This motion was granted, and the penalty is included in the Order below.

DISCUSSION WITH FURTHER FINDINGS

Citation 2861521

This citation marked the third year that Respondent failed to perform the required continuity and resistance tests in a timely fashion. The operator did not have its own grounding bed until one was installed in 1985 by the Tech Support Unit of MSHA. The testing of the adequacy of the ground bed was performed for the operator by Tech Support as a part of the setting up of the bed. At that time, it was explained to Respondent that the ground bed would have to be tested within a year. Despite this, Respondent was found in violation in November 1986, for failing to test the ground bed resistance and continuity of the grounding system.

At the hearing, Respondent did not consider the tests significant (Tr. 45), despite the fact that Tech Support instructed the operator as to the importance of maintaining a ground bed and performing these tests annually.

Failure to test the ground bed annually is a serious matter. Even where an electrical utility company maintains its own ground bed outside the mine, the failure of the mine operator to perform these tests at the mine can result in a fatality.

Respondent was highly negligent in failing to perform the required tests. It was given ample assistance by Tech Support in 1985, but was cited the next year for failing to conduct the required tests. It was again found in violation in January 1988. Respondent's history shows indifference concerning the need for the tests and the seriousness of failing to perform them.

Considering each of the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of \$300 is appropriate for this violation.

Order-Citation 2861527

The foreman and two miners were working at the primary jaw crusher, to do repair work, but the circuit for the machine was not locked out. Respondent's lockout procedure required that the control room, above ground, which supplied power to the primary jaw crusher, be locked while the machine was de-energized during repair work. However, the control room was not locked and the power circuit to the jaw crusher was not locked out. The foreman knew that this was the case. Failure to de-energize and lock out this dangerous equipment during repairs constituted aggravated conduct which showed an "unwarrantable" failure to comply with the safety standard. It was also a "significant and substantial" (S and S) violation.

Considering each of the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of \$500 is appropriate for this violation.

Order-Citation 2861528

The inspector observed two miners, working at the primary jaw crusher, who were not wearing hard hats. They were working under the direction of their foreman, Glenn Brewer. The violation was obvious and serious. The two miners were below the level on which tools were located, and they were underground. There was a clear danger of being struck by falling tools or falling rock from the mine roof or ribs. The need for the protection of hard hats is basic to mining, as demonstrated by the dents commonly seen in hard hats caused by falling objects and bumping into objects underground. Considering the obvious danger and the foreman's plain view of this violation, Respondent's conduct rose to the level of an "unwarrantable" failure to comply with the standard.

Considering each of the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of \$500 is appropriate for this violation.

Order-Citation 2861529

Respondent violated 30 C.F.R. § 57.4161 by having an open flame heater burning underground. The diesel fuel heater (a "salamander") was on a platform at the primary jaw crusher where two miners and their foreman, Glenn Brewer, were working. This was a significant and substantial violation, which presented a clear risk of a mine fire and emission of a high level of carbon monoxide that could reasonably be expected to cause serious injuries.

The operator was cited for this same condition a month earlier. When issuing the previous citation, the mine inspector discussed the prohibition against having open flames underground with Glenn Brewer, foreman, and, before the date of the subject order-citation (January 26, 1988), MSHA supervisor Vernon Denton held a conference with management representatives Lyle Walker, Glenn Brewer and Dave Riley; at the conference he explained in detail the prohibition against operation of a salamander underground. Respondent's repeat of the same violation was flagrant, and showed an unwarrantable failure to comply with the safety standard.

Considering each of the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of \$1,000 is appropriate for this violation.

Order-Citation 2861909

This order-citation was issued for an imminent danger and violations involving the mine exhaust fan. In conjunction with a § 107(a) order, the inspector issued four § 104(a) citations. Each citation has the same number as the order. For identification, the following citations are numbered in the order as (1), (2), (3), and (4).

(1) Respondent violated 30 C.F.R. § 57.14001 because the fan blades (8-feet, propeller type blades) were not adequately guarded and were accessible to contact by personnel. The person turning the fan on and off was at risk of coming in contact with the blades. This was an S and S violation, due to ordinary negligence.

Considering each of the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of \$150 is appropriate for this violation.

(2) The 480 volt motor for the fan was not grounded, in violation of 30 C.F.R. § 57.12025. This condition presented a serious risk of electric shock. This was an S & S violation, due to ordinary negligence.

Considering each of the criteria for a civil penalty in § 110(i) of the Act, I find a penalty of \$150 appropriate for this violation.

(3) The 20 horsepower motor for the fan was not provided with a lead make-up box cover, in violation of 30 C.F.R. § 57.12032. The regulation requires that cover plates on electrical equipment and junction boxes be kept in place at all times except during testing or repairs. The motor was energized and the wire connections in the box were exposed to contact, moisture, damage, dust and dirt. This was an S and S violation, due to ordinary negligence.

Considering each of the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of \$150 is appropriate for this violation.

(4) The 480 volt cable to the fan had several improperly insulated splices, in violation of 30 C.F.R. § 57.12013. The splices left the conductors exposed to contact, damage, moisture, dust, and dirt. This was an S & S violation, due to ordinary negligence.

Considering each of the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of \$150 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.
2. Respondent violated the safety standards as charged in Citations and Order-Citations Nos. 2861521, 2861527, 2861528, 2861529, 2861909 and 286135.

ORDER

Respondent shall pay the above civil penalties of \$2,985 within 30 days of this Decision.

William Fauver

William Fauver
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, 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PFNN 89-111
Petitioner	:	A. C. No. 36-07230-03557
	:	
v.	:	Bailey Mine
	:	
CONSOL PENNSYLVANIA COAL	:	
COMPANY,	:	
Respondent	:	

DECISION

Appearances: Nanci A. Hoover, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Michael R. Peelish, Esq., Consol Pennsylvania Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty for an alleged violation filed by the Secretary of Labor against Consol Pennsylvania Coal Company, under the Federal Mine Safety and Health Act of 1977, 30 U. S. C. § 820. An evidentiary hearing was held on July 11, 1989. The parties have filed post-hearing briefs.

Citation No. 3083738 dated January 4, 1989, charges a violation of 30 C.F.R. § 75.1100-2(e)(2) for the following condition or practice:

"A fire extinguisher and 240 lb of rock dust was not provided for an electrically operated water pump located 100 feet outby the face of the No. 1 return entry in the 5 B Section."

30 C.F.R. § 75.1100-2 provides in pertinent part as follows:

75.1100-2 Quantity and location of firefighting equipment.

(a) Working sections. (1) Each working section of coal mines producing 300 tons or

more per shift shall be provided with two portable fire extinguishers and 240 pounds of rock dust in bags or other suitable containers; waterlines shall extend to each section loading point and be equipped with enough fire hose to reach each working face unless the section loading point is provided with one of the following:

(i) Two portable water cars; or

(ii) Two portable chemical cars; or

(iii) One portable water car or one portable chemical car, and either (a) a portable foam-generating machine or (b) a portable high-pressure rock-dusting machine fitted with at least 250 feet of hose and supplied with at least 60 sacks of rock dust.

* * * *

(b) Belt conveyors. In all coal mines, waterlines shall be installed parallel to the entire length of belt conveyors and shall be equipped with firehose outlets with valves at 300-foot intervals along each belt conveyor and at tailpieces. At least 500 feet of firehose with fittings suitable for connection with each belt conveyor waterline system shall be stored at strategic locations along the belt conveyor. Waterlines may be installed in entries adjacent to the conveyor entry belt as long as the outlets project into the belt conveyor entry.

(c) Haulage tracks. (1) In mines producing 300 tons of coal or more per shift waterlines shall be installed parallel to all haulage tracks using mechanized equipment in the track or adjacent entry and shall extend to the loading point of each working section. Waterlines shall be equipped with outlet valves at intervals of not more than 500 feet, and 500 feet of firehose with fittings suitable for connection with such waterlines shall be provided at strategic locations. Two portable water cars, readily available, may be used in lieu of waterlines prescribed under this paragraph.

* * * *

(d) Transportation. Each track or off-track locomotive, self-propelled man-trip car, or personnel carrier shall be equipped with one portable fire extinguisher.

(e) Electrical installations. (1) Two portable fire extinguishers or one extinguisher having at least twice the minimum capacity specified for a portable fire extinguisher in § 75.1100-1(e) shall be provided at each permanent electrical installation.

(2) One portable fire extinguisher and 240 pounds of rock dust shall be provided at each temporary electrical installation.

* * * *

At the prehearing conference counsel for both parties agreed to several stipulations which were placed on the record at the hearing held the next day. These stipulations are as follows:

(1) The operator is the owner and operator of the Bailey Mine located in Washington, Pennsylvania;

(2) The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;

(3) The administrative law judge has jurisdiction over this case pursuant to Section 105 of the Act;

(4) In the two-year period prior to May 27, 1989, the mine had no known violations of the standard contested in this case;

(5) The size of the operator is reflected by the following data:

(i) The mine employs approximately 370 underground and service employees;

(ii) Annual production is approximately 4,659,479 tons;

(iii) The operator operates 33 mines;

(iv) The annual production of all the operator's mines is approximately 49,776,000 tons.

(6) The alleged violation was abated within the required time period;

(7) Imposition of a penalty herein will not affect the operator's ability to continue in business;

(8) The pump in issue was a temporary electrical installation within the meaning of the mandatory standard;

(9) Firefighting equipment at the load center satisfied the requirement of Section 75.1100-2(a), which is not at issue in this case.

The pertinent facts are as follows: The cited pump was in a return entry several hundred feet in by the load center ("A" on Joint Exh. 1, Tr. 11-12). This location was on the working section but the pump was not within sight of the load center (Tr. 33, 71). The pump received its power from the load center and was used to pump water from the section which had water but was not especially wet (Tr. 73-75). No firefighting equipment was located at the pump (Tr. 18). The pump was energized (Tr. 17).

It is the operator's position that because the firefighting equipment at the load center satisfied the requirements for such equipment on the working section and because the pump was on the working section, there was no violation. The operator argues that having met its obligations under subparagraph (a) of § 75.1100-2 which sets forth the firefighting equipment required on the working section, it need do no more. The Secretary, on the other hand, maintains that although the operator has satisfied subparagraph (a), it must also provide the firefighting equipment specified by subparagraph (e) for temporary electrical installations.

I conclude the Secretary's position is correct. The parties have agreed that the pump is a temporary electrical installation within the meaning of the mandatory standard. Stipulation No. 8 1/. Moreover, the stipulation accords with general practice and usage. Thus the term "temporary installation" is defined as:

An installation made for a limited time only, generally in the area between the loading point and the working face, but also in other locations where portable or mobile equipment is installed for a limited time.

1/ Much of the operator's brief appears at odds with this stipulation, into which it freely entered. The stipulation is binding in this case.

A temporary installation is limited to a period of six months. BuMines. Coal-Mine Inspectors' Manual, June 1966, pt. 3-18e, p. 53.

Dictionary of Mining Terms, U. S. Bureau of Mines (1969), p. 1127.

The various subparagraphs of § 75.1100-2 set forth requirements for firefighting equipment by location and type of machinery. In absence of evidence to the contrary, I believe the health and safety purposes of the Act are best served by insisting that every requirement of the standard applicable by its terms to a given situation, be fulfilled. The operator's witnesses agreed that except for subparagraph (a) other subparagraphs of § 75.1100-2 should be read together in cumulative fashion. Thus the mine foreman testified that if a pump such as the one in this case were located in the belt entry, it would have to satisfy not only subparagraph (b) regarding firefighting equipment in a belt entry, but also subparagraph (e) with respect to temporary electrical installations (Tr. 74-75). He also stated the same would be true with respect to a pump in a haulage-way that is governed by subparagraph (c) (Tr. 74-75). The operator's foreman asserted that the dual requirements could be imposed on temporary pumps in belt entries and haulageways because such pumps might be further away from firefighting equipment than they would be on a working section. I do not find this argument persuasive. The foreman himself admitted that a temporary pump on a working section could be several hundred feet from the firefighting equipment required by subparagraph (a) (Tr. 78). Moreover, once certain subparagraphs of § 75.1100-2 are read and applied together there is no basis in the wording or structure of the mandatory standard to make an exception for subparagraph (a) so that where it applies, nothing else does.

The MSHA Policy Manual is not binding but in appropriate instances it may serve as a guide in interpreting a mandatory standard. U. S. Steel, 10 FMSHRC 1138 (1988), U. S. Steel, 5 FMSHRC 3 (1983), Alabama By-Products, 4 FMSHRC 2128 (1982). However, the 1988 Manual, is of no use here. The manual states that a permanent electrical installation referred to in section (i) of subparagraph (e) is electric equipment expected to remain in place for a relatively long or indefinite period of time. Items of electric equipment considered permanent are listed and those pieces which should not be considered permanently installed are also identified. However, the manual does not define or specify what equipment qualifies as a temporary electrical installation under section (ii). The fact that something should not be considered a permanent electrical installation does not mean it thereby becomes a temporary installation. It may be neither. I agree with the inspector's testimony that certain types of equipment under ordinary circumstances do not qualify as

installations (Tr. 45). In any event, the parties have agreed that the cited pump was a temporary electrical installation. In addition, the manual provides that firefighting equipment required for welding under subparagraph (g) of § 75.1100-2 may be satisfied by the equipment required by subparagraph (a) for the working section. (Solicitor's Brief p. 8). The manual gives no rationale for the exemption it allows under (g). Neither the Solicitor nor operator's counsel makes mention of the fact that prior to 1978 the manual allowed the same exemption for temporary installations under (e) as for welding under (g). Since the mandatory standard is the same under the 1977 Act as it was under the 1969 Act, the reason for the manual change regarding subparagraph (e) is not apparent. In this respect also the manual is deficient. However, as set forth above, the decision in this case is based upon a schematic interpretation of the mandatory standard.

In light of the foregoing, I conclude there was a violation.

The evidence shows that the absence of the required firefighting equipment created the danger an individual could be overcome by smoke or electrical shock (Tr. 20-21). However, on the day in question methane was within permissible limits and nothing was wrong with the pump (Tr. 23, 32, 41). Therefore, I conclude gravity was only moderate.

The Commission has set forth specific criteria for establishing whether or not a violation is significant and substantial. Cement Division, National Gypsum Co., 3 FMSHRC 872 (1981), Mathies Coal Co., 6 FMSHRC 1 (1984). As set forth above, the violation presented a discrete safety hazard, but the evidence does not show a reasonable likelihood the hazard would result in injury. The inspector first testified that an injury could happen or was a possibility (Tr. 20, 22). When pressed about "reasonable likelihood" the inspector's subsequent statement that it was reasonably likely, is unconvincing since he premised that conclusion upon methane which he admitted was not at dangerous levels, upon a defect in the pump when there was no defect, and upon dust concerning which there was no testimony (Tr. 22-24). In light of the foregoing, I conclude the violation was not significant and substantial.

The inspector admitted that he had not previously discussed the need for firefighting equipment at temporary pumps with the mine foreman or the operator's safety supervisor (Tr. 91). The inspector said he had talked to safety people who traveled with him (Tr. 91). In the prior two years no citations had been issued for this type of violation. Although MSHA is not in any way estopped, these circumstances do affect the degree of fault. I conclude negligence was minimal.

The post hearing responses have been reviewed. To the extent they are inconsistent with this decision they are rejected.

A penalty of \$50 is assessed.

ORDER

It is hereby ORDERED that the operator pay \$50 within 30 days from the date of this decision.

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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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 7 1989

SOUTHERN OHIO COAL COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEVA 88-56-R
: Order No. 2895233; 10/21/87
SECRETARY OF LABOR :
MINE SAFETY & HEALTH : Martinka No. 1 Mine
ADMINISTRATION (MSHA), : Mine ID 46-03805
Respondent :
SECRETARY OF LABOR : CIVIL PENALTY PROCEEDING
MINE SAFETY & HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 88-156
Petitioner : A.C. No. 46-03805-03843
v. :
: Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY, :
Respondent :

DECISION

Appearances: B. Anne Gwynn, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Secretary.
David M. Cohen, Esq., American Electric Power
Service Corp., Lancaster, Ohio for the Contestant/
Respondent.

Before: Judge Maurer

These cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"), to challenge the legality of a section 104(d)(2) order issued to the contestant at its Martinka No. 1 Mine on October 21, 1987. The captioned proceedings have been consolidated for hearing and decision because the order contested in the contest proceeding charges a violation of a mandatory safety standard for which the Secretary seeks a penalty in the civil penalty proceeding.

Pursuant to notice, the cases were heard in Morgantown, West Virginia, on March 2, 1989. The parties filed post-hearing proposed findings of fact, conclusions of law, and briefs which have been considered by me in the course of making this decision.

Section 104(d)(2) Order No. 2895233, which is the subject of this proceeding, was issued by MSHA Inspector Homer W. Delovich on October 21, 1987. The order alleges a violation of the mandatory safety standard found at 30 C.F.R. § 75.1403 1/, and the condition or practice alleged by the inspector to be a violation of that standard, which pertains to safeguards, states as follows:

In the D-3 Longwall sections, the 24 inch clearance was obstructed on the headgate operator's side for approximately 120 feet along the panline and for 10 outby the section belt tailpiece; obstructing the clearance was water, coal and coal dust mixed 6 inches to 18 inches in depth and in this accumulations were 3 cables, coal and rock, the accumulations existed between the coal rib and panline. No one working on conditions when observed, no pump provided for the water and two men were observed performing other work in this clearance. Condition presents a slipping and stumbling hazard. Safeguard issued 02-03-82, Number 863963.

Safeguard No. 863963 had been issued by Inspector Delovich on February 3, 1982. That safeguard notice provided that:

Twenty-four inch clearance was not provided along the stage loader and chain conveyor at the headgate on the C2 longwall section. Obstructing the 24-inch clearance was a roof crib within 4 inches of the control station, large shale roof rock walkway where persons work along the panline and post laying on the floor of the clearance. All stage loaders and panlines at headgates in this mine shall have 24 inches of unobstructed clearance.

STIPULATIONS

The parties stipulated to the following, which I accepted (Tr 10-11):

1. The Administrative Law Judge has jurisdiction over these proceedings.

1/ 30 C.F.R. § 75.1403 repeats section 314(b) of the Mine Act, 30 U.S.C. § 874(b), and states:

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

2. The Martinka No. 1 Mine is owned and operated by the Southern Ohio Coal Company.

3. The Martinka No. 1 Mine and the Southern Ohio Coal Company are subject to the jurisdiction of the Federal Mine Safety & Health Act of 1977.

4. Safeguard No. 863963 was properly served by duly authorized representatives of the Secretary of Labor upon an agent of the Southern Ohio Coal Company on the date, time and place stated therein.

5. Safeguard No. 863963 had not been vacated or withdrawn at the time Order Number 2895233 was issued.

6. Order Number 2895233 was properly served by duly authorized representatives of the Secretary of Labor upon an agent of the Southern Ohio Coal Company on the date, time and place stated therein.

7. The assessment of a civil penalty in this proceeding will not affect Southern Ohio Coal Company's ability to stay in business.

8. The annual coal production of the Martinka No. 1 Mine in 1986 was one million one hundred seventy-seven thousand three hundred forty-seven tons.

9. There was no intervening clean inspection between September 1, 1981, when Order No. 859286 was issued and October 21, 1987, when Order No. 2895233 was issued.

10. There were approximately 346 inspection days at the Martinka No. 1 Mine in the 24 month period prior to the issuance of Order No. 2895233.

DISCUSSION AND FINDINGS

On October 21, 1987, Inspector Delovich conducted a regular quarterly inspection of the Martinka No. 1 Mine. In the D-3 longwall section, he found the travelway between the panline and the rib to be covered with water, mud, coal muck, etc. A "quagmire" in his words. This condition existed from 10 feet outby the tail piece to 120 feet inby along the panline, and ranged in depth from 6 to 18 inches. He issued the order at bar because of this condition, shutting down the longwall operation and withdrawing the 3 miners who had been working in this mess.

The inspector felt this was a significant and substantial violation because he believed it was highly likely that a miner

would slip, trip or fall in the muck and if a miner fell in the area between the panline and the rib, he could fall onto the moving panline, and serious injuries would be reasonably likely to occur.

The inspector also determined that this condition had existed for two to three weeks prior to the issuance of the instant order and at the time of the issuance, nothing was being done to correct this situation. The testimony of Messrs. Kirchartz and Yost established that mine management was aware of the condition for the entire 2-3 weeks of its existence, and graphically described the unpleasantness of working in these messy conditions.

It so happens that Inspector Delovich had also issued the underlying safeguard some five years earlier. He issued that safeguard in the C-2 longwall section because the travelway between the panline and the solid coal rib was obstructed by large stone and rock and had a crib built in close proximity to the stage loader. Miners were observed by him at that time to be walking through the obstructed area between the panline and the solid coal rib because this was the only entrance to the longwall face. They also had to bring supplies in through this area between the rib and the panline. His purpose in issuing this safeguard then was to alleviate the stumbling and tripping hazards he found and to provide for an unobstructed travelway between the coal ribs and the stage loaders and panlines.

In a previous case involving this same contestant, Southern Ohio Coal Co., 10 FMSHRC 963 (1988), the Commission discussed in general terms the safeguard issue. Therein they stated at 966-67:

The Commission has previously had occasion to examine the Act's safeguard provision. The Commission has noted that the broad language of the provision "manifests a legislative purpose to guard against all hazards attendant upon haulage and transportation in coal mining." Jim Walter Resources, Inc., 7 FMSHRC 493, 496 (April 1985). The Commission has observed that while other mandatory safety and health standards are adopted through the notice and comment rulemaking procedures set forth in section 101 of the Act, section 314(b) extends to the Secretary an unusually broad grant of regulatory power -- authority to create what are, in effect, mandatory safety standards on a mine-by-mine basis without regard to the normal statutory rulemaking procedures. Southern Ohio Coal

Co., supra, 7 FMSHRC at 512. The Commission also has recognized that the exercise of this unique authority must be bounded by a rule of interpretation more restrained than that accorded promulgated standards. Therefore, the Commission has held that a narrow construction of the terms of a safeguard and its intended reach is required and that a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the remedial conduct required by the operator to remedy such hazard. Id.

These underlying interpretive principles strike an appropriate balance between the Secretary's authority to require safeguards and the operator's right to notice of the conduct required of him.

That earlier Southern Ohio Coal Company case cited in the above quotation is directly on point in this proceeding. In Southern Ohio Coal Co., 7 FMSHRC 509 (1985), the Commission held that notices to provide safeguards must be narrowly construed. In that case, the notice to provide safeguards referred to "fallen rock and cement blocks" in a travelway. These solid objects in the travelway presented a stumbling hazard, and depending on the amount of material present could have prevented passage in the walkway altogether. Abatement of this condition was accomplished by simply removing the discrete objects. The Commission specifically opined at 7 FMSHRC 513:

[F]urther instances of physical obstructions in travelways, whether rocks, cement blocks, or other objects such as construction materials, mine equipment or debris would fall within the scope of the safeguard.

The obstruction cited as a violation of the safeguard in that instance, however, was not any of those objects. It was water, in combination with the clay bottom of this same Martinka No. 1 mine, rock dust and mud, which did create a serious slipping and stumbling hazard.

The holding in that case is also set out at 7 FMSHRC 513:

The alleged obstruction cited in this case, an accumulation of water, was neither specifically identified in the safeguard notice, suggested thereby, nor in our opinion even contemplated by the inspector when he issued his safeguard notice. The presence of water in an underground coal mine is not an unusual condition; it sometimes results from its introduction into the mining process, but often it is caused by natural ground conditions. The record in this case indicates that natural water seepage was common at this

mine, particularly at the location involved. Given the frequency of wet ground conditions in the mine, and the basic dissimilarity between such conditions and solid obstructions such as rocks and debris, we find that SOCCO was not given sufficient notice by the underlying safeguard notice issued in 1978 that either wet conditions in general or the particular conditions cited in 1983 by the inspector in this case would violate the underlying safeguard notice's terms.

We do not hold that a safeguard notice pertaining to hazardous conditions caused by wetness could not be issued. Conditions such as those cited by the inspector here, if hazardous, can just as readily be eliminated by issuance of safeguard notices specifically addressing such conditions. By taking this approach rather than bootstrapping dissimilar hazards into previously issued safeguard notices, the operator's right to notice of conditions that violate the law and subject it to penalties can be protected with no undue infringement of the Secretary's authority or loss of miner safety.

Returning to the instant case, in the words of the MSHA inspector who issued it, he issued the notice to provide safeguards in February of 1982 because SOCCO had the cited travelway obstructed with large stones and rock and they had a crib block built right next to the stage loader.

In October of 1987, the same inspector testified he found a "quagmire", six to eighteen inches in depth, consisting of water, mud, coal lumps and dust and cables running through this "muck" in the cited area. He defined "muck" to be coal dust and water mixed to a consistency where it forms a mud.

Mr. Kirchartz, a safety committee member and employee of SOCCO at the Martinka No. 1 mine accompanied Inspector Delovich on October 21, 1987 during his inspection and witnessed the issuance of the order at bar as well as the conditions in the cited area. He testified that both sides of the panline were in a very muddy condition and that this area of the mine was a particularly wet one.

Mr. Yost, another SOCCO employee was called and he testified that he is a shear operator on the longwall and was knowledgeable about the conditions in the cited area at the time the order was issued. He described the conditions as being muddy and mucky on both sides of the panline. He had previously complained about the mud there. He stated that to work in eighteen inches of mud all day was a mess and definitely no fun.

Mr. Lane, a longwall foreman at Martinka No. 1, also testified that he was familiar with the conditions in the area at the time the violation was written and was present when the order was issued. He denies that any rock or large chunks of coal were present in this area at the time. He admits the muck existed, but denies that there were any cables laying in the muck on the operator's side of the stage loader between the face and the conveyor motor. The order states that there was an obstruction on the headgate operator's side for approximately one hundred and twenty feet along the panline and for ten feet outby the section belt tailpiece, but the cables were only involved within the ten feet outby the section belt tailpiece.

Mr. David Stout, a safety assistant employed by SOCCO, was also with the inspector at the time the order was issued and was aware of the conditions in the cited area at the time. He observed a mixture of water, small lumps of coal, small gravel-sized rock and clay bottom material. Most of this fine mixture was water in his opinion. With regard to the cables at issue herein, he testified that there were three cables coming from the stage loader area next to the tailpiece that were looped out of the motor, and were on the floor within the ten feet outby the section belt tailpiece.

The cited condition was abated by a dozen miners using buckets to put the muck onto the conveyor within the stage loader. Shovels were tried, but were found to be ineffective because the consistency of the material did not allow it to stay on the shovels.

The safeguard makes no reference to mud or water or muck, and the inspector somewhat incongruously states that if it wasn't for the muck that was present, he would not have written the alleged violation under the safeguard section of the mandatory standards. He testified that in 1982 the travelway was obstructed; there were obstructions on the floor and in his words, "it wasn't meant to be specific what kind of obstructions". Therefore, he issued the safeguard. Subsequently, in 1987, when he found the "quagmire", rather than issue a new safeguard notice to eliminate the conditions he believed to be hazardous, he attempted to include muck within the prohibitions of the existing safeguard which referenced only large rocks, a crib block and a post laying on the floor.

The order at bar which he issued in this instance alleged that the clearance was obstructed with a mixture of water, coal and coal dust (muck) in which there were located three cables, coal and rock. The three cables referenced in the order were part of the longwall unit and provide power for the longwall. These three cables were not on the mine floor between the panline

and the solid coal block within the 120 feet next to the panline, but rather were on the floor next to the solid coal block within the 10 feet outby the section belt tailpiece. The ten feet outby the section belt tailpiece, not being next to the stage loader or panline is not included in the area covered by the safeguard. That effectively eliminates the cables from any further consideration.

As far as any coal and rock that existed in the "quagmire", I find that the consensus of the evidence is that it was very small lumps of coal and rock along with clay or bottom material which formed a muck, some six to eighteen inches deep. I also find that it was solely this muck, rather than any discrete physical objects, that resulted in the issuance of the order at bar.

Commission precedent, Southern Ohio Coal Co., supra, is clear in this case. The safeguard must identify with specificity the class of obstructions prohibited. The obstruction cited by the 1987 order in this case was essentially muck. Muck was not mentioned in the 1982 sareguard notice that the order purportedly relies on and no reasonable construction of the underlying safeguard notice in this case could conceivably include it. Accordingly, the instant order must be vacated.

ORDER

On the basis of the foregoing findings and conclusions, SOCCO's contest IS GRANTED, Order No. 2895233 IS VACATED, and MSHA's related civil penalty proposal IS REJECTED. The civil penalty proceeding IS THEREFORE DISMISSED.


Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 7 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 88-187
Petitioner : A.C. No. 46-03805-03846
v. :
SOUTHERN OHIO COAL COMPANY, : Martinka No. 1 Mine
Respondent :

DECISION

Appearances: Therese Salus, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
David M. Cohen, Esq., American Electric Power Service Corporation, Southern Ohio Coal Company, Lancaster, Ohio, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for two alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed a timely answer and contest, and a hearing was held in Morgantown, West Virginia. The parties filed posthearing briefs and proposed findings and conclusions, and the arguments presented therein have been considered by me in the course of this decision.

Issues

The parties settled one of the violations, and the settlement was approved from the bench during the hearing, and my settlement decision has been reaffirmed. With regard to the remaining contested violation, the issues presented include the fact of violation, the appropriate civil penalty assessment for

the violation, taking into account the civil penalty criteria found in section 110(i) of the Act, and whether or not the inspector's S&S and unwarrantable failure findings were properly made. 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. 30 C.F.R. § 75.1704.
3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 11-13):

1. The respondent and the subject mine are subject to the jurisdiction of the Act, and the presiding judge has jurisdiction to hear and decide this matter.
2. The contested order was properly served on the respondent by a duly authorized representative of the Secretary of Labor.
3. The alleged violation was abated by the respondent in a timely fashion.
4. The subject mine produced approximately 2.8 million tons of coal as of March, 1989, and the respondent company produced approximately 12.2 annual tons as of March, 1989.
5. The proposed civil penalty assessment will not affect the respondent's ability to continue in business.
6. The records obtained from MSHA's Office of Assessments reflects that the respondent was issued 55 section 104(a) violations citing violations of mandatory safety standard 30 C.F.R. § 75.1704, over the 2-year period preceding the issuance of the contested order in issue in this case.

The respondent agreed that there is no dispute with regard to the section 104(d) procedural "chain" concerning the preceding section 104(d) citation relied on by the inspector to support the subsequently issued section 104(d) order (Tr. 17).

Discussion

Section 104(d)(2) Order No. 2895079, January 6, 1988,
30 C.F.R. § 75.1403-9(c).

The parties agreed to settle this alleged violation, and they presented their oral arguments on the record in support of the proposed settlement, and a reduction of the initial proposed civil penalty assessment from \$1,000 to \$50.00.

Petitioner's counsel stated that the inspector based his order on his belief that the respondent exhibited a high degree of negligence in allowing a tripping hazard to exist along a shelter hole for two to three shifts. However, counsel confirmed that there is no credible testimony to support this conclusion and that the order should be modified to a section 104(a) citation because the unwarrantable failure finding cannot be supported, and there is no support for any finding that the respondent exhibited aggravated conduct in connection with the violation. Counsel also asserted that the condition was not entered in any preshift examination reports, and that the respondent immediately abated the cited condition. Counsel confirmed that the respondent's history of prior violations includes no previous violations of the safeguard provisions of 30 C.F.R. § 75.1403-9(c), (Tr. 5-8).

Petitioner's counsel confirmed that she discussed the proposed settlement disposition with the inspector who issued the order on many occasions, and that he agreed with it (Tr. 10). After due consideration of the proposed settlement, it was approved from the bench (Tr. 10). My ruling in this regard is herein reaffirmed.

The remaining contested section 104(d)(2) Order No. 2895499, issued on January 6, 1988, cites an alleged violation of 30 C.F.R. § 75.1704, and the condition or practice states as follows:

Additional roof supports are needed in the intake escapeway for the North Mine butts (031) section at Sta. #17845 where the roof is loose, broken and some spalling has occurred from around existing supports. The location has been reported in the examination book since 12/2/87 and no action has been taken to correct this condition since being reported.

In her opening statement at the hearing, petitioner's counsel asserted that on January 6, 1988, MSHA Inspector Frank Bowers, accompanied by UMWA Fire Boss Gary Pastorial, and the respondent's safety representative David Stout, conducted a regular inspection of the mine, and in the course of the inspection walked along the North Main Butts section belt into the

entry. At Station No. 17845, the inspector observed a danger tag that had been hung on or about December 2, 1987, by Mr. Pastorial. In the vicinity of the tag, Mr. Bowers observed cracked and broken roof and falling roof materials on the mine floor at the crosscut at the station in question. The condition covered an area of approximately 16 feet long and 2 to 3 feet wide. Based on his observations, and the fact that the danger tag had been placed there for more than a month prior to the inspection, with no indication of any remedial measures taken by the respondent to correct the conditions, the inspector issued the section 104(d)(2) order, with special S&S findings, citing a violation of section 75.1704.

Counsel stated further that after the inspection was concluded, the inspector went to the surface and reviewed the respondent's weekly examination books which contained references to the cited roof conditions since early December, 1987. This confirmed the inspector's belief that the conditions had existed for more than 1 month, and supports the issuance of the order (Tr. 15-16).

Respondent's counsel agreed that the cited conditions had been reported in the weekly examination books since December 2, 1987. However, he asserted that the book entries repeatedly, reflect that the area was "safe to travel" (Tr. 16).

Counsel asserted that section 75.1704, requires that at least two separate and distinct travelable passageways be maintained in a safe condition, and since the UMWA fire boss repeatedly noted in the book that the cited area was safe, no violation has been established. Further, even if it were to be determined that the cited area was unsafe, since the condition was never reported to mine management as unsafe, the unwarrantable failure finding by the inspector is not justified (Tr. 17).

Petitioner's Testimony and Evidence

MSHA Inspector Frank Bowers, testified as to his background and experience, and he confirmed that he issued the contested order during the course of his mine inspection on January 6, 1988 (Tr. 24). He stated that he observed that loose and broken rock had fallen from the roof in and around the existing roof supports in the area which had been tagged by fire boss Gary Pastorial on December 2, 1987. Mr. Pastorial informed him that he had continued to report the condition in his examination book since that date but could not get anything done about it (Tr. 26).

Mr. Bowers stated that the cited regulatory section 75.1704, requires that two separate and distinct escapeways be marked and maintained in safe condition at all times, and that one of them must be on the intake air. He confirmed that the cited area was on the intake escapeway, which was required to be isolated from

the belt and track with permanent cinder block stoppings, and that the track was used as the secondary escapeway. He also confirmed that the danger tag had Mr. Pastorial's initials on it, and the tag stated that "additional roof support needed here at Station No. 17845" (Tr. 27).

Mr. Bowers stated that the tagged roof area was not roped off or closed off in any way, and that the area was required to be examined weekly. He described the loose and broken roof, and stated that the roof materials on the floor were approximately a foot deep and extended across the entire entry which was approximately 16 feet wide (Tr. 28).

Mr. Bowers stated that he cited section 75.1704, rather than the roof control regulatory series under 75.200, because it is MSHA's policy to cite roof falls in the intake escapeway under section 75.1704 (exhibits G-3 and G-4; Tr. 29-31).

Mr. Bowers stated that roof "spalling" consists of rock that is breaking up around the existing roof bolts and plates, leaving the bolts and plates hanging down and no longer against the roof top. He confirmed that he observed the roof spalling, and also observed roof cracks approximately 2 feet wide and 16 feet long across the entry. The fallen roof materials were on the floor directly under the cracks, and he assumed that the conditions had existed since December 2, 1987, the date which was on the tag (Tr. 32). He described the sizes of the fallen materials, confirmed that the 4-1/2 to 5 foot spacing between the roof bolts was not a problem, but that the existing roof needed additional support "due to the roof deteriorating, broken and cracked and falling" (Tr. 33-34).

Mr. Bowers confirmed that he observed no other problems with the roof or the width of the escapeway, and that the materials on the floor did not impede travel through the escapeway. He estimated that the cited escapeway was 2,000 feet outby the working section. He confirmed that abatement was achieved by installing roof support posts, and that this took approximately one-half hour to an hour, and he considered this to be prompt (Tr. 35).

Mr. Bowers did not believe that his safety or health was in jeopardy when he walked into the cited area and stated that "it seemed to me it was just becoming unsafe to be traveled and the area needed attention. They had to install additional supports." He confirmed that the only person in the area would be the examiner who would be in the area once a week, and the only others exposed to any hazard would be miners travelling through the area in an emergency (Tr. 35).

Mr. Bowers stated that after his inspection, he travelled to the mine surface and reviewed the weekly examination books, and

he identified exhibit G-6 as copies of the examination records he reviewed with respect to Station No. 17845, and confirmed that from December 2, 1987 to the date of his inspection, different fire bosses, including Mr. Pastorial, noted that the escapeway in question needed additional roof support at the cited location (Tr. 40-42).

Mr. Bowers stated that he was not certain why the fire bosses noted in the examination book that "the area can be traveled," or whether or not they believed it could be physically traveled. He believed that one could physically travel the area, but was not sure whether the examiners believed that it was safe to travel the area. It was not clear to him what specific areas the examiners were referring to since several places were referred to in the examiner's notations (Tr. 42).

Mr. Bowers stated that he issued the unwarrantable failure order because the roof conditions he observed were a violation of the law, and he found that the respondent had known about the condition because it had been reported in the weekly examination book and took no action during this time to correct it (Tr. 44). He identified exhibit G-7, as MSHA's new policy guidelines, effective July 1, 1988, with respect to the issuance of unwarrantable failure orders (Tr. 45). He explained the factors he considered in issuing the order as follows (Tr. 46-49).

A. One here where it includes the amount of time the violation has been left uncorrected.

Q. And in this case, what facts do you feel justified an unwarrantable finding?

A. I feel from January 6 through December the 2nd was over a month was more than enough time to correct the condition, especially when it comes to a roof.

Q. How long did it take to correct it?

A. Approximately a half hour to an hour, probably, after they got the material over there.

Q. Were special materials necessary?

A. Well, they had to bring posts over. They set posts.

Q. Were they available at the site?

A. Somewhere along in the area they've got the posts, yes.

Q. The next factor, what is that?

A. "Whether the hazard created by the violation is particularly serious, thus warranting increased attention from the operator to vent or correct it."

Q. And in your opinion, what facts would support that, if any?

A. Well, you have an area here that you're going to use in event of an emergency for people to escape. You may have between your weekly examination, you could have a roof fall in the area which would then impede the travel for these people to get through this entry or it's possible that if a person would be walking down through there and spalling rock would hit him, it could cause serious injuries.

Q. Had a roof fall occurred or a more substantial fall occurred, would the operator have known about it?

A. In weekly examination.

Q. Only during the weekly examination?

A. Unless someone would go down through there, chances are they wouldn't detect it for the following week.

Q. And what about the next factor?

A. Okay, that's "Whether the violation is repetitious of a previous violation."

Q. And to your knowledge, was this?

A. Yes, it is repetitious.

Q. How do you know that?

A. I've issued several violations and orders at this mine, in particular, where they had stuff in the books and not taking action to correct it.

JUDGE KOUTRAS: The what? I'm sorry. I didn't hear that.

THE WITNESS: I say I've issued several violations and orders at this mine over the years, Your Honor, where they hadn't taken action to correct, it had been left in the books.

BY MS. SALUS:

Q. To your recollection were any of these conditions that you observed that have been left uncorrected, did any of them relate to intake escapeways?

A. I can't recall if it was just on intake escapeways. I've had some on track. I've had some in return entries, different areas, I'm sure possibly if I would go back through the records, I may find some on 1704.

Q. What about the next factor?

A. That's "Whether the violation was a result of deliberate activities by the operator."

Q. Did you consider that factor?

A. No, I didn't. I don't think there was any deliberate activities there.

Q. What about the next one?

A. That's "Or whether the operator knew or had reason to know that its actions violated a mandatory standard."

Q. And in your opinion, were the facts --

A. Well, I feel that they did know because it was being reported in their weekly examination book which by law the mine foreman and the superintendent or his assistant signs it and reads this book on a daily and weekly basis.

Mr. Bowers stated that he could have issued a section 104(a) citation, rather than an order, but did not do so because he found that the condition had been reported in the examination books and the respondent knew about it. He did not believe that the condition presented an imminent danger, and if he had issued a citation, he would have allowed the respondent an additional day to correct the condition (Tr. 50).

Mr. Bowers stated that at the time he walked the area, he did not believe that it was likely that the roof would fall in on top of him, but believed that anyone making an examination in the area would reasonably likely sustain serious injuries if pieces of spalling roof rock were to hit him, and that he could suffer broken bones, crushing injuries, or possible death. He believed that this was reasonably likely because "over the years we've had several people that have been hurt through roof falls and rock that's hit them and anywhere from serious injuries to death." He

also believed that the deteriorated top, which was "already loose and broken and spalling out," and the fact that the conditions were next to an intersection which was a bigger area and where the roof is weaker, were all factors contributing to the likelihood of a roof fall. He also considered the length of time that the conditions had existed as increasing the likelihood of a fall because "it's gradually going to deteriorate to where it will get worse" (Tr. 50-51).

Mr. Bowers stated he based his "high negligence" finding on the fact that the condition was noted in the weekly examination books, and the mine foreman or assistant superintendent signs the book on a daily or weekly basis, and "he sees what is there so I'm taking that they did know the negligence was there and should have been taken care of" (Tr. 52). When asked whether mine management "knew" or "could have known" that the condition posed a hazardous or dangerous condition, Mr. Bowers responded "that I don't know whether they would or not" (Tr. 52). However, he confirmed that he observed nothing which would lead him to conclude that any remedial action had been taken.

Mr. Bowers stated that he considered the violation to be S&S for the following reason (Tr. 53):

A. Well, anywhere where you have bad roof conditions where people are required to work or travel in these areas, you have the likelihood of a person being hurt or injured seriously in these areas from falling rock or roof, and that's what I base that on to be significant.

Mr. Bowers stated that the weekly examiner would be exposed to a roof fall hazard, and although he would be aware of the hazard, anytime he travels through the area, he would be exposed to the hazard. Although others on the section would also be exposed to a hazard, this would only occur if they had to use the entry to escape from the mine in an emergency (Tr. 55). Mr. Bowers confirmed that none of the respondent's representatives indicated that they had been aware of the cited conditions (Tr. 53).

On cross-examination, Mr. Bowers stated that with a roof spalling condition, the roof would come down in pieces, rather than in a massive fall, and that the falling material may be from 1 to 3 inches in thickness. He confirmed that most of the roof pieces he observed on the floor were broken up where they had fallen out between and around the bolts and plates (Tr. 56-58).

Mr. Bowers stated that the examination book notations "can be traveled" may or may not mean "safe to travel," and while this is unclear, he believed that "anytime you have an area where you need additional roof support it needs immediate action" (Tr. 60).

He confirmed that a person would not be in the area for a long time, and that he issued no other violations in the intake escapeway at the time of his inspection (Tr. 61).

Mr. Bowers stated that "If I find where it's being reported to you and you know about it and you're not taking any action to correct it, that to me is unwarrantable" (Tr. 62).

In response to further questions, Mr. Bowers confirmed that he made no measurements of the fallen materials, that the roof was 6 feet high, and that the materials will break when they hit the ground (Tr. 64). He saw no evidence of any falls above the roof bolts, saw no problems with the roof bolting pattern, and did not believe that the spalling affected the effectiveness of the bolts which were in place, except that the roof was starting to deteriorate and needed additional support (Tr. 65).

Mr. Bowers stated that the examination books do not indicate that the cited area was "safe to travel," and while the statements indicate that "it can be traveled," he was not sure what the examiners meant by this statement. He did not believe that the two statements mean the same thing, and he explained the difference as follows (Tr. 66):

A. Well, like I said a while ago, you could go through the area, but that does not make it safe due to this condition that you may have throughout the area. It may be like I'm reading in here where they're speaking of excessive water and one place here where it's over his boots, I don't know whether this examiner this date was talking about the water, but he's stating -- if the water is over your boots and it may be that that's what he meant, and it needs to be taken care of, but yet you can go through it.

Mr. Bowers did not know how many posts were installed to abate the condition, and he stated that someone walking through the area may never see the danger tag, which he described as "little," approximately 4 to 6 inches long, and 3 inches wide (Tr. 69). He confirmed that the roof-control plan itself would not require the respondent to address the spalling, loose and broken roof condition (Tr. 71). He could not determine why additional support was not installed sooner, and stated that Mr. Pastorial told him that he had advised the general mine supervisor about the condition (Tr. 72).

Mr. Bowers confirmed that MSHA's regulations do not explain the kind of danger tag which was at the cited roof area, and do not require such a tag. He agreed that one could interpret the tag to mean "I can walk through this area, but I'd better be careful" (Tr. 74). He confirmed that the tag was not an official MSHA danger tag such as those used by inspectors to prohibit

persons from walking through such an area. The tag was a company tag, and he could not say whether it would prohibit anyone from walking through the area (Tr. 75-76). He confirmed that the entryway was well marked and designated with reflectors.

Joseph Gary Pastorial, confirmed that he was the union fire boss at the time of the inspection, that his duties include the examination of the intake escapeways and the return airways, and that this is his full time job. He confirmed that he is required to travel the areas in question in their entirety, once a week, not exceeding 7 days (Tr. 78-81). He confirmed that any observed conditions which need to be corrected are entered in the weekly examination book. If he observes a condition that does not pertain to his particular area, or is not a violation, or a hazardous condition, but has a potential to be one, he communicates it to mine management, and usually to Mr. Metz, sometimes in writing, and sometimes verbally. He stated that this usually happens "maybe a couple of times a month" (Tr. 82).

Mr. Pastorial stated that he accompanied Mr. Bowers during his inspection and he confirmed that Mr. Bowers cited the "bad place in the roof" at Station No. 17845. Mr. Pastorial also confirmed that he had previously examined the area, and found that the roof had cracked and had loose rock, and had deteriorated to the point where it needed additional roof support to keep it from falling in. He tagged the area and recorded the condition in the weekly examination book (Tr. 84). He described the roof condition as a 3-foot "ripper" extending across the entry for approximately 16 feet. He stated that 4 to 6 inches of roof material had fallen from the center of the roof, and he estimated that it was "a couple of feet long by 2 or 3 inches thick and maybe 6, 8 inches wide." The roof was 6 to 6-1/2 feet high, and while he did not know the weight of the fallen material, he stated that "it was visible and you had to walk over it" (Tr. 85). He did not know the extent of the cracks, and described them as "gagged edges" and not smooth (Tr. 86).

Mr. Pastorial confirmed that he posted the tag in December, and wrote in the date, his initials, and noted that the area needed additional roof support. He obtained the tag from the mine safety department and it was the same type that is used to "danger out" electrical equipment (Tr. 86). He described the tag as 4 inches by 6 inches, and stated that he hung it just in by the roof where it was deteriorated, between the working face and bad place in the roof, and that he attached it to a roof bolt plate (Tr. 87).

Mr. Pastorial could not recall whether he advised anyone about the roof conditions other than entering it in the book, and although he does notify mine management in "a lot of instances" verbally or by written memo, he could not recall whether he did so in this instance (Tr. 87). Mr. Pastorial stated further that

he "sometimes" talks to Mr. Metz about the need for timbers, and while he thought he did in this case, he was not sure "so I don't want to testify yes or no" (Tr. 88).

Mr. Pastorial identified the notation entry which he made in the examination book on December 2, 1987, and he confirmed that while he noted that the roof needed additional support, he did not make any notation that he had dangered it off, because that is not standard procedure, and he had never done it before (Tr. 90).

Mr. Pastorial identified another entry which he made in the examination book on December 9, 1987, and he confirmed that he made a notation that the "North Main Butts Section intake escapeway needs additional roof support at Station No. 17845," and that he noted that the area "can be traveled" (Tr. 90). He explained that his notation "can be traveled" had the following meaning (Tr. 91):

A. It was my opinion that that area needed additional roof support just like it needed garbage cleaned and all those other violations corrected, but if a person had to get down through there in an emergency, it may or may not be safety (sic) but you could travel the entry.

Mr. Pastorial identified two additional examination book entries made by mine examiner Frank Latocha on December 17, and 26, 1987, where he noted "escapeway roof support at Station No. 17845" and that "intake escapeway needs additional roof support at Station No. 17845," and in both instances, Mr. Latocha noted that the area "can be traveled." When asked if he knew what Mr. Latocha meant by the notations "can be traveled," Mr. Pastorial responded "I can't speak for Mr. Latocha, but I believe it meant that people could get down through there if they had to" (Tr. 92).

Mr. Pastorial identified an examination book entry made by mine examiner Richard Eddy on December 28, 1987, which reflects that "escapeway needs additional roof support at Station No. 17845" and that the area "can be traveled." Mr. Pastorial stated that "I again cannot speak for Richard Eddy, but I believe that he means that there is a violation existing in this entry, but it can be traveled in the case of an emergency" (Tr. 93-94).

Mr. Pastorial stated that he finds nothing in the notations made by the other mine examiners which would lead him to conclude that they believed the area was safe to travel, and when asked whether "safe to travel" is the same as "can be traveled," Mr. Pastorial responded "absolutely not," and he explained his answer as follows (Tr. 95):

A. Safe to travel means to me that there are no violations, that you could travel that area without any problems whatsoever. Can be traveled means to me that you can get through that entry if you have to, but the violations, there are violations in the area that need to be corrected as soon as possible.

Mr. Pastorial stated that every entry that he has made in the examination books would reflect his opinion that the condition is either a hazard, or a violation, or both (Tr. 95). However, in response to certain bench questions, he responded as follows (Tr. 96-97):

JUDGE KOUTRAS: I notice a couple of entries that don't say anything. For example, Mr. Eddy made a notation for the period ending December 19th, which is the third page, "Grassy Run Mains intake escapeway safe to travel." That's all he said. What's that mean? Does that mean that he inspected that particular escapeway and found it safe to travel?

THE WITNESS: Which page was that, sir?

JUDGE KOUTRAS: Page 3 of the stapled fire boss books for the week ending 12/19 on line 1. Mr. Eddy says, "Grassy Run Mains intake escapeway safe to travel." That's all he says.

THE WITNESS: Okay, as far as I know, if that was my entry, that would mean that he didn't see anything wrong there. It was perfect. It was well rock dusted, there was no loose roof.

JUDGE KOUTRAS: Well, why put it in there when it says the only thing you put in there is hazards noted.

THE WITNESS: Well, you have to indicate in the book that you traveled the area so that this is a record to prove that you made the weekly examination of the area. Generally, what I do now is put in the book, if I don't find anything in the area, I just put none observed.

JUDGE KOUTRAS: So it's not true that every entry that's made in here indicates a hazard or a violation? She asked you a question whether every entry that's made in these books indicates hazards or violations. Your response was yes. That's not accurate, is it. I mean, if someone just puts in there like he just did?

THE WITNESS: Yeah, technically, I guess you're right. I didn't mean to --

And, at (Tr. 98):

JUDGE KOUTRAS: In other words, what you're doing, the intent of this is to bring to the attention of someone various hazards?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: It might turn out that those hazards may not be specific violations of the standards, isn't that true?

THE WITNESS: That's possible, yes sir.

Mr. Pastorial confirmed that except for the fire boss who is in the area once a week, the only others in the area would be the section crew of 10 miners and their foreman, who would have to travel the escapeway every 90 days, and the crew who would have to travel the area in the event of a possible disaster (Tr. 99). He stated that he usually spends about 30 minutes inspecting the escapeway, that it would take him less than a minute to walk through the cited roof area, and that anyone else in the area would take less than a minute to walk through that area (Tr. 100).

Mr. Pastorial stated that to the best of his recollection, the roof condition in question had deteriorated between the time he tagged it on December 2, until the day of the inspection on January 6, because there was more spalling and more material on the floor. He speculated that there was some movement or shifting of the roof which was causing the material to fall. When reminded of the fact that examiner Eddy's notations were consistently the same, and did not indicate any worsening conditions, Mr. Pastorial responded "I can't speak for Mr. Eddy" (Tr. 101). He also stated that if he believes that an area which needs additional roof support is getting worse, he would normally tell Mr. Metz about it, but he was not sure that he informed him about this in this case (Tr. 102).

Mr. Pastorial confirmed that although he was in the cited area several times he did not feel that his safety was at risk because the roof had already fallen and was not cracking, popping, or working, but there was an indication that it had been, and that it took him only a couple of seconds to travel under it (Tr. 103).

Mr. Pastorial stated that he was not sure that an accident or injury was likely, and that it was possible that anytime a roof has deteriorated, a fall was possible. He did not believe that it was particularly likely that he would be injured "because I walked under it" (Tr. 103). He confirmed that he was more concerned that the escapeway would be blocked or would have

restricted escape in an emergency, rather than the roof falling and striking someone, and he recalled three or four instances in his experience where roof falls have restricted an escapeway (Tr. 104). He also believed that the intersection is the weakest part of the entry, and that a fall would likely occur at an intersection rather than in the entry itself (Tr. 106). He stated that 8 to 10 posts were set on each side of the "ripper" to provide additional roof support, and that these materials were readily available in the mine (Tr. 107).

On cross-examination, Mr. Pastorial stated that he did not danger the area off, and that he uses the tag "to identify the area and caution the people in that area." Had he dangered it off, he would have entered this in the book and "would have contacted Mr. Metz and had him withdraw his people" (Tr. 109). He confirmed that he has worked with Mr. Metz for 14 years and tries to make it a practice to see him every day (Tr. 110).

Mr. Pastorial stated that "safe to travel" means "the people can go through there, but that doesn't mean -- there can still be a violation in the entry." He confirmed that he has never discussed this interpretation with Mr. Metz because he has had no occasion to do so and has never been questioned on his entries in the examination book (Tr. 110).

In response to further questions, Mr. Pastorial stated that roof falls are required to be reported, but that he did not consider the cited conditions to be a roof fall (Tr. 112). He acknowledged that he and the other examiners have used the terms "can be traveled" and "safe to travel" in some of their examination book entries, but that he has rarely used the term "unsafe to travel" unless there is a roof fall or deep water that impedes travel (Tr. 112). He indicated that the phrase "can be traveled" means "there are violations that exist in the entry, but you could still get down through there if you have to" (Tr. 113). He confirmed that he is reluctant to danger off every area that needs timbering and that he uses his own judgment "on how bad or how serious it is" (Tr. 114).

Mr. Pastorial confirmed that the examination book records which he testified about are signed daily by Mr. Metz, the mine foreman, and mine superintendent Wesley Hope. He commented that "if they read them, they'll know what's in there" (Tr. 118). He confirmed that while he did not inspect the cited area from December 9, 1987, to the day of the inspection by Mr. Bowers, he discovered that the area had deteriorated during the second week that he traveled there and when he was with Mr. Bowers (Tr. 119).

Respondent's Testimony and Evidence

Dave Stout, safety assistant, confirmed that he observed a "ripper" going across the entry at the cited intake location in

question, and he described a "ripper" as an area where the roof spalls due to shifts in the laminated shell that causes it to break and spall out. He described the ripper as 41 inches wide, and 8 to 12 inches deep into the roof, and extending to within 18 inches of the left-hand rib line. He did not consider the condition to be imminently dangerous because rippers are common in the mine, no roof bolts were disturbed, and the bearing plates on both sides of the ripper were "intact and tight to the top" (Tr. 123). The spalling which he observed was between the bolts, the roof had not been dislodged around the bolts, and there were no gaps between the plate on the roof bolt and the roof. The roof was broken, and there was some loose rocks within the immediate shell inside the crevasse or the ripper. The escapeway appeared to be travelable at the time of the inspection (Tr. 124).

On cross-examination, Mr. Stout stated that after the order was issued, he informed section foreman John Bevilock to withdraw miner's from the face. He confirmed that he had no occasion to be in the cited area prior to the inspection. He confirmed that he observed rock materials on the floor which had fallen from the ripper, and that there were some big pieces of flat shale or slate on the floor. He also confirmed that the existing roof bolts were not affected by the conditions, and were not disturbed since materials fell from between the bolts and not from around them. The bearing plates were intact and tight, against the top (Tr. 125-127).

Mr. Stout stated that he was with Mr. Bowers when he reviewed the examination books, but that he (Stout) does not review the books, and that he spends most of his time accompanying mine inspectors and taking the necessary remedial action by contacting the appropriate foreman. His duties do not include the review of the examination books, and to his knowledge the respondent took no action to remedy the cited conditions prior to the inspection (Tr. 129). He stated that the roof on each side of the ripper was intact and that he observed no broken roof in these locations (Tr. 131).

John C. Bevilock, day shift supervisor, confirmed that while the cited escapeway location was not an area that he generally inspected during his shift, he would have to travel it every 90 days with two men. He could not recall when he was last in the area prior to the inspection, and he stated that it was located approximately 2,400 feet from the face area. He confirmed that the area is examined once a week by someone else, and that he never observed the cited roof conditions during December, 1987, and no one ever advised him that additional roof support was required in the area. He also confirmed that he never observed the condition prior to the inspection by Mr. Bowers, and first saw it when he was called to the area to correct the violations (Tr. 132-134).

Mr. Bevilock stated that he observed that the top had spalled out approximately 6 to 8 inches above the top and that "it was just a ripper running across the entry" and he did not consider the condition to be hazardous because the roof was supported with resin roof bolts and the bolts on each side of the ripper had not been disturbed. He did not believe that the area was dangerous for people to travel through in the event of an emergency (Tr. 135).

On cross-examination, Mr. Bevilock stated that it took approximately an hour and a half to correct the conditions, and that support posts were available in the area. He confirmed that he observed approximately 6 to 8 inches of loose rock which had spalled out of the top on the floor, and he did not know how long it had been there. He considered the condition to be safe, and he did not feel threatened that he would be struck by falling roof because the roof "drips and works" before it falls, and this was not the case (Tr. 137). He had no indication as to when the roof "last worked," or when it would "next work," and he stated that "we usually have indications of roof falls that are major falls that can occur before they fall." He did not consider the fall to be major, and that small falls would normally be indicated by small pieces of roof falling or breaking at the top. He did not observe such conditions in this case (Tr. 138).

Mr. Bevilock stated that when he observes a violation or hazardous conditions he takes immediate corrective action if materials and manpower are available, and if not, he records it in the preshift examiner's book which is different from the weekly examination book. He stated that he has no occasion to review the weekly examination book, and although he would not normally be assigned to correct the conditions, he did so because his section was the nearest available production section. The cited location is not his responsibility because he supervises production only from the end of the track (Tr. 140).

Mr. Bevilock stated that he "sounded" the roof after he was called to the area, and that it sounded "solid on both sides of the ripper," and he would have been able to tell if it were hollow and cracked (Tr. 141). He confirmed that the roof was cracked and broken in parts, and although he sounded it on both sides of the ripper to determine if it was hollow on either side of the crack, he did not sound the cracked or broken area (Tr. 142).

Mr. Bevilock stated that he observed the roof, and that the roof bolts "looked good" and he saw no indications that any material had fallen away from the roof bolts. The spalling took place 6 to 8 inches in by one set of supports and 3 to 4 inches from the other set of supports (Tr. 142).

John Metz, general mine supervisor, confirmed that with the exception of one report ending December 28, 1987, the other examination book reports are signed with his signature at the place indicated as "superintendent or assistant." He stated that he countersigns approximately 30 records or books each day, and in most cases, the records require no less than six signatures in each book. He countersigns about 180 documents each day, and is required to read them all (Tr. 144-145).

Mr. Metz stated that in his view, the statement "can be traveled" which appears in the examination books, means that the area "can be traveled, that there's nothing there to keep a person from going down that entry," and that "one would assume that it would be safe to travel" (Tr. 145).

In response to questions as to whether anyone ever advised him that the cited area was not safe to travel, Mr. Metz responded as follows (Tr. 145-146):

Q. Did anyone ever tell you that the area referenced in this Order 2895499, which is in front of you as Government Exhibit 2 was not safe to travel during December, 1987?

A. I can't recall that anyone specifically said it was not safe to travel.

Q. Or prior to, as I say, during 1988, the first 6 days of 1988, did anybody ever tell that to you?

A. No, sir. I can't say that they did or did not.

Q. Does Gary Pastorial report to you?

A. Yes, sir, he does.

Q. When it is important for work to be done as a result of something that Mr. Pastorial has determined during his examination, does he generally do something more than write a line in the examination book?

A. Normally, there has been opportunity and under normal situations when Gary encountered something in the mine in general or specifically in the intakes and returns that he feels needs immediate attention, in most cases he fills me out a piece of paper or calls me on the telephone and says, hey, you need to get jumping on this and take care of it, and in most cases there is some type of immediate communications.

Mr. Metz confirmed that he generally speaks with Mr. Pastorial daily, and that if he discovers anything in the

intake or returns that he believes needs immediate attention, in most cases he will put it in writing or call him on the telephone. Mr. Metz could not recall Mr. Pastorial saying anything to him about the cited conditions and stated that "he could have very easily and I'd not remember it because he does give me quite a few documents" (Tr. 146). Mr. Metz stated that he was not in the area when the order was issued, and he could not recall being there prior to that time (Tr. 147).

On cross-examination, Mr. Metz confirmed that he never saw the cited roof conditions, and that "ripper's" involve movement in the roof top but do not affect the bolt itself unless the top moves (Tr. 148). He stated that he has known Mr. Pastorial for 15 years, and has been his supervisor in one capacity or another. He also confirmed that Mr. Pastorial does a good job and that he respects his judgment with respect to roof conditions and "anything else that he might tell me that needs taken care of" (Tr. 149).

Mr. Metz confirmed that he and Mr. Pastorial have observed conditions that he records in the books "hundreds of times," and stated that "we don't view each thing identically. I have to set priorities and try to determine what is put in the book as far as what needs to be done first, what is most important, or what is dangerous" (Tr. 149). He also stated that he has no reason to question Mr. Pastorial's entries in the examination books, and that entries made by the examiners in the books are matters that they view as necessary to be taken care of, or they know are violations, and that as a general rule they do not make entries that do not fall into these categories (Tr. 150).

Mr. Metz stated that while Mr. Pastorial in most cases brings to his attention conditions that need to be taken care of immediately, such as an imminent danger, matters which do not need immediate attention, or which present a potential problem, are normally documented in the appropriate book. Mr. Metz could not recall that Mr. Pastorial directly contacted him with respect to the cited roof conditions (Tr. 151).

Mr. Metz stated that based on his experience with the mine top, not all roof rippers are serious. Based on the fact that the roof bolts in this case were intact, he would not view this as a serious condition (Tr. 153). When asked for his reaction to the fact that three different examiners considered that station 17845 needed additional roof support, Mr. Metz responded as follows (Tr. 154):

A. Ma'am, at our coal mines we have over 500 miles of entries that we have mined. Out of these entries I would assume that we probably have somewhere in the vicinity of 60 miles of travelable entries. To get overly excited about a ripper, it just would indicate

to me that there was something there that needs some attention. I read entries of those natures day in and day out and again, relying on my experiences as working at that mine, I don't always make the right decision or the proper judgment call.

Mr. Metz confirmed that the term "ripper" is not included in any of the book entries, and that the time to provide additional support would be "as fast as possible," taking into consideration the other priorities noted in the 28 to 30 books which he must sign. He confirmed that he gave no instructions to take care of the cited roof conditions (Tr. 155). He also confirmed that time does not allow him to refer back to any particular book entry, and he was aware of mandatory safety section 75.323, which requires that hazardous conditions be corrected promptly (Tr. 157).

In response to further questions, Mr. Metz stated that the notations "can be travelled" indicates to him that "a person could get down through there. In the case that they needed to travel, there was nothing there to totally eliminate them from traveling that entry." If the notations had indicated "bad top," he would consider this to be a more serious condition, but that none of the records indicated any bad top in the cited area. He did not consider the reported conditions to be "bad top," and the notations "needs additional support" describes a cure rather than a hazard (Tr. 162). He could not recall discussing Mr. Pastorial's entries concerning the roof with him. He also believed that the notation "needs additional support" indicates that the roof condition was relatively stable in the cited area (Tr. 163).

Mr. Pastorial was recalled by the court, and when asked why he did not include the spalling, loose roof, and broken rock on the ground in his entries in the books, he responded that he has never included a description of the particular conditions in the books because he assumes that management knows what "additional roof support" means (Tr. 164). He also indicated that he and Mr. Metz generally discuss the materials needed to correct a condition and how much timber is needed, but he did not have any note that he may have given Mr. Metz, and stated that "I don't want to say one way or another" (Tr. 165).

Mr. Pastorial stated that if he makes a notation that additional roof support is needed, "then the top is bad," and "it means the same thing." He stated that in the future, he will include such information in his notations (Tr. 166). Mr. Pastorial stated that he cannot disagree with Mr. Metz's opinion that "can be traveled" means "its safe to travel," and he explained his current procedure for making book entries (Tr. 166-168).

Findings and Conclusions

Fact of Violation - Order No. 2895499, 30 C.F.R. § 75.1704

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 75.1704, which requires designated escapeways to be "maintained to insure passage at all times of any person, including disabled persons" and "maintained in safe condition and properly marked." The evidence establishes that the escapeways were properly marked and identified, and that they were passable. MSHA's assertion at page 8 of its brief that the rocks which fell from the roof and were lying on the ground "could have impeded escape in an emergency or by disabled miners" is rejected. I find no such condition or practice cited in the order, and the inspector who issued it testified that the rock materials on the floor would not have impeded travel along the escapeway in question (Tr. 34). Therefore, the only issue here is whether or not the escapeway roof area cited by the inspector was maintained in a safe condition.

The respondent argues that even though some spalling had taken place at the cited roof area, it was nonetheless maintained in a safe condition. In support of this conclusion, respondent states that all of the witnesses testified that the roof conditions did not pose an imminent danger, and that they did not believe that their safety was in jeopardy when they were in the area. The respondent further points out that the roof area was not closed by the fire boss to prohibit people from walking there, that the roof bolts and bearing plates on either side of the roof crack were intact, undisturbed, and snug against the roof, and that the section supervisor who visited the area sounded the roof on either side of the crack, and found that it was solid and "not working."

The fact that no one considered the roof conditions to be an imminent danger requiring the closing of the area is immaterial. It is clear that a violative condition may be established regardless of the presence of any imminent danger or closure action by a fire boss. With regard to the condition of the roof bolts and bearing plates which had been installed in the roof area in question, while there is no credible evidence to establish that the bolts and plates had separated from the roof, the fact remains that the roof had obviously deteriorated over time, and spalling had recently occurred. "Spalling" is a condition caused by rock which is subjected to excessive tension, causing it to break off in pieces. See: A Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1986 Edition, at page 1049.

In addition to the spalling condition of the roof, the inspector's credible testimony establishes the presence of cracks in the roof, approximately 2 feet wide, and extending for some

16 feet across the entry and next to an intersection, a location described by the inspector "as a bigger area where the roof is weaker." The inspector believed that the roof was deteriorating, and he characterized it as "already loose and broken and spalling out." Although he saw no evidence of any falls above the existing roof bolts, observed no problems with the spacing of the bolts, and did not believe that the spalling affected the effectiveness of the roof bolts which were in place, he nonetheless concluded that the roof was starting to deteriorate and needed immediate additional support. Additional roof supports were in fact installed to abate the condition.

The inspector stated that the rock which had fallen from the roof area in question had fallen out between and around the roof bolts and plates, and he described the sizes of the rocks as "from small pieces, one to two inches, to three inches, maybe thickness, to a foot or so in diameter" (Tr. 33). Given the approximate 6 foot high roof, the inspector indicated that the rocks may or not break up once they hit the ground, and he believed that any rock, which he described as slate, may weigh "several pounds." The inspector believed that anyone struck by a piece of spalling rock from the roof could suffer severe injuries.

Union Fire Boss Pastorial, corroborated the inspector's observations of the roof conditions in question, and the respondent's general mine supervisor, John Metz, confirmed that he has known Mr. Pastorial for 15 years and that he respected his judgment with respect to roof conditions. Mr. Pastorial confirmed that when he first observed and tagged the roof area in question on December 2, 1987, and when he visited it later, he found that it had cracked, had loose rock, and had deteriorated to the point where it needed additional support. He described some of the rocks which had fallen from the "center of the roof" as 2 feet long, 2 or 3 inches thick, and 6 to 8 inches wide, and he observed a crack or "ripper" approximately 3 feet wide which extended some 16 feet across the entry. Mr. Pastorial believed that during the intervening period when he first observed the roof, and the day of the inspection, the roof had deteriorated further. He observed more rock materials and evidence of further spalling on the mine floor, and he speculated that this was the result of some movement or shifting of the roof. He believed that a roof fall was possible anytime deteriorated roof conditions are present, and he agreed with the inspector that a roof fall would likely occur at an intersection because it is the weakest part of the entry.

The inspector's observations with respect to the roof conditions are also corroborated by the respondent's safety assistant Dave Stout. Although he characterized the crack in the roof as a "ripper," Mr. Stout confirmed that this condition is the result of roof spalls due to the shifting of the laminated roof shell

which causes it to break and "spall out." Mr. Stout stated that the roof was broken, that rocks had fallen from between the bolts, and he observed loose rocks within the immediate "ripper" shell, and "big pieces of flat shale or slate" on the floor. Although Mr. Stout stated that the roof on either side of the ripper was intact and unbroken, and shift foreman Bevilock, who went to the area after the order was issued, stated that he sounded the roof on both sides of the ripper, he did not sound or otherwise test the roof area which was cracked and broken, although it was customary to do so.

Mine Supervisor Metz, who never viewed the conditions, confirmed that the mine roof top is so unpredictable, that rocks falling from the roof top are not uncommon occurrences (Tr. 163). He also characterized a "ripper" as "some type of movement in the bolt or in the top," and stated that the roof bolt itself does not move unless the top moves (Tr. 147-148).

Foreman Bevilock, who viewed the conditions for the first time after the order was issued, did not consider the roof to be hazardous because "it wasn't a place that was working at the time" (Tr. 137). He described the term "working" as movement within the roof, and he had no idea when the roof had "last worked" or when it would next "work." He did not consider the rocks which had fallen to be a "major fall," and although he confirmed that small pieces of rock falling or breaking off from the top of the roof is an indication of "falling materials," he did not observe any materials falling while he was there. In my view, the fact that Mr. Bevilock did not actually observe rocks falling from the roof area at the precise moment he was there is immaterial to any determination as to whether the roof had deteriorated to the point where it was not safe and posed a reasonable potential for additional "working" and fall of additional rock materials. I venture a guess that if Mr. Bevilock had observed rocks falling from the roof while he was there with the inspector, they would have beat a hasty retreat from the area, and the inspector would have issued an imminent danger order.

Section 75.1704 contains two basic requirements with respect to escapeways. The first requirement is that an escapeway be maintained to insure passage of miners at all times. The evidence in this case reflects that the escapeway was passable and could be travelled, and that there were no physical obstructions to prevent miners from using it in an emergency. The rock materials which had fallen from the roof did not block the escapeway, and the inspector confirmed that this would not have impeded travel.

The second requirement found in section 75.1704 is that escapeways be maintained in a safe condition. While it is true that the area was not endangered off, and the witnesses all indicated that they did not believe their safety was in jeopardy

while they were in the area during the inspection, the fact remains that the roof was deteriorating and was apparently shifting and taking weight, resulting in spalling and the breaking of rocks from around the roof bolts and plates. The roof also contained a "ripper" or crack which had not been tested or otherwise supported with timbers, and the credible testimony of the fire boss Pastorial establishes that additional rocks had fallen, and that the roof had deteriorated further from the time he first noted it and the time of the inspection. Under all of these circumstances, and given the existing roof conditions found by the inspector at the time of his inspection, I conclude and find that the roof area at the cited Station No. 17845, was not maintained in a safe condition as required by section 75.1704. I further conclude and find that a violation of this standard has been established by a preponderance of the credible testimony and evidence, and the inspector's finding in this regard IS AFFIRMED.

Significant and Substantial Violations

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).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

The respondent argues that the violation was not significant and substantial, and in support of this conclusion it cites the testimony of the witnesses who were of the opinion that their safety was not in danger in the roof area in question. It also cites the testimony of fire boss Pastorial who indicated that while it was possible, he did not feel that it was particularly likely that he could have been injured, and his testimony that he saw no reason for closing the area and only put the tag up to caution people to be careful, but would have closed the area if it were "a more dangerous situation." Respondent also cited the fact that the weekly examination books did not indicate that the roof condition had gotten progressively worse, and the testimony by the section foreman and Mr. Pastorial that the roof was not "popping or cracking," thus indicating that the condition did not pose an immediate danger.

The respondent discounts the inspector's testimony that he considered the violation to be significant and substantial because a fire boss could be hit by pieces of spalling rock while he walked in the area, and takes the position that such an occurrence was not reasonably likely because the weekly mine examiner, the only person who would have travelled the area, other than an inspector, was aware of the condition and would only be in the area "a few seconds a week." With regard to any miners using the escapeway in the unlikely event of a mine disaster, respondent asserts that they only would have been in the roof area "for less than a minute."

With regard to Mr. Pastorial's testimony, while it is true that he did not believe he was exposed to a roof fall hazard, his testimony was qualified and must be considered in context. His belief that he was not exposed to any hazard was based on the fact that rock had already fallen, that the roof was not "working" when he passed under it for a few seconds, and that the roof had not fallen on him. He went on to state that "it could have fell on me," and the fact that it did not "doesn't mean that it

couldn't have fell in between the time I did the examination and the next week" (Tr. 103). As for the inspector's testimony that a weekly examiner would have been aware of the condition, he further explained that notwithstanding this fact, a hazard exposure still existed "anytime you travel through" the area, and that the section work crew consisting of approximately 10 miners would be exposed to the hazard in the event they had to use the escapeway in an emergency (Tr. 54).

The Commission has taken note of the fact that mine roofs are inherently dangerous and that even good roof can fall without warning. Consolidation Coal Company, 6 FMSHRC 34, 37 (January 1984). It has also stressed the fact that roof falls remain the leading cause of death in underground mines, Eastover Mining Co., 4 FMSHRC 1207, 1211 & n. 8 (July 1982); Halfway Incorporated, 8 FMSHRC 8, 13 (January 1986); Consolidation Coal Company, supra.

In the Consolidation Coal Company case, supra, the Commission affirmed my "S&S" finding concerning an over-wide roof bolting pattern which had existed along a supply track for a period of 6-months, and stated that "[T]he fact that no one was injured during that period does not ipso facto establish that there was not a reasonable likelihood of a roof fall."

In U.S. Steel Mining Company, Inc., 6 FMSHRC 1369, 1376 (May 1984), Judge Melick found that a hazardous roof condition was significant and substantial notwithstanding testimony from a mine foreman that it was unlikely that the roof would fall "right away," and his belief that the condition was not unsafe because he and the inspector were under the roof while taking certain measurements. In R B J Coal Company, Inc., 8 FMSHRC 819, 820 (May 1986), Judge Melick cited Mathies Coal Company, 6 FMSHRC 1 (1984), in support of his finding that a hazardous roof condition constituted a significant and substantial violation even in the absence of an "immediate hazard."

In Halfway Incorporated, supra, the Commission upheld a significant and substantial finding concerning a roof area which had not been supported with supplemental support, and ruled that a reasonable likelihood of injury existed despite the fact that miners were not directly exposed to the hazard at the precise moment of the inspection. In that case, the Commission stated as follows at 8 FMSHRC 12:

[T]he fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood for injury existed. The operative time frame for making that determination must take into account not only the pendency of the violative condition prior to the citation, but also continued

normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

In the instant case, although Mr. Pastorial indicated that he was concerned that a roof fall may have impeded the exit of miners down the escapeway, and that roof falls have occurred on three or four occasions in escapeways resulting in the restriction of the escapeway, he was also aware of prior instances where miners have been injured by rocks falling from the roof. He also believed that since the intersection is the weakest part of the entry, any roof fall would likely occur at such a location.

Inspector Bowers testified that it was reasonably likely that anyone struck by a piece of spalling or falling rock would suffer serious injuries, and that during his experience as an inspector, he was aware of serious injuries and death resulting from people being struck by falling rocks. In making his significant and substantial finding, he confirmed that he considered the fact that the roof had deteriorated, and that it was loose, broken, and spalling. He also considered the fact that the cited roof area was located next to an intersection which was larger than the entry, and where the roof would be weaker, and the fact that the existence of the deteriorating roof conditions during the time period prior to his inspection increased the likelihood of further deterioration and worsening of the condition (Tr. 51). As noted earlier, mine supervisor Metz confirmed that the mine roof top is so unpredictable that rocks falling from the top are not uncommon occurrences, and that the existence of a roof "ripper" indicates that there is some type of movement in the roof bolt or the top.

After careful consideration of all of the testimony and evidence adduced in this case, I agree with the inspector's significant and substantial finding. I conclude and find that the cited roof conditions, which clearly establish that the roof was deteriorating to the point where rocks had spalled or fallen from between the existing roof supports and/or from the "ripper" or crack which extended across the entry at the intersection in question, posed a discrete roof or rock fall hazard. I further conclude and find that the hazard contributed to by this hazardous roof condition would likely result in an injury, and that anyone struck by rock falling from the roof for an approximate distance of 6 to 6-1/2 feet, which was the approximate height of the roof area in question, would likely suffer injuries of a reasonably serious nature. Accordingly, the inspector's significant and substantial finding with respect to the violation in question IS AFFIRMED.

The Unwarrantable Failure Issue

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogeny & Ohio, at 9 FMSHRC 2010:

We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention."

Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

The issue here is whether or not the respondent's failure to address the roof conditions in the cited escapeway location constituted aggravated conduct exceeding ordinary negligence. Inspector Bowers made a finding that the violation was the result of "high negligence," but did not result from any "deliberate activity" by the respondent. He confirmed that he based his negligence finding on the fact that the roof condition had been noted in the weekly examination books which are required to be read and signed by the mine foreman and superintendent. He also confirmed that his unwarrantable failure order was consistent with MSHA's recently published guidelines which became effective on July 1, 1988, after the order was issued. These guidelines are found in MSHA Program Policy Manual, Volume I, Section 104, pg. 6, (exhibit G-7), which state in relevant part as follows:

* * * * *

Factors to look for when making an unwarrantable-failure-to-comply determination include the amount of time the violation has been left uncorrected, whether the hazard created by the violation is particularly serious thus warranting increased attention from the operator to prevent or correct it, whether the violation is repetitious of a previous violation, whether the violation was a result of deliberate activity by the operator, or whether the operator knew or had reason to know that its action(s) violated a mandatory standard. Citations and orders should clearly document the facts relied upon by the inspector in making the determination. Any one of the circumstances above may constitute sufficient grounds for an unwarrantable failure citation or order.

Mr. Bowers reviewed the aforementioned "factors" which he believed justified the unwarrantable failure order. Since the condition had existed and had been noted in the examination books for over a month from December 2, 1987, to January 6, 1988, he believed that the respondent had more than enough time to take corrective action, and he noted that abatement was achieved within one-half hour to an hour after the available timbers were brought to the area (Tr. 47).

Mr. Bowers stated that he also considered the fact that a roof fall could have occurred during the intervals in the weekly examinations, and in the event of such a fall, it could have impeded travel through the entry, and that it was possible that anyone walking through the area could be struck by a spalling

rock and suffer injuries (Tr. 47). He also considered the fact that the violation was repetitious, and he explained that he had previously issued several violations and orders at the mine because of uncorrected conditions which had been noted in the mine examination books. He was not certain that any of these prior citations or orders related to intake escapeways, but did recall that some of them were issued for uncorrected conditions in the track, return entries, and other different areas of the mine (Tr. 47-48).

Mr. Bowers concluded that the respondent "knew or should have known that its actions violated a mandatory standard" because the roof condition had been reported in the mine examination books which are required to be read and signed by the mine foreman or superintendent (Tr. 49). He confirmed that while he could have issued a section 104(a) citation, and allowed the respondent at least 1 day to correct the conditions, he did not do so because the condition had been noted in the books and the respondent knew about it. He did not believe that the condition constituted an imminent danger because "I didn't feel that it was imminent at the time that I seen it" (Tr. 49). When asked whether or not the respondent "knew or could have known that the condition posed a hazard or presented a dangerous condition, Mr. Bowers responded "That I don't know whether they would or not" (Tr. 52).

Fire boss Pastorial testified that his usual practice after observing further deterioration in a roof area which he had previously noted in the examination books as requiring additional support is to speak with the mine foreman and superintendent and ask them to take care of the matter, or write a note to Metz (Tr. 102, 108). Mr. Pastorial could not recall that he did this and I find no credible evidence to support any conclusion that he personally contacted mine management and apprised them of the fact that the roof area which he had previously tagged and observed had deteriorated further. In hindsight, Mr. Pastorial commented that "when it went over a week or two weeks, I should have contacted MSHA and told them that I have a place that needs timbered and I can't get management to timber it and I didn't do that" (Tr. 117).

Mr. Pastorial confirmed that it was not his usual practice to describe the specific roof conditions requiring additional support when he makes such an examination book entry because he assumes that mine management understands the meaning of a notation "needs additional roof support." He explained that he and superintendent Metz generally discuss the logistical arrangements and roof support materials required to correct such a recorded roof condition, but he could not document that this was done in this case (Tr. 165). He stated further that "If I indicate in that book that it needs additional roof support, then the top is bad. Why would I put in there that it needs additional roof

support if the top wasn't bad? To me that means the same thing" (Tr. 166). When asked whether he disagreed with Mr. Metz' conclusion that an examination book entry "can be traveled" means that "it is safe to travel," Mr. Pastorial responded "No. If that's the way he feels and that's how he understands, that's his opinion and I can't disagree with that" (Tr. 166).

Mine Supervisor Metz confirmed that he did not view the roof conditions at the time the order was issued, and he could not recall being in the area prior to the inspection. He also could not recall whether anyone specifically told him that the area was not safe to travel, or whether he ever personally discussed the condition with Mr. Pastorial. Mr. Metz was of the opinion that the phrase "can be traveled," which appeared as notations by the fire bosses in the mine examination books, meant that there was nothing to prevent anyone from travelling the escapeway, and he assumed that the phrase also meant "safe to travel." In commenting on the notations made by three fire bosses in the examination books that the cited location required additional roof support, Mr. Metz alluded to the many entries in the mine and the fact that he reviews many such notations on a day-to-day basis. He conceded, however, that a notation "needs additional roof support" would indicate to him "that there was something there that needs some attention." He explained that given the priorities dictated by notations in the 28 to 30 examination books which he must sign, corrective action to provide the additional roof support would be taken "as fast as possible," taking into account "other priorities" and his mining experience. He candidly conceded that he does not always make the right decision in addressing such matters.

When asked about any affirmative steps he would normally take in response to an examination book entry that a roof area "needs additional roof support," Mr. Metz stated that he has had occasion to speak with Mr. Pastorial in such instances in order to seek clarification or to determine whether the condition needed to be addressed immediately, or whether it could "wait a week or ten days," but he could not recall doing that in this case (Tr. 163). Mr. Metz confirmed that as a normal practice, the entries made in the mine examination books by Mr. Pastorial and the other fire bosses with respect to any mine conditions only relate to conditions that they view as necessary to be taken care of, or conditions which they know are violations, or may present potential problems, and that as a general rule, they do not make entries which do not fall within these categories (Tr. 150-151).

Mr. Metz conceded that he was familiar with mandatory standard 30 C.F.R. § 75.323, which requires that any hazardous conditions noted in the daily and weekly mine examination books be corrected promptly. The respondent's defense to the unwarrantable failure order is based on its assertion that Mr. Metz had no

reason to believe that the "needs additional roof support" notations made by the fire bosses in the examination books indicated a hazardous roof condition requiring immediate attention, and that based on the fact that all of the witnesses agreed that the notations "can be traveled" were unclear, it was not unreasonable for Mr. Metz to believe or conclude that the escapeway was safe to travel, and that the roof area in question was not hazardous, and did not require further immediate attention.

Copies of the mine examination books concerning the escape-way examinations conducted by three different fire bosses during the period December 2, 1987, to January 4, 1988, contain notations that additional roof support was required at the North Mains butts intake escapeway Station No. 17845, the identical location cited by the inspector in the contested order. The first notation was made by Mr. Pastorial on December 2, 1987, and subsequent identical notations were made by fire bosses Latocha and Eddy on December 8, 20, and 28, 1987, and January 4, 1988. All of the examination book pages on which these entries appear are signed by Mr. Metz. Mr. Metz confirmed that he is required to read or review all of these records, and he confirmed that he signed each of the pages in question. When asked whether he reviewed the specific pages in question, Mr. Metz responded that he was required to "read and countersign all books" (Tr. 145). Although he alluded to the fact that he is required to review approximately 180 examination book entries each day, I nonetheless conclude that Mr. Metz had actual or constructive notice of the conditions noted in the books by the fire bosses. I also find and conclude that from December 2, 1987, the day the roof condition was initially noted and tagged by Mr. Pastorial, until January 8, 1988, the day the order was issued, Mr. Metz was aware of the fact that the cited roof area was in need of additional roof support.

With regard to the hazardous nature of the cited roof area, I have concluded and found that the conditions were unsafe, and that the violation was significant and substantial. I take particular note of the fact that Mr. Metz' opinions and conclusions concerning the hazardous nature of the roof area in question were based on his after-the-fact evaluations of the terms "needs additional roof support" and "can be traveled" as they appear in the examination books. Mr. Metz confirmed that he did not observe the conditions at the time the order was issued, and he had no recollection that he visited the area or viewed the conditions at any time prior to the issuance of the order. Although Mr. Metz indicated that he had 19 years of underground mining experience, he conceded that he does not always make the right decision, and since he did not view the roof conditions in question, I have serious doubts that he had any factual basis for making any informed judgement decision as to the actual hazards presented by the prevailing roof conditions without the benefit of personally observing the conditions. Under the circumstances,

I have given little weight to his suggestions that the cited roof conditions were not hazardous.

Although Mr. Metz was of the opinion that roof "rippers" are nothing "to get overly excited about" because they are common occurrences in the mine, he nonetheless conceded that such a condition would indicate to him that the roof required attention, and that the existence of such a condition indicates some type of movement of the roof top. Coupled with his admission that the roof is unpredictable, that rocks falling from the roof are not uncommon in the mine, and his knowledge that fire bosses normally do not make examination books entries unless they believe a violation has occurred, or the condition noted presented a potential problem, I have difficulty comprehending why Mr. Metz failed to at least visit the roof area in question at some time during the 30-day period that the condition existed prior to the inspection and issuance of the order, why he failed to take timely follow-up action to insure that the roof was provided with additional support, or why he failed to timely seek out Mr. Pastorial to discuss the matter with him.

Although Mr. Metz stated that he would normally take corrective action "as fast as possible" when reviewing examination books entries which indicate that additional roof support was required in any area of the mine, he explained that any decision as to when such action would be taken would be based on "other priorities." Since he failed to elaborate further, or to explain what these other priorities may have been, I find nothing that may serve to mitigate Mr. Metz' failure to address the roof conditions in a more timely manner.

MSHA's assertions that the violation was repetitious is unsupported by any credible evidence, and I have given it little weight. Although the computer print-out detailing the respondent's prior history of violations reflects 55 prior section 104(a) citations for violations of section 75.1704, none of these violations were unwarrantable failure orders, and since none of the citations were produced, the facts and circumstances surrounding these violations were not forthcoming. With regard to the inspector's testimony that he had previously issued citations and orders to the respondent for recorded conditions that had been left uncorrected, no further details were forthcoming from the inspector, and the facts and circumstances connected with these allegations are not known.

After careful consideration of all of the testimony and evidence in this case, I conclude and find that the inspector's high negligence and unwarrantable failure findings were justified. I further conclude and find that the passage of 30 days from the time the roof conditions were initially noted in the examination book until the order was issued, without any action

whatsoever being taken by the respondent to address those conditions, was an inordinate amount of time, and that Mr. Metz' failure to act was less than what would reasonably be expected from a mine supervisor, and that his failure to act was inexcusable and constituted a lack of due diligence and failure to take reasonable care. Under the circumstances, the inspector's unwarrantable failure finding IS AFFIRMED, and the contested order IS LIKEWISE AFFIRMED.

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

Based on the stipulations by the parties, I conclude and find that the respondent is a large mine operator and that the civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The respondent's history of prior violations, as reflected by an MSHA computer print-out, reflects that for the period January 1, 1986 through December 31, 1988, the respondent paid \$346,794, for 1,592 violations issued at the Martinka No. 1 Mine. One-Thousand five-hundred and fifty (1,550), of these paid violations were for violations found to be significant and substantial (S&S), and fifty-five (55) were for violations of mandatory safety standard 30 C.F.R. § 75.1704. For an operation of its size, the respondent does not have a very good compliance record, particularly with respect to the escapeway requirements found in section 75.1704. Although I have given little weight to these prior violations for purposes of my unwarrantable failure finding, I have considered them for purposes of the civil penalty assessment which I have made for the contested violation which has been affirmed.

Good Faith Compliance

The parties have stipulated that the violation was abated in good faith by the respondent, and I conclude and find that the respondent timely abated the violation in good faith after receiving notice of the violation.

Negligence

On the basis of my unwarrantable failure findings and conclusions, which are herein incorporated by reference, I conclude and find that the violation resulted from a high degree of negligence, and an unwarrantable failure by the respondent to comply with the requirements of the cited standard.

Gravity

In view of my "S&S" findings and conclusions with respect to the contested order, I conclude and find that the violation was serious.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of \$2,000, is reasonable and appropriate for a violation of mandatory safety standard 30 C.F.R. § 75.1704, as stated in section 104(d)(2) Order No. 2895499, January 6, 1988.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$2,000, for the aforementioned violation of 30 C.F.R. § 75.1704, and a civil penalty assessment in the amount of \$50, in settlement of the modified section 104(a) Citation No. 2895079, 30 C.F.R. § 75.1403-9(c), January 6, 1988. Payment of these civil penalty assessments shall be made to MSHA within thirty (30) days of the date of this decision and order, 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
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SEP 7 1989

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 89-224-D
ON BEHALF OF RANDY VARNEY,	:	
Complainant	:	Hope CD 89-6
v.	:	
	:	Mine No. 1
ROSE ENERGY, INC.,	:	
REX FOUGHT, ROBERT CURTIS,	:	
Respondents	:	

DECISION APPROVING SETTLEMENT

On August 9, 1989, the Secretary filed a Motion to Approve Settlement. This Motion indicates that the above matter has been settled by the Parties. I have read the Settlement and Release attached to the Motion, and find it fairly disposes of the issues herein. Accordingly, the Secretary's Motion is GRANTED.

It is ORDERED that the Parties shall abide by all the terms of the Settlement Agreement dated July 26, 1989, and attached to the Secretary's Motion To Approve Settlement. It is further ORDERED that the above case be DISMISSED with prejudice.


Roy J. Maurer
Administrative Law Judge

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SEP 11 1989

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 89-99-D
ON BEHALF OF	:	MSHA Case No. PIKE CD 89-03
RUSSELL RATLIFF, and	:	
KENNETH MULLINS,	:	Docket No. KENT 89-107-D
Complainants	:	MSHA Case No. PIKE CD 89-03
v.	:	MSHA Case No. PIKE CD 89-05
	:	
INFERNO COALS, INC.,	:	No. H-8 Mine
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 89-200
Petitioner	:	A.C. No. 15-11529-03521
v.	:	
	:	Mine H-8
INFERNO COALS INC.,	:	
Respondent	:	

DECISIONS APPROVING SETTLEMENTS

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a complaint of alleged discrimination filed by MSHA on behalf of the complainants against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complaint alleged that the respondent discharged miners Russell Ratliff and Kenneth Mullins on or about December 22, 1988, for voicing their safety concerns to their supervisor about working alone on their roof-bolting machines under what they regarded as unstable roof conditions. MSHA subsequently amended its discrimination complaint to include a request for an assessment of a civil penalty in the amount of \$1,800, for an alleged violation of section 105(c) in connection with the alleged discriminatory discharge of both complaining miners, and it also filed the captioned civil

penalty proceeding seeking a civil penalty assessment in the amount of \$500, for the respondent's alleged discharge of Mr. Ratliff subsequent to his reinstatement in compliance with an Order of Temporary Reinstatement which I issued on April 4, 1989 (Docket No. KENT 89-99-D).

The respondent filed timely answers denying any discriminatory actions on its part, and the cases were consolidated for hearing in Pikeville, Kentucky. The hearing was subsequently continued due to a medical emergency of one of the parties, and it was rescheduled for September 11-14, 1989. However, on September 5, 1989, counsel for the parties advised me that they agreed to settle the dispute, and on September 7, 1989, they filed a joint motion seeking approval of their proposed settlement. Included in the motion is the settlement agreement entered into by the parties, and it has been signed and executed by both counsel, the respondent's president, and both complaining miners. The relevant terms of the settlement are as follows:

1. Inferno agrees to pay Mullins the sum of five thousand dollars (\$5,000.00) which sum represents payment of all claims, including lost wages in the amount of \$4,840.00, employee benefits, and medical expenses. By accepting \$5,000.00, Mullins agrees that Inferno will not have to offer reinstatement to him.

2. Inferno agrees to pay Ratliff the sum of ten thousand dollars (\$10,000.00) which sum represents payment of all claims, including lost wages in the amount of \$5,720.00, employee benefits, and medical expenses. By accepting \$10,000.00, Ratliff agrees that Inferno will not have to offer reinstatement to him.

3. The records maintained by Inferno in Mullins' and Ratliff's personnel and company files shall be completely expunged of all information relating to the matters being litigated herein.

4. In the event that Inferno is contacted by a prospective employer of either Mullins or Ratliff at any time in the future, Inferno, its owners, officers, agents, and those acting in concert with them shall not give Mullins or Ratliff a negative or unfavorable reference regarding their job performance while employed by Inferno. When contacted by a prospective employer of either Mullins or Ratliff, Inferno, its owners, officers and agents, and those acting in concert with them shall give such prospective employer only their job title(s) and dates of employment.

5. Inferno will provide signed letters on its corporate stationery to Ratliff and Mullins which shall

state the dates of each miner's employment, the jobs performed for Inferno, the training each received, and that they had no unauthorized absences from work. The letters will state further that Ratliff was laid off as part of a general workforce layoff which was necessitated by adverse economic conditions. This general workforce layoff was necessitated by economic factors affecting this mine. Further, the letter for Mullins will state that he left the employment of Inferno when he found other employment.

6. Inferno will not be required to offer employment and/or reinstatement to either Mullins or Ratliff at any time in the future.

7. In light of the difficulties and contingencies necessarily attendant to the litigation of the subject cases, the signatories to this Motion agree that the proposed settlement of this case is appropriate and fair under the circumstances.

8. By entering into this agreement, Inferno does not admit that Inferno violated Section 105(c) of the Act or violated the Temporary Reinstatement Order issued on April 4, 1989, or any other provision of the Act.

9. It is the parties' belief that approval of this settlement is in the public's interest and will further the intent and purpose of the Federal Mine Safety and Health Act of 1977.

With regard to the proposed settlement of the civil penalty case, including MSHA's civil penalty proposal filed as part of its amended discrimination complaint, MSHA's counsel has provided information concerning the six statutory civil penalty criteria found in section 110(i) of the Act, and a discussion and disclosure as to the circumstances on which its civil penalty assessment proposals are based.

I take note of the fact that the respondent disputed the allegation that it had discharged the miners in violation of the Act, and took the position that the complaining miners voluntarily left their jobs. With regard to the alleged failure by the respondent to comply with my reinstatement order concerning Mr. Ratliff, I take note of the fact that the inspector issued the citation on April 26, 1989, upon instructions by his supervisor after apparently receiving information that Mr. Ratliff had again been discharged on April 25, 1989. The information provided by the parties as part of their motion reflects that the mine superintendent advised the inspector that Mr. Ratliff had

not been discharged, and that he had quit his job on April 25, 1989, returned to work the next day, April 26, 1988, and voluntarily left the mine again that day. On April 27, 1989, during the course of a regular inspection of the mine, the inspector observed that Mr. Ratliff was again at work underground, and he terminated the citation which he had issued the day before.

Included with the proposed settlement disposition of the discrimination complaint is a proposed settlement of the civil penalty assessment initially filed and proposed by MSHA for the alleged violation of section 105(c) of the Act, and the alleged violation by the respondent for allegedly discharging Mr. Ratliff following his reinstatement in compliance with my reinstatement order. The respondent has agreed to pay a civil penalty assessment of \$100 in settlement of the former alleged violation, and a civil penalty assessment of \$50 for the latter alleged violation.

Conclusion

After careful consideration of the settlement terms and conditions executed by the parties and the complaining miners in this proceeding, I conclude and find that it is a reasonable resolution of the complaint filed by MSHA on behalf of the miners. It seems clear to me that all parties are in accord with the agreed upon settlement disposition of the dispute, and I see no reason why it should not be approved. With regard to the proposed settlement of the civil penalty proceeding, I conclude and find that it is reasonable and in the public interest, and I find no reason for not approving it.

ORDER

The joint motion IS GRANTED, and the proposed settlements ARE APPROVED. The respondent IS ORDERED to fully comply forthwith with the terms of the settlement, and it is expected to immediately pay to Mr. Mullins and Mr. Ratliff the agreed upon monetary settlements of their claims. The respondent IS FURTHER ORDERED to pay to MSHA civil penalty assessments in the amount of \$150 in satisfaction of the alleged violations in question, and payment of the penalties is to be made within thirty (30) days of the date of these decisions and order. Upon receipt of payment by the complaining miners and MSHA, these proceedings are dismissed.


George A. Koutras
Administrative Law Judge

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SEP 11 1989

SECRETARY OF LABOR, MSHA, : DISCRIMINATION PROCEEDING
on behalf of :
EUGENE McCARIO, : Docket No. LAKE 89-62-DM
Complainants :
v. : MD 88-08
THREE STAR DRILLING & : D.A.D. Well No. 1
PRODUCTION CORPORATION, :
Respondent :

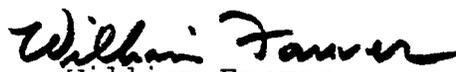
DECISION APPROVING SETTLEMENT

Before: Judge Fauver

The parties have moved for approval of a settlement agreement and dismissal of this case. I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the purposes of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is GRANTED and this proceeding is DISMISSED.


William Fauver
Administrative Law Judge

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SEP 12 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 89-12
Petitioner	:	A.C. No. 01-01247-03817
v.	:	
	:	Docket No. SE 89-32
JIM WALTER RESOURCES,	:	A.C. No. 01-01247-03828
INCORPORATED,	:	
Respondent	:	No. 4 Mine

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner;
Harold D. Rice, Esq., Robert Stanley Morrow, Esq., Jim Walter Resources, Inc., Birmingham, Alabama, for Respondent.

Before: Judge Maurer

These cases are before me upon petitions for assessment of civil penalty under Section 104(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., (the Act).

Pursuant to notice, a hearing was held in Birmingham, Alabama, on May 9, 1989. Prior to the commencement of testimony at the hearing, the parties advised me that they had a proposed settlement of one of the three citations at issue. Citation No. 9984577 was originally assessed at \$241 for a violation of 30 C.F.R. § 70.100(a). A reduction in penalty to \$50 is proposed for that respirable dust violation because further investigation revealed that the exposed employees were wearing personal protective equipment (respirators). In light of that additional information, MSHA agreed to delete the significant and substantial (S&S) characterization of the violation. I have considered the representations submitted by motion on the record in this case, and have concluded that the proffered settlement is appropriate under the statutory criteria set forth in Section 110(i) of the Act. I so approved the petitioner's motion from the bench at the hearing. Pursuant to the Rules of Practice before this Commission, this written decision confirms the bench decision I rendered at the hearing, approving the partial settlement of this case.

The aforementioned partial settlement did not include Citation Nos. 3010179 or 3187766 which both allege identical violations of 30 C.F.R. § 75.1718 and propose a civil penalty of \$20 each. Two different inspectors issued the above two citations, and in order to avoid having to call the second inspector to testify to essentially an identical fact situation, the parties agreed to actually try only Citation No. 3010179. They agreed that whatever that outcome should be, would also control the result concerning Citation No. 3187766.

STIPULATIONS

The parties stipulated to the following, which I accepted (Tr. 19-20):

1. Jim Walter Resources, Inc. is the owner and operator of the subject mine.
2. The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The Administrative Law Judge has jurisdiction to hear this case.
4. The Inspector who issued the citation was a duly authorized representative of the Secretary.
5. A true and correct copy of the subject citation was properly served upon the operator.
6. The copy of the subject citation is authentic and may be admitted into evidence for the purpose of establishing its issuance, but not for the purpose of establishing truthfulness or relevance of any statements found therein.
7. Imposition of a penalty will not affect this operator's ability to continue in business.
8. The operator's history of prior violations is average.
9. The operator is large in size.
10. The operator abated the violation in good faith.

DISCUSSION AND FINDINGS

Citation No. 3010179 sets forth the subject condition as follows:

Potable drinking water was not provided for the active No. 2 Longwall Section.

The Citation charges a violation of 30 C.F.R. § 75.1718 which provides:

An adequate supply of potable water shall be provided for drinking purposes in the active workings of the mine, and such water shall be carried, stored, and otherwise protected in sanitary containers.

Mr. David McAteer testified that he is a UMWA safety committeeman at the No. 4 mine. On the day of the inspection that culminated in the issuance of the instant citation, he told Inspector Meredith that they were having problems getting the company to provide potable water on the sections and asked for his help.

Inspector Meredith testified that he issued the citation at bar on August 4, 1988, when he did not find a container of any kind with potable drinking water on the No. 2 longwall section. At the time he was outby the section in the area where they keep the emergency sled, emergency supplies, first aid equipment, and normally, their potable drinking water. The inspector further testified (Tr. 32, 38-9):

I asked Mr. Fillibaum, who is the evening shift assistant mine foreman at that time, if he knew where any potable water was, because there wasn't any on the sled. And Mr. Fillibaum, if I recall, he said, "Well, you know everybody brings their water." And I says, "No, I don't know that, but you're going to have to provide water here," because this is normally where they have it, is on the emergency sled.

I asked him where the potable drinking water was they were supposed to provide and he said, "We don't have any up here. We'll have to get some sent in from the outside."

Mr. John Fillibaum testified on behalf of the operator. He stated that in his opinion there was an adequate supply of potable drinking water on the section, because each miner carries his own drink of choice.

I find that the preponderance of the evidence demonstrates that there was not an adequate supply of potable drinking water on the No. 2 longwall section as charged by the Secretary.

The regulation speaks of an "adequate" supply of drinking water. This incorporates a requirement that the water be readily available to the miners and I believe that the regulation also contemplates that the water be provided by the operator. It is not sufficient compliance to shift this regulatory burden to the individual miner to furnish his own water, even if, as a practical matter, most miners do furnish their own personal drinks.

On this basis, I conclude that a violation existed, and I have considered the statutory criteria set forth in Section 110(i) of the Act for determining the appropriate penalty for this violation. Under the facts and circumstances present in this record, I find that the \$20 penalty proposed by the Secretary is the appropriate penalty for the violation. By agreement of the parties, I make the same findings with regard to Citation No. 3187766.

ORDER

Accordingly, it is ORDERED that Citation Nos. 9984577, 3010179 and 3187766 are AFFIRMED. The allegation in Citation No. 9984577 that the violation was significant and substantial is stricken.

It is further ORDERED that the following civil penalties are assessed:

<u>Citation No.</u>	<u>Penalty</u>
9984577	\$50
3010179	\$20
3187766	\$20

It is further ORDERED that the operator pay \$90 within 30 days from the date of this decision as civil penalties for the violations found herein.


Roy J. Maurer
Administrative Law Judge

Distribution:

William Lawson, Esq., U.S. Department of Labor, Office of the Solicitor, Suite 201, 2015 Second Avenue North, Birmingham, AL 35203 (Certified Mail)

Harold D. Rice, Esq., Robert Stanley Morrow, Esq., Jim Walter Resources, Inc., Post Office Box 830079, Birmingham, AL 35283-0079 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 13 1989

GARY THOMPSON, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 88-162-D
: MADI CD 88-05
ISLAND CREEK COAL COMPANY, :
Respondent : No. 11 Mine

DECISION

Before: Judge Maurer

On February 11, 1988, the Complainant, Gary Thompson, filed a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter referred to as the "Act") with the Secretary of Labor, Mine Safety and Health Administration (MSHA) against the Island Creek Coal Company. That complaint was denied by MSHA and Mr. Thompson thereafter filed a complaint of discrimination with the Commission on his own behalf under section 105(c)(3) of the Act. Mr. Thompson alleges that he was discriminated against in violation of section 105(c) of the Act because he was discharged on February 8, 1988, by Island Creek Coal Company for failing to report to work on February 3, 1988 and later submitting an admittedly invalid doctor's excuse for his absence. He had been working up until that time under the terms of a Last Chance Agreement because of excessive absenteeism. Mr. Thompson admits that he was actually absent on February 3, 1988 due to a personal bankruptcy proceeding, but asserts that another employee used an invalid doctor's excuse but was not fired.

Island Creek Coal Company, by counsel, has moved to dismiss the subject complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted under section 105(c) of the Act. On August 14, 1989, an ORDER TO SHOW CAUSE was issued by the undersigned wherein the complainant was ordered to show cause within fifteen (15) days as to why this proceeding should not be dismissed for "failure to state a claim for which relief can be granted under section 105(c)(1) of the Act." There has been no response received to date.

For the purposes of ruling on Island Creek Coal Company's motion to dismiss, the well pleaded material allegations of the complaint are taken as admitted. 2A Moore's Federal Practice

¶12.08. A complaint should not be dismissed for insufficiency unless it appears to a certainty that the complainant is entitled to no relief under any state of facts which could be proved in support of a claim. Pleadings are, moreover, to be liberally construed and mere vagueness or lack of detail is not grounds for a motion to dismiss. Id.

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

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

In order to establish a prima facie violation of section 105(c)(1) the complainant must prove that he engaged in an activity protected by that section and that his discharge was motivated in any part by that protected activity. Secretary ex. rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980) rev'd on other grounds sub nom, Consolidation Coal Company v. Secretary, 633 F 2d. 1211(3rd Cir. 1981). In this case, Mr. Thompson asserts that he was discharged for using an invalid doctor's excuse to cover up an absence from work while another person was known by management to have done the same thing and was not discharged. Assuming that this allegation is true, it is clearly not sufficient to create a claim under section 105(c)(1) of the Act. That section does not provide a remedy for what the complainant perceives to be "discrimination" but what is in reality, at best, unfairness or inequitable treatment; if that conduct on the part of the operator was not caused in any part by

an activity protected by the Act. Violating the operator's personnel regulations is not activity protected by the Act. Therefore, I find that the complaint herein fails to state a claim for which relief can be granted under section 105(c)(1) of the Act, and this case is therefore dismissed.


Roy J. Maurer
Administrative Law Judge

Distribution:

Mr. Gary Thompson, Route 2, Box 253, Madisonville, KY 42431
(Certified Mail)

Stephen X. Munger, Esq., Jackson, Lewis, Schnitzler & Krupman,
2400 Preachtree Center, Harris Tower, 233 Peachtree Street, N.E.,
Atlanta, GA 30303-1509 (Certified Mail)

/inl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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 DENVER, CO 80204

SEP 13 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA), : Docket No. WEST 89-22-M
 Petitioner : A.C. No. 04-03008-05515
 :
 v. : Oro Grande
 :
 VINNELL MINING AND MINERALS :
 CORPORATION, :
 Respondent :

DECISION

Appearances: Dane C. Dauphine, Esq., Office of the Solicitor,
 U.S. Department of Labor, Los Angeles, California,
 for Petitioner;
 D. McRae, General Manager, Vinnell Mining &
 Minerals Corporation, El Monte, California,
pro se.

Before: Judge Lasher

Subsequent to hearing the parties reached an amicable
 resolution of all matters in dispute.

Upon Petitioner's motion for approval of a proposed settle-
 ment of the 5 violations involved, and the same appearing proper
 and fully supported in the record, the settlement is approved.

The terms of the settlement are as follows:

<u>Citation No.</u>	<u>Original Proposed Penalty</u>	<u>Settlement Amount</u>
3291321	\$ 46.00	\$ 46.00
3291322	63.00	63.00
3293718	63.00	20.00
3293718	20.00	20.00
3293720	20.00	20.00

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 sum of \$169.00 as and for the penalties agreed on and here
 assessed.

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

Distribution:

Dane C. Dauphine, Esq., Office of the Solicitor, U.S. Department of Labor, Room 3247 Federal Building, 300 N. Los Angeles Street, Los Angeles, CA 90012 (Certified Mail)

Mr. D. McRae, General Manager, Vinnell Mining & Minerals Corp., 3380 Flair Drive, Suite 236, El Monte, CA 91731 (Certified Mail)

/bls

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FALLS CHURCH, VIRGINIA 22041

SEP 13 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 89-70
Petitioner : A.C. No. 46-04266-03543
v. :
: Meredith Mine
BULL RUN MINING, INCORPORATED, :
Respondent :

DECISION

Appearances: Carol B. Feinberg, Esq., U.S. Department of Labor,
Office of the Solicitor, Arlington, Virginia, for
Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of \$450 for an alleged violation of the mandatory safety standards found in 30 C.F.R. Part 75.

The respondent contested the violation and requested a hearing. Pursuant to notice, a hearing was convened in Morgantown, West Virginia, on June 30, 1989, and while the petitioner appeared, the respondent did not. In view of the respondent's failure to appear, the hearing proceeded without them. For reasons discussed later in this decision, respondent is held to be in default, and is deemed to have waived its opportunity to be further heard in this matter.

The record in this case indicates that a Notice of Hearing dated May 2, 1989, setting this case down for hearing in Morgantown, West Virginia, on June 30, 1989, was received by the respondent on May 4, 1989.

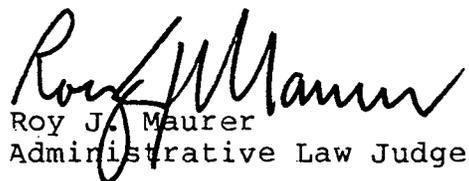
Subsequently, because the respondent had continued to ignore the petitioner's discovery requests, I issued an Order to Show Cause on June 9, 1989, to the respondent to show cause why it should not be held in default for its failure to comply with my discovery orders of April 25, 1989.

Respondent has never replied to the above Show Cause Order, nor did any representative of respondent appear at the designated time and place for the hearing of this case.

The hearing proceeded in the respondent's absence. The petitioner put in her prima facie case through the testimony of Inspector Phillips and moved for a decision affirming the order at bar and the proposed civil penalty by default.

Under the circumstances in this record, I conclude and find that the respondent has waived its right to be heard further in this matter and that it is in default. Moreover, I find that the issuance of yet another Show Cause Order would be a futile gesture.

Accordingly, I find that the respondent is in default and the penalty of \$450 proposed by the Secretary in this case must be paid within 30 days of the date of this decision.


Roy J. Maurer
Administrative Law Judge

Distribution:

Carol B. Feinberg, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Mr. Kevin A. Mayor, Superintendent, Bull Run Mining Company, Inc., 2607 Cranberry Square, Morgantown, WV 26505 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 14 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 89-81
Petitioner : A.C. No. 46-03805-3886
v. :
: Martinka No. 1 Mine
SOUTHERN OHIO COAL CO., :
Respondent :

DECISION APPROVING SETTLEMENT

Appearances: Mark Malecki, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for the Secretary; Rebecca J. Zuleski, Esq.,
Furbee, Amos, Webb & Critchfield, Morgantown,
West Virginia, for SOCCO.

Before: Judge Broderick

The above case was called for hearing in Morgantown,
West Virginia, on August 22, 1989. The Secretary moved on
the record for approval of a settlement agreed to between
the parties. The docket contains a single alleged violation
originally assessed at \$311. The parties propose to reduce
the penalty to \$50. Counsel for the Secretary stated that
the gravity of the violation, and the operator's negligence
were less than originally believed. I have considered the
motion in the light of the criteria in section 110(i) of the
Act and conclude that it should be approved.

Accordingly, the settlement is APPROVED and Respondent
is ORDERED TO PAY the sum of \$50 within 30 days of the date
of this order.


James A. Broderick
Administrative Law Judge

Distribution:

Mark Malecki, Esq., U.S. Department of Labor, Office of the
Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Rebecca J. Zuleski, Esq., Furbee, Amos, Webb & Critchfield,
5000 Hampton Center, Suite 4, Morgantown, WV 26505 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 20 1989

GEORGE JACKSON, JR., : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 89-75-D
: :
NALLY AND HAMILTON : BARB CD 89-03
ENTERPRISES, INC., :
Respondent :
:

ORDER OF DISMISSAL

The Parties having jointly moved the Administrative Law Judge to permit the Complainant to withdraw his Complaint of Discrimination in this case and to dismiss this case with prejudice and the Administrative Law Judge being fully advised does hereby ORDER as follows:

1. The Complaint of Discrimination filed by Complainant in this action be and is hereby WITHDRAWN.
2. This case be and is hereby DISMISSED with prejudice.


Avram Weisberger
Administrative Law Judge

Distribution:

R. Scott Madden, Esq., 116 Lawyer Street, Manchester, KY
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Lloyd R. Edens, Esq., Cline & Edens, Post Office Drawer 2220,
Middlesboro, KY 40965 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DENVER, CO 80204

SEP 20 1989

SECRETARY OF LABOR, : CONTEST PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 89-45-R
Petitioner : Order No.3226175; 11/4/88
: v. : Docket No. WEST 89-46-R
: Order No. 3223764; 11/10/88
: MID-CONTINENT RESOURCES, INC., : Dutch Creek Mine
Respondent : Mine ID 05-00301
: SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 89-143
Petitioner : A.C. No. 05-00301-03690
: v. : Docket No. WEST 89-175
: A.C. No. 05-00301-03700
MID-CONTINENT RESOURCES, INC., :
Respondent : Dutch Creek Mine

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Respondent/Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb,
Glenwood Springs, Colorado,
for Contestant/Respondent.

Before: Judge Cetti

The above captioned contest proceedings and their related
civil penalty proceedings are consolidated for purpose of
decision.

At the Glenwood Springs hearings of December 15, 16, 17,
1988, the parties presented extensive documentary evidence and
three days of testimony from numerous witnesses. A portion of
the case was continued for further hearing. Prior to the
continued hearing the parties negotiated proposed settlements of
the cases.

The parties have now filed a joint motion requesting
approval of the proposed settlements. The settlement agreements
provides that petitioner amend the proposed penalties in civil
proceedings Docket Nos. WEST 89-143 and WEST 89-175 as shown

below and Mid-Continent withdraw its Notice of Contest to all citations and orders contained in Docket Nos. WEST 89-45-R and WEST 89-46-R.

Docket No. WEST 89-143

<u>Citation/Order No.</u>	<u>Proposed Penalty</u>	<u>Amended Proposed Penalty</u>
3226053	\$ 259.00	\$ 155.40
3226176 (89-45-R)	590.00	354.00

Docket No. WEST 89-175

2931141	\$1,400.00	840.00
3226628	1,300.00	780.00
3226175 (89-45-R)	1,300.00	780.00
3223765 (89-46-R)	1,400.00	840.00
3223771	1,500.00	900.00
2876864 (89-46-R)	1,200.00	720.00

In support of the proposed settlement disposition of these cases, the petitioner has submitted information pertaining to the six statutory civil penalty criteria found in Section 110(i) of the Act. In addition, the petitioner has submitted a discussion and disclosure as to the facts and circumstances surrounding the issuance of the citations and orders in question, and a reasonable justification of the reduction of the original proposed civil penalty assessments.

Conclusion

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

ORDER

1. Contest proceedings in Docket Nos. WEST 89-45-R and WEST 89-46-R are vacated.

2. Respondent is ORDERED to pay civil penalties in the settlement amounts shown above in satisfaction of the citations and orders in question in the amount of \$509.00 on or before April 1, 1990 for the penalties assessed in Docket WEST 89-143 and in the amount of \$4,860.00 on or before July 1, 1990 for the penalties assessment in Docket WEST 89-175.



August F. Cetti
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Edward Mulhall, Jr., Esq., Delaney & Balcomb, P.O. Drawer 790, Glenwood Springs, CO 81602 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 21 1989

LINDA LESTER, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. VA 88-59-D
: :
GARDEN CREEK POCAHONTAS CO., : Pocahontas No. 6 Mine
Respondent :

DECISION

Appearances: Susan Oglebay, Esq., Oglebay & Graham, Damascus, Virginia, for Complainant; Donald D. Anderson, McGuire, Woods, Battle & Boothe, Richmond, Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that she was removed from her temporary roof bolting job and returned to the job of general inside laborer, because of safety complaints to her safety committeeman and a Federal inspector. She did not lose time from work, but claims lost wages measured by the difference in pay between the roof bolting job and the general inside laborer job from May 18, 1988 until May 1989 when she became a permanent roof bolter, except for the period between August 1988 and February 1989, when she was out of work because of an employment-related injury. Respondent concedes that complainant made a protected safety complaint. It denies that she was subjected to adverse action because of the safety complaint. Pursuant to notice, the case was called for hearing in Abingdon, Virginia, on July 18, 1989. Linda Lester, Kenneth Lester, John Woolford and Ray Lester testified on behalf of Complainant. George King, Tom Meade and Ronald D. Coleman testified on behalf of Respondent. Both parties were given the opportunity to file post-hearing briefs. Respondent filed such a brief; Complainant did not. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Respondent, Garden Creek Pocahontas Co. (Garden Creek), is the owner and operator of an underground coal mine in Oakwood, Virginia, known as the Pocahontas No. 6 Mine. Complainant Lester

is employed at the subject mine as a miner. She has worked at the mine since February 1981. Her jobs included general inside laborer, miner helper, scoop operator, roof bolter, apprentice electrician, and beltman. She worked as a roof bolter in November 1981, and in May 1983 for periods of time not disclosed in this record. As of April 22, 1988, she was employed as a general inside laborer.

In April 1988, Garden Creek was doing construction work to set up a new miner section. This involved cutting in a rock area, and necessitated bolting the rock roof. One permanent roof bolter, Tommy Proffett, was on the rock crew and a temporary roof bolter was assigned to work with him. After some days, the Union requested that the job be posted, and filled in accordance with the existing collective bargaining contract. A prior grievance settlement at the subject mine required the company to post a job vacancy whenever a temporary job existed for seven days or more. Garden Creek told the Union officials that the rock bolting project would be completed in a few days, but the Union wanted it posted anyway. Garden Creek agreed but informed the Union that "as soon as the project is completed this job will be eliminated." (Tr. 94)

On April 22, 1988, a notice of Temporary Vacancy for the position of roof bolter was posted. (R-Ex. A) The name D. Smith was written on the notice. Smith was a permanent roof bolter working on a coal-producing section, and had been one since 1981. He was off work because of an injury since June 1987. In June 1987, the mine was doing truss bolting which required six roof bolters on the day shift. In early 1988, the mine began using the super bolt system and phased out the truss bolting. In the super bolt system, only four roof bolters were required on the full-time day shift. Complainant was awarded the posted job on April 29, 1988. She began working on the new job on May 9, 1988, but was paid as a roof bolter beginning May 2, 1988. Complainant assumed that she was temporarily filling the job of Donnie Smith. Garden Creek intended that she was filling a temporary position doing rock bolting until the rock project was completed. On May 9, Complainant told her foreman that she was supposed to work on the coal producing section as Donnie Smith had done, rather than on rock work. She filed a grievance which management denied.

On May 10, 1988, Complainant was told by her foreman, Ronald Coleman, that she would have to begin installing bolts herself without the assistance of the other roof bolter. She protested that the height of the area would require her to climb on to the roof bolter canopy and that she was afraid that she would be injured. She asked to have the safety committeeman and the Federal inspector who was at the mine, assess the safety of her work. The inspector told Complainant that he would not tell her the job was safe but that he could not see any other way that it could be done. So far as the record shows, no citations or orders were issued concerning the performance of the work.

On the following day, May 11, Coleman called Complainant aside and told her that she should either do her work or withdraw from the job. He told her that her roof bolting partner had complained that he was doing her work as well as his own. Coleman also told her that she was causing problems in talking to the safety committeeman and the inspector. After this conversation, Complainant became upset. She left work, and was taken to a hospital for what was diagnosed as hyperventilation. She returned on Friday, May 13, and was assigned to a belt crew. She continued working on the belt the following Monday and Tuesday, May 16 and 17, and on May 18 was told that the roof bolting job had been discontinued. She was paid as a roof bolter through May 18, 1988. The mine superintendent testified that the work was completed on May 16, but Complainant was not informed of this until May 18. The Superintendent was aware of Complainant's safety complaints to the safety committeeman and the inspector. Complainant's foreman Coleman was not involved in the decision to eliminate or discontinue her job.

In about March 1989, the mine added a third section crew to the day shift. Complainant bid for and was awarded the job of permanent roof bolter in April or May 1989. She has continued on that job to the date of the hearing.

ISSUES

1. Whether the temporary roof bolter position was discontinued and Complainant was removed from that position because she made safety complaints to her safety committeeman and a federal inspector?

2. If so, to what remedies is Complainant entitled?

CONCLUSIONS OF LAW

Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 (the Act) in the operation of the subject mine. Complainant is a miner protected under section 105(c) of the Act.

Under the Act, a complaining miner can establish a prima facie case of discrimination by proving that she engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. If the operator cannot rebut the prima facie case in this manner, it may nevertheless defend affirmatively by proving that the adverse action was also motivated by other factors than the protected activity and that it would have taken the adverse action for these factors in any event. Robinette, supra.

I

The parties agree that Complainant made safety complaints to a safety committeeman and a Federal inspector, and that these Complaints constitute activity protected under the Act.

II

The action taken by Respondent in removing Complainant from the position of roof bolter on May 18, 1988, which resulted in a loss of pay, constituted adverse action.

III

The evidence establishes that Complainant's foreman Coleman reprimanded her for making safety complaints protected under the Act. The crucial issue is whether the safety complaints were in any way related to the adverse action described above. Coleman testified that he was not involved in the decision to eliminate the roof bolter position. I accept his testimony as credible.

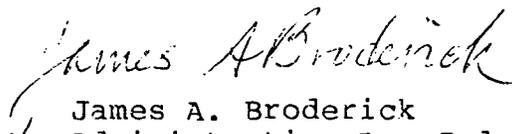
The Superintendent, George King, did make the decision to eliminate the position when the rock work was completed. King was aware of the fact that Complainant had made safety related complaints to the committeeman and the inspector. He testified, however, that this awareness was not related to the elimination of the roof bolting job. He testified that, in accordance with his agreement with the Union, when he was informed by the mine foreman that the rock project was completed, he told the foreman to inform Complainant that the job was eliminated. I accept the testimony of King as credible and consistent with the other evidence in the record. I conclude therefore that the adverse action suffered by Complainant was not in any way related to her protected safety complaints. The testimony of John Woolford and Ray Lester concerning their bolting activities after Complainant's temporary position was eliminated was explained by King and Coleman as related to clean up work or coal face bolting unrelated to the rock project. I accept their explanation as credible.

Further, I conclude that even if Complainant established a prima facie case of discrimination, the operator has established that the adverse action was motivated by unprotected factors, namely, the completion of the rock project, and that it would have taken the adverse action for these factors alone.

Therefore, Complainant has failed to establish that Respondent discriminated against her in violation of the provisions of section 105(c) of the Act.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that Complainant's complaint of discrimination is DISMISSED.


James A. Broderick
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 21, 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 88-44-M
Petitioner	:	A. C. No. 44-03995-05509
v.	:	
	:	Culpepper Plant
A. H. SMITH STONE COMPANY,	:	
Respondent	:	
	:	
	:	Docket No. YORK 89-24-M
	:	A. C. No. 18-00275-05517
	:	
	:	Branchville Plant
	:	
	:	Docket No. YORK 89-35-M
	:	A. C. No. 18-00481-05507
	:	
	:	Brandywine Mine
	:	
	:	Docket No. YORK 89-36-M
	:	A. C. No. 18-00293-05504
	:	
	:	Clinton Mine
	:	
	:	Docket No. YORK 89-40-M
	:	A. C. No. 18-00275-05520
	:	
	:	Docket No. YORK 89-43-M
	:	A. C. No. 18-00275-05518
	:	
	:	Docket No. YORK 89-44-M
	:	A. C. No. 18-00275-05519
	:	
	:	Branchville Plant

DECISION

Appearances: Jack F. Strausman, Esq., Office of the
Solicitor, U. S. Department of Labor,
Arlington, Virginia, for Petitioner;
Lisa M. Wolff, A. H. Smith Stone Company,
for Respondent.

Before: Judge Merlin

When the above-captioned cases came on for hearing counsel for both parties advised that settlements had been reached. With the permission of the bench these settlements were placed upon the record. Other cases scheduled for hearing at the same time were heard on the merits.

VA 88-44-M

This case involves four violations which were originally assessed at \$362 and the operator agreed to pay the original assessments in full. The circumstances of these violations were explained on the record and I accepted the proffered amounts from the bench.

YORK 89-24-M

This case involves twenty violations which were originally assessed at \$1,499. The proposed settlement is for \$1,460.

Citation No. 3247135 was issued for a violation of 30 C.F.R. § 56.14107(a) because the guard for the secondary crusher was inadequate. The penalty was originally assessed at \$79 and the proposed settlement is for \$40. The Solicitor represents that the penalty reduction is warranted because gravity is less than originally thought. The Solicitor advises that a guard had been in place which had a small opening ten inches above the floor as originally designed and installed. Due to the closeness of the opening to the floor and to the size of the opening, the probability of injury was less than originally thought. The foregoing representations were accepted from the bench and the proposed settlement was approved.

The operator agreed to pay the original assessments for the remaining nineteen violations involved in this case. The circumstances of these violations were explained on the record and I accepted the proffered amounts from the bench.

YORK 89-35-M

This case involves two violations which were originally assessed at \$170. The proposed settlement is for \$124.

Citation No. 3247111 was issued for a violation of 30 C.F.R. § 56.12036 because fuse tongs were not available for removing and replacing electrical fuses. The penalty was originally assessed at \$79 and the proposed settlement is for \$60. The Solicitor represents that the penalty reduction is warranted because negligence is less than originally thought. This condition had not been cited in previous inspections and the violation was abated in good faith. The foregoing repre-

sentations were accepted from the bench and the proposed settlement was approved.

Citation No. 3247113 was issued for a violation of 30 C.F.R. § 56.20001 because the inspector found evidence that alcohol was being consumed on mine property. The penalty was originally assessed at \$91 and the proposed settlement is for \$64. The Solicitor represents that the penalty reduction is warranted because negligence is less than originally thought. The Secretary has agreed to adjust the assessment of negligence from moderate to low due to representations by the operator that there have not been problems with employees drinking on the property previous to the time this bottle was discovered. Also there was no other evidence known to the operator of alcohol-related problems. The foregoing representations were accepted from the bench and the proposed settlement was approved.

YORK 89-36-M

This case involves six violations which were originally assessed at \$399. The proposed settlement is for \$289.

Citation No. 3246014 was issued for a violation of 30 C.F.R. § 56.14112(b) because the v-belt drive on the gravel shaker screen was not adequately guarded. The penalty was originally assessed at \$63 and the proposed settlement is for \$44. The Solicitor represents that the penalty reduction is warranted because negligence is less than originally thought. The guard was present, but, it did not extend the entire distance. The foregoing representations were accepted from the bench and the proposed settlement was approved.

Citation No. 3247104 was issued for a violation of 30 C.F.R. § 56.14132(a) because the automatic reverse back-up alarm on a loader was inoperative. The penalty was originally assessed at \$79 and the proposed settlement is for \$65. The Solicitor represents that the penalty reduction is warranted because gravity is less than originally thought. Because the loader would not be moving fast, the seriousness of any injury was slightly less. The foregoing representations were accepted from the bench and the proposed settlement was approved.

Citation No. 3247106 was issued for a violation of 30 C.F.R. § 56.14103(c)(2) because a window on the left side of a loader had been removed and a piece of solid metal had been used to replace it. The penalty was originally assessed at \$79 and the proposed settlement is for \$50. The Solicitor represents that the penalty reduction is warranted because gravity is less than originally thought. The loader was not moving fast. The foregoing representations were accepted from the bench and the proposed settlement was approved.

Citation No. 3247108 was issued for a violation of 30 C.F.R. § 56.12036 because fuse tongs were not available for removal and replacement of fuses. The penalty was originally assessed at \$79 and the proposed settlement is for \$50. The Solicitor represents that the penalty reduction is warranted because negligence is less than originally thought. This condition had not been cited in previous inspections. The foregoing representations were accepted from the bench and the proposed settlement was approved.

Citation No. 3247110 was issued for a violation of 30 C.F.R. § 56.12016 because an employee was standing on a conveyor belt that had not been locked out to keep it from being inadvertently energized. Locks for locking out the equipment were not available. The penalty was originally assessed at \$79 and the proposed settlement is for \$50. The Solicitor represents that the penalty reduction is warranted because gravity is less than originally thought. The employee was at the low end of the belt which was not very high off the ground. The foregoing representations were accepted from the bench and the proposed settlement was approved.

The operator agreed to pay the original assessment for the remaining violation involved in this case. The circumstances of the violation were explained on the record and I accepted the proffered amount from the bench.

YORK 89-40-M

This case involves two violations which were originally assessed at \$1,700. The proposed settlement is for \$950.

Citation No. 3246302 was issued for a violation of 30 C.F.R. § 56.14001 because a conveyor belt was not provided with a guard on the tail pulley. An employee was observed working in the area and exposed to the hazard. The penalty was originally assessed at \$500 and the proposed settlement is for \$250. The Solicitor represents that the penalty reduction is warranted because negligence is less than originally thought. The Solicitor accepted the operator's representation that the guard had been removed for cleaning and had not been immediately replaced. The foregoing representations were accepted from the bench and the proposed settlement was approved.

Order No. 3247101 was issued for a violation of 30 C.F.R. § 56.18006 because new workers had not been indoctrinated in the safety rules and in safe work procedures. This information was given to the inspector both from supervisors and from an interpreter who interpreted for Hispanic employees. The penalty was originally assessed at \$1,200 and the proposed settlement is for \$700. The Solicitor

represents that the penalty reduction is warranted because gravity is less than originally thought. Only 5 employees, instead of 9 as originally determined by the inspector, were affected. The foregoing representations were accepted from the bench and the proposed settlement which is a substantial amount was approved.

YORK 89-43-M

This case involves twenty violations which were originally assessed at \$2,897. The proposed settlement is for \$2,102.

The Solicitor has advised that Citation Nos. 3246731, 3246736, 3247100, and 3247138 which were originally assessed at \$157, \$119, \$400, \$119 respectively were, vacated by MSHA on August 10, 1989, as being issued in error.

The operator has agreed to pay the original assessments for the sixteen remaining violations involved in this case. The circumstances of these violations were explained on the record and I accepted the proffered amounts from the bench.

YORK 89-44-M

This case involves one violation which was originally assessed at \$20 and the operator has agreed to pay the original assessment in full. The circumstances of this violation were explained on the record and I accepted the proffered amount from the bench.

ORDER

In light of the foregoing the recommended settlements are APPROVED and the operator is ORDERED TO PAY the following amounts within 30 days from the date of this decision.

VA 88-44-M

<u>Citation No.</u>	<u>Amount</u>
2851999	\$ 79
2852000	\$ 79
2852603	\$ 85
2852604	\$ 119
Total	\$ 362

YORK 89-24-M

3246407	\$ 20
3246303	\$ 147
3246729	\$ 20
3246730	\$ 20

3246826	\$ 105
3246827	\$ 105
3246831	\$ 20
3247082	\$ 79
3247083	\$ 79
3247084	\$ 20
3247085	\$ 20
3247088	\$ 79
3247134	\$ 157
3247135	\$ 40
3247136	\$ 79
3247137	\$ 20
3247140	\$ 20
3246830	\$ 105
3247095	\$ 147
3247096	\$ 178
Total	<u>\$1,460</u>

YORK 89-35-M

3247111	\$ 60
3247113	\$ 64
Total	<u>\$ 124</u>

YORK 89-36-M

3246014	\$ 44
3247104	\$ 65
3247106	\$ 50
3247107	\$ 20
3247108	\$ 60
3247110	\$ 50
Total	<u>\$ 289</u>

YORK 89-40-M

3246302	\$ 250
3247101	\$ 700
Total	<u>\$ 950</u>

YORK 89-43-M

3246727	\$ 20
3246728	\$ 20
3246731	VACATED
3246732	\$ 20
3246733	\$ 119
3246734	\$ 178
3246735	\$ 136
3246736	VACATED
3246739	\$ 119
3246740	\$ 119

3246824	\$ 420
3246828	\$ 157
3247081	\$ 119
3247086	\$ 119
3247087	\$ 119
3247090	\$ 225
3247100	VACATED
3247138	VACATED
3247139	\$ 192
3246829	\$ 20
Total	<u>\$2,102</u>

YORK 89-44-M

3247099	\$ 20
Grand Total	<u>\$5,307</u>



Paul Merlin
Chief Administrative Law Judge

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Ms. Lisa M. Wolff, Director Safety, A. H. Smith Stone Company, 9101 Railroad Avenue, Branchville, MD 20740 (Certified Mail)

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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 21 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 88-202-M
Petitioner : A.C. No. 24-00014-05513
v. : Trident Plant & Quarry
IDEAL CEMENT COMPANY, :
Respondent :

DECISION

Appearances: Robert Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
James J. Gonzales, Esq., Holland & Hart,
Denver, Colorado;
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charged respondent, Ideal Cement Company, (hereafter "Ideal"), with violating a safety regulation 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 Helena, Montana.

At the hearing the parties agreed the Commission has jurisdiction to hear the case (Tr. 389).

The parties submitted post-trial briefs in support of their positions.

Summary of the Evidence

MSHA's Evidence

This case involves the death of miner Thomas E. Bertagnolli that occurred on October 19, 1987, while he was operating a front-end loader. The witnesses at times referred to the loader

as a Bobcat and at other times as a Uniloader. The citation alleges a violation of 30 C.F.R. § 56.9002. 1/

MSHA's witnesses were Vincent J. Schafer, Stephen M. Carey, Stephen L. Livingood, Archie Huenergardt, Marvin Doornbos, Stanley Veltkamp, Robert E. Stinson, Eric Shanholtz and Darrell Woodbeck.

Bert Todd, Gary Huls, William Fairhurst and Arlene Sherman testified for respondent.

VINCENT J. SCHAFER has been employed by Ideal as a maintenance man for ten years and he was familiar with the Uniloader.

Fifty percent of the workers at the plant have operated the equipment.

The Uniloader was equipped with a seat belt and ROPS, 2/ but it was necessary to modify the ROPS so the equipment could fit in the kiln. 3/ In addition, narrower wheels had also been installed.

The Uniloader, equipped with side screens, has been operated by the witness without the side screens since before October 1987. He did not consider it unsafe to operate without side screens. The bucket affixed to the equipment takes ten seconds from its lowest setting to an upright position.

Schafer also installed a shield on the front of the loader. The shield consisted of $\frac{3}{4}$ -inch plywood. This prevented the kiln bricks from falling into it. In October 1987 Schafer would enter the equipment by climbing over the plywood. He did not consider it safe to exit the Bobcat to the rear.

1/ The regulation allegedly violated here provides as follows:

Equipment defects affecting safety shall be corrected before the equipment is used.

2/ Roll-over protective structure.

3/ The kiln is 300 feet long. The loader is 12 feet long by $3\frac{1}{2}$ to 4 feet wide with the bucket attached.

When the loader operator exits the equipment he lowers the arms and turns off the equipment. He then removes the bungee cord holding the plywood shield. The plywood makes the equipment more safe as compared to less safe.

On October 19th a cylinder popped on the loader. A new cylinder was not available so it was replaced by an old one. On the same date he had difficulty operating the loader. He turned it off because the ignition key had been broken off.

At the close of his shift he met Bertagnolli coming up the steps. He told Bertagnolli to be careful. He made this statement because it was a dangerous piece of equipment. But after he had repaired it the loader was all right.

STEPHEN CAREY, a heavy equipment operator, is familiar with the loader and he has operated it inside the kiln. He was a heavy equipment operator for over 11 years. When Bertagnolli was killed he was operating the loader without side screens; he had not been required to remove the screens. However, Carey did kiln work with the side screens attached. When not in use the screens are stored in a garage.

Carey considered himself a better loader operator than most. He had installed the plywood in the front.

The loader is easier to operate with a bucket than with the jackhammer attachment. (The jackhammer attachment is used to knock down bricks in the kiln).

Bertagnolli had sufficient training to operate the loader.

STEPHEN LIVINGOOD, a maintenance man, indicated the left-hand lever on the loader would catch. The machine would move forward on its own although it was set in neutral gear. Livingood did not learn to compensate for the "creep". He did not ask for additional training and he had the authority to "red tag" any equipment he considered defective.

The screens interfere with side vision to the rear. Since he couldn't see the rear tire he could not keep the loader on the ramp of the kiln.

Livingood did not see Bertagnolli's accident but he found him lying on the side of the kiln up against the wall. There were no side screens on the loader. Tom said the "God-damn Bobcat crushed him."

Bertagnolli expired during the 32-mile ambulance ride to the hospital.

ARCHIE HUENERGARDT, an electrician, has picked up and moved sacks of cement with the loader bucket. He had never used the jackhammer attachment and he had operated the equipment without the screens attached.

Huenergardt stayed by the telephone and did not directly participate in Bertagnolli's rescue.

MARV DOORNBOS had been ordered to work the area at the front of the kiln on the night of the accident.

He saw Bertagnolli getting ready to run the loader. There was a front shield but no side shields on the loader.

It appeared to the witness that Bertagnolli was having trouble knocking out the first row of bricks. They appeared to resist the effort being made to break them loose.

Bertagnolli was working about 40 feet past the entrance of the kiln.

Doornbos went into the control room to get a welding helmet. When someone said Bertagnolli had been hurt, he returned to the kiln and found Bertagnolli standing up and leaning over. He was holding his side. Bertagnolli said something about the "damn Bobcat."

STANLEY VELTKAMP, a maintenance man, worked in the same area as Bertagnolli. He observed that Bertagnolli was apparently having difficulty knocking out the bricks in the kiln with the jackhammer.

When the machine idled down, Veltkamp, looking in the direction of the loader, saw Bertagnolli leaning out the right side of the equipment. ^{4/} In addition, he was "all over" the arms and the cylinder of the loader. Bertagnolli, who was buckled in by his seat belt, then moved back into the seat, shut off the air to the jackhammer and crawled out the left side. The arms of the loader were down.

^{4/} At the hearing Veltkamp did not remember that he saw Bertagnolli leaning out the right side of the Bobcat. However, on this point I credit his past recollection, i.e., his written statement of the facts given to by MSHA on the date of the accident (Ex. P-21).

As he staggered down the kiln Veltkamp rushed to him. Bertagnolli said he had been crushed.

ROBERT STINSON, a person experienced in mining, issues safety citations and conducts health investigations for the State of Montana.

On October 20, 1987, he went to the Ideal plant when he learned that a man had been crushed by a loader.

That evening he and Dr. Bertagnolli, father of the victim and a medical doctor, discussed the accident. The doctor indicated there was a mark across his son's back two inches wide as well as two parallel marks across his front down through the liver area. Dr. Bertagnolli said his son had been crushed through the liver and aorta and had "bled out."

During his investigation, Inspector Stinson observed employees enter and exit the loader. Several employees entered over the rear and another entered over the lifting arms. He did not see any enter at the front.

The ROPS had been altered by cutting and rewelding four posts. There were two bolts missing in each arm. On the left wheel there was a hose that caused a hindrance to one of the controls. The side screens were missing.

When the jackhammer was raised the plate would block the view of the chipper point.

Mr. Stinson identified various photographs taken at the scene of the accident. He also expressed his opinion that if the side shields had been in place Bertagnolli would not have been injured. The guard shields are specifically designed to prevent workers from getting into the arms of the loader. In the inspector's opinion the accident would have been prevented by using a different type of machine or by using side screens.

In Mr. Stinson's view, Bertagnolli was killed when the arms of the loader caught him. The arms could have been going up or coming down.

The specification sheet from the manufacturer shows the 1835 Case Uniloader with the side shields in place.

ERIC SHANHOLTZ, an MSHA inspector, cited the operator on December 7, 1983, for failing to have a ROPS structure on a front-end loader. This citation was not contested and it was terminated the following day (Ex. P-26).

DARRELL WOODBECK, an MSHA inspector for 14 years, is a person experienced in mining.

On the issue of prior history Mr. Woodbeck identified citations issued to Ideal in the previous two years (Ex. P-27).

Mr. Woodbeck took part in the inspection. He also concluded that side shields would have prevented the miner from placing himself in a position where he could be injured.

As a result of his inspection at the work site Woodbeck issued Citation No. 2649413. He also determined that the operator's negligence was moderate. He believed that Bertagnolli was crushed between the lifting arms of the bucket and the top of the rollover protection.

Inspector Woodbeck considered that the removal of the side screens was a violation of MSHA regulations.

Mr. Woodbeck also considered this was an S&S violation.

Respondent's Evidence

BERT TODD, a person experienced in operating small equipment, has supervised and trained Ideal employees in the use of such equipment.

The Uniloader, equipped with a jackhammer on the bucket, knocks brick out of the kiln.

Between 1984 and 1987 Todd has seen the equipment being operated without side screens. He has seen employees using the equipment without screens while MSHA inspectors were present. But he was not aware of any citations being previously issued for the absence of such screens. The absence of screens had never been previously discussed with MSHA inspectors.

Todd trained Bertagnolli in the operation of the Uniloader. He was taught to exit the machine to the front and he observed Bertagnolli following his instructions.

The loader was purchased with side screens. They prevent rocks from falling on the operator. Also they keep the operator's arms within the loader while he is operating it.

GARY HULS, Ideal's production supervisor, accompanied an MSHA inspector in September 1987. On that occasion Tom Meyers was operating the loader cleaning up spills with the bucket. The inspector leaned into the loader but made no comments about the absence of side screens.

Ideal has a policy of red-tagging any unsafe equipment. The employees learn this policy from training and the company handbook.

WILLIAM DOUGLAS FAIRHURST, a mill supervisor, has also served as a heavy equipment operator. The safety handbook discusses all mobile equipment. It generally directs employees to enter the equipment through the front. After he enters the loader the operator sits down and buckles his seat belt. When he exits the equipment he leaves with the arms lowered. The loader involved in this accident did not have any side screens attached. It is the loader operator's decision whether or not he should use side screens.

In the afternoon before Bertagnolli's accident, the left arm of the loader had to be changed.

The safety manual also states that guards shall not be removed except when making repairs, cleaning, dressing, oiling or adjusting the equipment. In such circumstances such repairs can only be made by authorized personnel when the machines are stopped.

ARLENE SHERMAN, a person educated and experienced in safety, is the Personnel and Industrial Relations Administrator at the Trident Plant. She is responsible for all plant safety.

Until 1986 the Trident Plant worked 4000 days without a lost-time injury. This is the best safety record of all of Ideal's plants in North America. The company previously received an award when it reached 3000 consecutive days without a lost-time accident (Ex. R-7).

The company's policy, both written and in practice, is that if an employee detects a hazard he can red-tag any equipment and refuse to operate it. An employee, without any retaliation, can also refuse to operate any equipment he believes is hazardous.

Company policy also requires employees to wear seat belts when they are operating equipment.

A citation received by the company in 1983 related to ROPS on a loader (Ex. P-26). Side screens had nothing to do with that citation and they were not mentioned.

The company prepared the MSHA form and the Workman's Compensation forms for this case. However, there were no eye-witnesses to the accident. Company representatives can only speculate as to how the accident occurred. But they are testing several theories: Bertagnolli was crushed when the side arms came down or when the arms were going up. In experimenting (with the machine) another employee placed his upper body over the side arm of the loader but he wasn't able to do this while wearing his seat belt.

Employees at times entered the loader through the back. During the operation of the equipment Ms. Sherman did not observe anything that she considered to be a defect. Before the machine was put back in operation the side screens were reinstalled.

In the company's opinion MSHA's evaluation of negligence was too high in view of the investigation and the company's past record.

The company had no information indicating the loader should not be operated without side screens in place. Further, the company did not have Exhibit P-25 (J.I. Case specifications re ROPS canopy) at the time of the accident.

The gross sales of the Trident Plant exceeded \$1,000,000 last year. However, the company is presently in a severe debt situation. About three years ago the company was close to bankruptcy.

ERIC SHANHOLTZ was called as a rebuttal witness by the Secretary. He testified that he had not been told by anyone at the plant that some unnamed safety inspector had stated the company did not have to use ROPS in certain positions and operations. Inspector Shanholtz requested the ROPS be re-installed. They were also returned with the side shields.

Discussion

A fatality in a case, in and of itself, does not by its mere occurrence prove a violation of the regulation, Lone Star Industries, Inc., 3 FMSHRC 2526, 2529, 2530 (1981); Texas Industries, Incorporated, 4 FMSHRC 352 (1982).

The law is clear that a safety regulation that imposes civil penalties for its violation must give an employer fair warning of the conduct it prohibits or requires and must further provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.

Diamond Roofing v. Occupational Safety and Health Review Commission, 528 F.2d 645, 649-650 (5th Cir. 1976); Diebold, Inc. v. Marshall, 585 F.2d 1327, 1335-1336 (6th Cir. 1978); Longview Refining Co. v. Shore, 554 F.2d 1006, 1114 (Temp. Emer. Ct. App. 1977) cert. denied, 434 U.S. 836 (1977).

A review of the record here indicates Ideal could not have anticipated that MSHA would require side screens on the equipment. It is true that when the Uniloader was purchased it had side screens. It is also uncontroverted that it was left to the discretion of employees whether to use such screens. However, the Commission has specifically rejected a per se rule that an equipment defect automatically arises "when equipment is not maintained in the manner in which it is received from the manufacturer," Allied Chemical Corporation, 6 FMSHRC 1854, 1857 (footnote 3).

A majority of the cases dealing with § 56.9002 and related parallel regulations deal with factual situations where the defect affecting safety is affixed to the equipment. For example, see Allied Products Company, 2 FMSHRC 2517 (1980) (Fauver, J.) (front end loader leaking hydraulic fluid and not repaired); Grove Stone and Sand Company, 2 FMSHRC 1261 (1980) (Steffy, J.) (back-up alarm ruled not defective); Ideal Basic Industries, Cement Division, 2 FMSHRC 1352 (1980) (Koutras, J.) (hydraulic coupling inoperable); Eastern Associated Coal Corporation, 1 FMSHRC 1472 (Commission) (inoperable parking brake on a jitney); Massey Sand and Rock Company, 3 FMSHRC 2132 (1981) (Vail, J.) (emergency brake on front-end loader defective and leaking hydraulic fluid); Evansville Materials, Inc., 3 FMSHRC 704 (1981) (Fauver, J.) (leaks in braking system of front-end loader that could have been detected from audible hissing sounds lasting one or two seconds); FMC Corporation, 4 FMSHRC 1818 (1982) (Morris, J.) (idler arm, ball joint and tie rods of pick-up truck were loose; linkage, which was loose, showed excessive wear); United States Steel Corporation, 5 FMSHRC 322 (1983), (Koutras, J.) (brakes defective since they would not hold truck on level incline); Walsenburg Sand and Gravel Company, Inc., 8 FMSHRC 451 (1986) (Carlson, J.) (leaking differential fluid from brakes; on conflicting evidence it was held that brake's effectiveness was not impaired).

However, it is not an absolute requirement that the defect be on the equipment. In Allied Chemical Corporation, supra, at 1858, the Commission held a violation existed where there

were two missing bolts in chocks. However, the distinction is that in Allied Chemical the missing bolts affected the integrity of a roof support system.

In contrast, in the case at bar, there is no evidence that the lack of side screens adversely affected the operation of the Uniloader, rendered it defective, inadequate, or presented functional problems in its operation as a loader.

In short, respondent was not on notice that MSHA would require side screens on the loader. It is a fundamental principle of due process that regulations which purport to govern conduct must give an adequate warning of what they command or forbid, Diebold, 585 F.2d at 1335.

If MSHA had issued a prior notice requiring the use of side screens then it would have remedied the deficiency in the regulation's present coverage. Such prior notice could have been given by a safeguard or an interpretive bulletin. To like effect, see Peabody Coal Company, 3 FMSHRC 392 (1981) (Kennedy, J.). However, the record here does not disclose that Ideal was on notice of a requirement that side screens must be used.

The Secretary's post-trial brief points to the fact that respondent violated the identical regulation contested here in Ideal Basic Industries, Cement Division, 3 FMSHRC 843 (1981).

The Secretary's argument is misdirected. The cited Commission case involved a violation of the same regulation. However, the defect was an observable defective hydraulic coupling. In the instant case there was no defective side screens, observable or otherwise. In short, the 1981 Commission decision would not put Ideal on notice that side screens were required on its Uniloader. To reiterate, no evidence has been presented in this case that would cause me to conclude that the side screens were in any way defective. Further, the absence of such screens did not affect the integrity of the Uniloader.

The Secretary also relies on the testimony of witness Schafer to the effect that he warned Bertagnolli "to be careful with it." This warning came on October 19, 1987, the night Bertagnolli was killed. Schafer also described the Uniloader in these terms:

It's just a dangerous piece of equipment from word one. It's probably one of the most dangerous pieces of equipment we have out here. (Tr. 46).

The Secretary follows with a condemnation of the company in failing to train and guard its employees in the operation of this "dangerous" loader.

I reject the Secretary's view of the evidence. In actuality, Schafer is referring to his repair of the cylinder arm during the day shift. After the cylinder was repaired he didn't notice anything that needed to be repaired on the loader (Tr. 50). He also ran it for two or three hours until quitting time. It was operating normally and as he expected it to operate (Tr. 51). This was the same piece of equipment Bertagnolli used (Tr. 55). If there had been a defect of some sort on the Uniloader he would have mentioned it to Bertagnolli (Tr. 63). When he heard about the accident he thought it might have had something to do with the malfunction of the cylinder but he checked. The cylinder had not malfunctioned (Tr. 66). Schafer did not think it was unsafe to operate the Uniloader without side screens (Tr. 68).

The record does not develop any reasons for Schafer's apparently gratuitous statement relied on by the Secretary. In view of his clear factual statements to the contrary, I do not find his statements about "dangerous" equipment to be credible.

As an aside, the Secretary would have the judge conclude that at least Schafer thought the Uniloader was dangerous. But Schafer himself operated it without screens "every once in awhile". He also operated it without screens on the shift prior to Bertagnolli's accident (Tr. 40, 41, 88).

The Secretary also contends that the Uniloader operators had the option of using the side screens. Further, she argues the lack of guards violates the company's safety manual. The manual provides "guards shall not be removed except for making repairs" (Ex. P-29, p. 9).

The Secretary's arguments are rejected. The evidence required to sustain this citation is whether the company had reasonable notice of MSHA's requirements that side screens were to be installed on this equipment.

The Secretary also focuses on the evidence relating to the lowered ROPS, the make-shift plywood screen, the probability

that Bertagnolli leaned out and was crushed by the arms, the improvised jackhammer, and, in general, the restricted work area.

It is apparent that none of the above conditions would cause Ideal to believe that MSHA would require side screens.

Inspector Stinson and Woodbeck clearly adhered to the views that the absence of side screens caused Bertagnolli's death. But such testimony is an after-the-fact evaluation. If it was so obvious after the fatality then it could have been readily observed and their installation required by MSHA before the fatality.

In support of her position that the absence of equipment such as side shields adversely affected safety within the meaning of the regulation, the Secretary relies on Jacquays Mining Corporation, 5 FMSHRC 788 (1983) (Morris, J.); Allied Products Company, 2 FMSHRC 2517 (1980) (Fauver, J.); Allied Chemical Corporation, 6 FMSHRC 1854 (1984) (Commission); United States Steel Corporation, 6 FMSHRC 1423 (1984) (Commission); FMC Corporation, 4 FMSHRC 496 (1982) (Broderick, J.).

The cases relied on by the Secretary are not controlling. In Jacquays Mining Corporation, a Gardner-Denver mucking machine did not have a step plate normally used by miners to stand on to operate the machine. However, Jacquays has no precedential value since the issue of due process was not raised as a defense.

In Allied Products Company, an oil leak existed in a Bobcat. This condition affected the Bobcat's steering. In short, there was a defect on the equipment which affected its safety. Such defects are within the scope of § 56.9002.

Allied Chemical Corporation, has been previously discussed. I further recognize the Commission's statements in the case that "[i]n both ordinary and mining industry usage, a "defect" is a fault, a deficiency, or a condition impairing the usefulness of an object or a part", Allied Chemical, 6 FMSHRC at 1857. However, as previously noted, in Allied Chemical the missing bolts in two chocks affected the integrity of the roof support system. In the instant case the safety of the Uniloader itself was not affected by the absence of the side screens.

In United States Steel Corporation, the defect consisted of failed brakes and disconnected drive shafts. Again, the Commission reiterated its view "that use of a piece of equipment containing a defective component that could be used and which, if used, could affect safety, constitutes a violation of 30 C.F.R. § 56.9-2" (now the present regulation), 6 FMSHRC at 1834.

In FMC Corporation, a front leaf spring was disconnected from a shackle because of a missing bolt. The described condition of the spring shackle could affect the driver's ability to steer and stop the vehicle. In the case Judge Broderick concluded that a violation of § 57.9-2 occurred. The cited case again involved a situation where the defect was on the equipment and such defect, in turn, affected the safety of the equipment.

In sum, none of the cases relied on by the Secretary support her position.

Inasmuch as the respondent was not on notice that side screens were required on its Uniloader, it follows that the citation should be vacated. Accordingly, it is not necessary to consider the remaining issues in the case.

For the foregoing reasons I enter the following:

ORDER

Citation No. 2649413 and all proposed penalties therefore are vacated.


John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 21 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 89-87
Petitioner : A.C. No. 46-03805-03887
v. :
: Martinka No. 1 Mine
SOUTHERN OHIO COAL CO., :
Respondent :

DECISION

Appearances: Mark Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor (Secretary); Rebecca J. Zuleski, Esq., Furbee, Amos, Webb & Critchfield, Morgantown, West Virginia, for Southern Ohio Coal Co. (SOCCO)

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary filed a Petition for the assessment of civil penalties for three alleged violations of mandatory safety standards promulgated under the Federal Mine Safety and Health Act of 1977 (Act). Pursuant to notice, the case was called for hearing on August 22, 1989, in Morgantown, West Virginia. At the hearing, the Secretary moved for the approval of an agreed upon settlement with respect to two violations, namely those charged in orders 3117591 and 3117599. Both citations changed violations of 30 C.F.R. § 75.303. Both were designated as unwarrantable failure violations and each was assessed at \$650. The motion proposes that Respondent pay \$650 for each violation, but that the unwarrantable failure finding be withdrawn and the 104(d)(2) orders be modified to 104(a) citations. The basis for the modification is the difficulty in proving that the operator was aware of the locations of the violative conditions in the mine. I stated on the record that I would approve the settlement. In the hearing on the remaining alleged violation, Terry Palmer and Raymond Glaspell testified on behalf of the Secretary. Dan Conaway and Douglas McQuaid testified on behalf of SOCCO. The parties waived their right to file posthearing briefs and argued their positions on the record. I have considered the entire record and the contentions of the parties, on the basis of which I make the following decision.

subject order, of which 20 were violations of 30 C.F.R. § 75.316. This history is not such that penalties otherwise appropriate should be increased because of it.

ISSUES

1. Whether the evidence establishes a violation of the approved ventilation plan and therefore of 30 C.F.R. § 75.316?

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

3. If a violation is established, was it caused by SOCCO's unwarrantable failure to comply with the standard?

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

CONCLUSIONS OF LAW

SOCCO is subject to the provisions of the Act in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

The evidence clearly establishes that SOCCO was not in compliance with its approved ventilation plan on October 12, 1988, in that it did not have completed permanent stoppings called for in the plan in crosscuts No. 3 and No. 4 outby the face, at the time the contested order was issued. Therefore a violation of 30 C.F.R. § 75.316 is established.

A violation is properly designated as significant and substantial if there is a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981); Mathies Coal Co., 6 FMSHRC 1 (1984); U.S. Steel Mining Company, Inc., 7 FMSHRC 1125 (1985). The inspector was of the opinion that the violation was significant and substantial because it would result in a tendency to lose air from the intake aircourse, and because methane has been found in this section. However, the evidence shows that the air velocity was adequate and methane was negligible at the time the order was issued. The stoppings had been constructed and the absence of plaster on the stoppings would, according to SOCCO production engineer McQuaid, not cause any significant interruption in ventilation. I conclude that the Secretary has not established that there was a reasonable likelihood that the hazard contributed to by the violation would result in injury. The violation was not properly designated as significant and substantial.

FINDINGS OF FACT

SOCCO is the owner and operator of an underground coal mine in Marion County, West Virginia, known as the Martinka No. 1 Mine. Three shifts were working at the mine as of October 12, 1988, the day shift being a maintenance shift, and the other two being production shifts.

Federal mine inspector Terry Palmer conducted a ventilation technical inspection of the subject mine on October 12, 1988. He entered the mine at the beginning of the afternoon shift, and proceeded to the 1 North section after terminating previously issued violations in the 3 West section. At about 7:00 p.m. he issued order 2944386 charging a violation of 30 C.F.R. § 75.316 because the approved ventilation plan was not being complied with. The ventilation plan required that permanent stoppings be maintained to and including the third crosscut outby the face. The miner was operating in the No. 2 entry and coal was being produced. The first crosscut outby was open, the second had a check curtain and the third and fourth had stoppings constructed of block, but were not plastered as the plan required. Plastering work had begun on the No. 4 crosscut stopping at the time the order was issued, but no plastering had been done on the No. 3 crosscut stopping. The section foreman told the inspector that the two stoppings were constructed on the afternoon shift the previous day. The midnight shift (a production shift) and the day shift (a maintenance shift) intervened before the inspection began.

The ventilation on the section was measured at 10,272 cubic feet per minute on the left return, and 22,344 cubic feet on the right return. This was in excess of the minimum requirement of 9,000 cubic feet per minute. A methane reading showed .1 percent in the right return, and .2 percent in the left return.

The condition was abated by finishing the plastering of the two stoppings and the order was terminated at 7:30 p.m. on October 12, 1988.

The production records (call out sheets and map) indicate that the section had advanced to the point where a permanent stoppings were required in the No. 3 and No. 4 crosscut on or about the midnight shift on October 10, 1988 and on or about the midnight shift on October 11, 1988.

Respondent is a large operator and the subject mine is a large mine. The history of prior violations shows 958 paid violations during the 24 months prior to the issuance of the

A finding that a violation resulted from unwarrantable failure to comply with the standard is established if the evidence shows "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987).

The evidence shows that SOCCO had partially completed the required stoppings. It also shows that seven or eight shifts, including four or five production shifts had occurred after the first stopping was required. The failure to plaster the stoppings was evident, and should have been observed by foremen on each intervening shift. The plastering could have been completed by a crew of three in 15 or 20 minutes. I conclude that the violation resulted from SOCCO's aggravated conduct constituting more than ordinary negligence. The violation was properly designated as significant and substantial.

Based on the above conclusions, I further conclude that the violation was moderately serious and was caused by a high degree of negligence. Under the criteria in section 110(i) of the Act, an appropriate penalty for the violation is \$400.

ORDER

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

(1) Order 3117591 is modified to a 104(a) citation, and the designation of unwarrantable failure is removed:

(2) Order 3117599 is modified to a 104(a) citation, and designation of unwarrantable failure is removed.

(3) Order 2944386 is modified to remove the designation of significant and substantial and, as modified, is AFFIRMED including the designation of unwarrantable failure.

(4) Within 30 days of the date of this decision SOCO shall pay the following civil penalties:

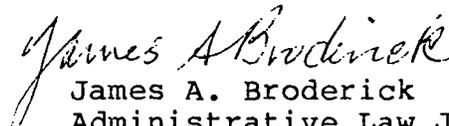
CITATION OR ORDER

PENALTY

3117591
3117599
2944386

\$650
650
400

TOTAL \$1700


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 25 1989

DONALD D. DAWSON,	:	DISCRIMINATION PROCEEDING
	:	
Complainant	:	Docket No. PENN 89-198-DM
	:	MD 89-01
v.	:	
	:	
J.T. DYER QUARRY,	:	
	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On May 16, 1989, you filed with this Commission a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act 1977. On July 18, 1989, a show cause order was issued directing you to provide information regarding your complaint or show good reason for your failure to do so. The show cause was mailed to you certified mail, return receipt requested and the file contains the receipt card indicating you received the show cause order. You have however, not responded and complied with the show cause order.

Accordingly, this case is DISMISSED.



Paul Merlin
Chief 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 25 1988

CYPRUS EMPIRE CORPORATION, : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. WEST 88-247-R
: Order No. 3225477; 3/4/88
SECRETARY OF LABOR, : Eagle No. 5 Mine
MINE SAFETY AND HEALTH : Mine ID 05-01370
ADMINISTRATION (MSHA), :
Respondent :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 89-13
Petitioner : A.C. No. 05-01370-03580
v. : Eagle No. 5 Mine
CYPRUS EMPIRE CORPORATION, :
Respondent :

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
For Petitioner/Respondent;
R. Henry Moore, Esq., Buchanan Ingersoll, P.C.,
Pittsburgh, Pennsylvania,
For Contestant/Respondent.

Before: Judge Morris

These consolidated contest and civil penalty proceedings are before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act").

Contestant/Respondent Cyprus Empire Corporation (hereafter "Empire"), challenges the issuance by the Secretary of a citation and order involving the regulatory standard at 30 C.F.R. § 70.100.

After notice to the parties a hearing on the merits was held in Denver, Colorado. The parties filed post-trial briefs.

Summary of the Cases

On March 4, 1988, MSHA issued Citation Number 9996225 under section 104(a) of the Act alleging a violation of 30 C.F.R. § 70.100.

On May 23, 1988, MSHA issued Order No. 3225447 under section 104(b) of the Act. The order caused the production of coal to cease in the longwall section of the mine.

Citation No. 9996225 reads as follows:

Based on the results of five valid dust samples collected by the operator, the average concentration of respirable dust in the working environment of the designated occupation, code 044 in mechanized mining unit 001-0 was 2.2 milligrams which exceeded the applicable limit of 2.0 milligrams. See attached computer printout dated March 1, 1988. Management will take corrective actions to lower the respirable dust and then sample each production shift until five valid samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory. Approved respiratory equipment shall be made available to all persons working in the area.

Order No. 3225447 reads as follows:

Based on the latest block of 5 samples received, the average concentration of respirable dust was 2.9 milligrams per cubic meter of air on MMU 001-0. The concentration has increased from 2.2 milligrams to 2.9 milligrams since the issuance of the citation. The operator's present approved respirable dust control plan has been unsuccessful in reducing the respirable dust concentrations. Production of coal from this section shall immediately close.

The regulation allegedly violated provides, in part, as follows:

§ 70.100 Respirable dust standards

(a) Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with § 70.206 (Approved sampling devices; equivalent concentrations).

Stipulations

At the commencement of the hearing the parties stipulated as follows:

1. The Eagle No. 5 mine is owned and operated by Empire.
2. The Administrative Law Judge has jurisdiction over these proceedings. Both Empire and the Eagle No. 5 mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The annual production of the Eagle No. 5 mine is approximately 1.7 million tons and the parties have agreed that Empire is a large operator.
4. The subject Order, Citation, modifications thereto and termination were properly served by a duly authorized representative of the Secretary of Labor upon agents of Cyprus Empire on the dates stated therein and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements inserted therein.
5. The imposition of a penalty by the Administrative Law Judge will not affect Empire's ability to continue in business. Empire does not stipulate that the imposition of any penalty is appropriate.

Summary of the Evidence

Lewis Raymond and Phillip Gibson testified for the Secretary.

LOUIS D. RAYMOND has been with MSHA for 27 years. He is the Branch Chief ^{1/} of the Pittsburgh Lab. The facility, with a capacity to process up to 500 to 600 samples per day, primarily weighs respirable coal dust. It also handles data transmission. The weighing branch of the lab has prepared an informational report in booklet form showing the entire proceedings of the dust samples (Ex. P-20).

Coal mine operators are obliged to sample for respirable dust and to submit five valid samples every two months. The samples themselves are taken by attaching a cassette in the breaking zone of a miner. The normal sampling time is 480 minutes which is based on an eight-hour day.

The sample may be invalidated by MSHA if the data card is improperly filled out. The card itself lists certain information such as the cassette number, the mine I.D., the mine name, the date of the sample, the sampling time, the tonnage of that production shift, the type of sample, the MMU number and the occupational code, the certified person and the initial weight of the cassette.

When the samples are received at the lab a certified person takes them to a separate area. The ceiling tape and plug are then removed. The inner portion (capsule) of the cassette is removed with a forceps and the material is placed in trays. ^{2/}

The capsules themselves are then desiccated by being placed in a four-foot vacuum drier for 15 minutes. This procedure removes the surface moisture. If heat was used it would have a tendency to drive off the inherent moisture in the coal. The vacuum changes the water to a vapor and withdraws it.

After 15 minutes the samples are removed and are permitted to acclimate in the air for one hour. The lab environment is controlled at 72 degrees and 50 percent humidity.

^{1/} Chief, Weighing Branch, Dust Division, Pittsburgh Health Technology Center.

^{2/} See Figure 3A and 3B of Exhibit P-20.

The cassettes are automatically weighed (See figure 5 of Exhibit P-20). A small printed-out sticker is attached. Generally the lab weighs 300 samples a day. ^{3/} Any excessive cassettes are weighed manually. Automatic weighing is more precise than manual weighing.

All data cards are stamped and sequentially numbered. Every sample received is weighed as it is received. The computer selects the first five samples received to determine the average weight. Additional samples are voided as excess (Tr. 72-73).

Exhibit P-18, a computer printout, illustrates how the samples are listed by the computer in the order of the date received by the computer. Certain codes indicate why a sample was voided or was not used.

The lab maintains a quality control over its weighing system: under the system, one cassette out of eight is weighed twice. If the two weighs do not agree the last eight must be reweighed.

The lab also checks the quality of the cassette samples for stability and they are compared to MSHA's weight. If any cassette does not agree within one milligram, then the entire day's production must be reweighed. MSHA technicians in the field also reweigh filters and send in reports. There is also a program to determine whether the information received is correctly entered into the computer.

The main variable is $.1 \text{ mg/m}^3$; the lab records to the nearest $.1 \text{ mg/m}^3$.

The method of desiccation used by the lab has been in place since 1970. The method used to weigh samples is an accepted scientific method of doing so and has been studied at this lab by the U.S. Bureau of Standards.

The data cards are removed after the results are recorded. The sample then goes to the data transmission room. In turn, the data goes to the MSHA computer room in Denver.

Mr. Raymond discussed at length the various codes used by the lab to designate the disposition of various samples.

^{3/} The correct measure of coal dust concentration is $\# \text{ mg/m}^3$. Occasionally, the shorthand of $\# \text{ mg}$ is used.

After the reports are generated they go to the operator and the MSHA field office. Citations are issued when the reports indicate concentrations above 2.0 mg/m^3 . The operator keeps its own sample sheets and records the results as they are received from MSHA.

Since coal is usually wetted during the mining process, the samples are dried or desiccated to be certain that the excess moisture is removed from the samples. (Excess moisture could establish excessive respirable coal dust). The lab process removes excess moisture but allows inherent moisture to remain. Any sample that appears to have excess moisture is marked as a contaminated sample and not tested by the lab. Also, any sample that contains oversized particles is marked as contaminated. The MSHA lab has determined that 15 minutes is the amount of time to completely dry samples in the desiccator.

Empire requested information regarding its samples and the lab responded (Exhibits P-19, Ex. 27). Empire expressed concern about excess moisture (16% to 40% moisture content).

With Empire's inquiry in mind, Mr. Raymond conducted a study to see if the lab's procedure was adequate. Empire had marked some cassettes as containing excessive moisture. The lab treated them further, using several approaches.

One approach was a heating process to heat the samples for one hour at 105 degrees F. Prior to heating the samples, the lab heated these blank samples to study the effect. They then heated the 11 samples. The blank samples lost .06 milligrams (as indicated on page 2 of Mr. Raymond's memo, Exhibit P-19.) The memo lists the weights of the blanks and the samples after vacuum desiccation and again after heating for one hour. The differences in the samples was negligible.

The eleven samples from Empire, marked "excess moisture", were heated for one hour and returned to the room. The weight difference was $.07 \text{ mg/m}^3$ and the standard deviation was $.08 \text{ mg/m}^3$. Mr. Raymond concluded the weight difference was not significant as it was only plus or minus $.1 \text{ mg/m}^3$. (See Exhibit P-19).

By these tests Mr. Raymond concluded the moisture was being adequately removed by the MSHA vacuum system. This is particularly true since any weight differences are entered as "truncated". For example, if the cassette weighs 2.19 mg it is entered as 2.1. The truncation of weights is to avoid any

plus or minus errors. The lab does not normally perform this additional heat treatment but the method had been used by Empire at its lab.

In Mr. Raymond's opinion vacuum desiccation is an accurate way of removing moisture.

An additional experiment confirmed Mr. Raymond's opinion: he retrieved a dust sample cassette and placed a 20 mg drop of water on it. This is 10 to 20 times the normal weight differential. The cassette was then treated normally in the vacuum and re-evaluated. It was found the cassette had returned to its initial weight.

An additional experiment he conducted involved the use of 24 samples and a lot of water. The samples were initially weighed without vacuuming and then heated for in excess of 16 hours at 50 degrees F. It was found that only two of the 24 filters had an additional .1 mg weight. In short, the results were within the plus-minus .1 mg accuracy factor.

Mr. Raymond expressed the opinion that the lab uses scientific methods. Further, the vacuum process is accurate to a degree of scientific certainty.

PHILLIP R. GIBSON, JR. is an MSHA inspector experienced in mining. Mr. Gibson issued the failure to abate order at the Eagle No. 5 mine on May 23, 1988 (Exhibit P-9).

MSHA Inspector Grant McDonald had written the original citation on March 4, 1988. Inspector McDonald is in charge of the respirable dust program for Eagle No. 5 underground coal mine.

The abatement date on the original citation was extended several times.

Inspector Gibson wrote the contested order on May 23, 1988. The order was written without an on-site inspection. The computer printout indicated high concentrations of respirable dust were being generated. The average concentration was going up instead of down. In view of the upward movement of the concentrations Inspector Gibson declined to grant any further extension of the abatement date.

After he wrote the 104(b) order Inspector Gibson went underground and placed the closure order on the shear. The shear was tagged to indicate it was the main source generating the dust.

Overexposure to coal dust, a serious hazard, can cause black lung disease, also called pneumoconiosis.

On May 24th Inspector Gibson was advised by his superior that the company was in compliance. He then checked and saw that the perimeters of the revised dust plan were in place (as per Ex. P-10). He then allowed mining to be resumed. The termination was based in part on Exhibit P-13, the computer printout showing that the concentrations for the MMU in the longwall were at or below the 2.0 mg/m³ concentration required by the regulation.

In cross-examination Inspector Gibson indicates he is essentially a safety inspector. Further, excessive dust is controlled by trial and error methods. Because the coal dust was increasing the inspector refused to grant a further extension. The concentration rose from 2.2 to 2.9 mg/m³.

The inspector didn't look for inconsistencies in the sampling and he didn't have earlier printouts to be used as a comparison.

Empire's Evidence

Robert Stalter, Samuel Cario and James Dodd testified for Empire.

ROBERT STALTER, a person experienced in mining, serves as Empire's superintendent of safety and loss control.

Mr. Stalter described how the respirable coal dust pumps are calibrated and how the dust samples are taken. Basically, the pumps are attached to the miners and left running until the miner leaves his job site.

When the sampling is completed the MSHA cards are filled out and the cassettes are forwarded to MSHA within 24 hours.

Mr. Stalter is familiar with various sampling procedures and the protection provided for the longwall operators. All shear operators prefer and wear AIRSTREAM helmets. Such MSHA approved helmets filter the air before it enters the face piece. The use of such a helmet alleviates the hazard from respirable dust. Affidavits at the hearing indicated the operators were all wearing helmets when they were sampled (Exhibit E-8 through E-14).

The shear operators prefer the AIRSTREAM because it is a full-face piece. The witness has seen only one shear operator

without an AIRSTREAM helmet. MSHA's approval of the helmet has its limitations: some shear operators chew tobacco and they must lift the face shield to spit.

Empire now samples its miners for respirable coal dust. The in-house sampling is then verified by a nearby lab known as CT&E, which has duplicated the MSHA lab. CT&E gives Empire the initial weight and the company determines the concentrations.

Mr. Stalter agrees excessive coal dust is a hazard; however, he believes 2.0 mg. is not excessive.

Mr. Stalter's work duties include taking and testing samples.

MSHA samples were taken at the tailgate because the highest concentration was at that location. The longwall is 750 feet long.

SAMUEL L. CARIO, a person experienced in mining, is Empire's longwall coordinator. Mr. Cario received the citation from Inspector McDonald. The inspector suggested the company take a second set of samples.

In order to reduce the dust Mr. Cario studied changes at the shear. The final decision involved the use of belting. Empire obtained several extensions from MSHA.

On the 20th Empire began to develop a plan (Ex. 21). The plan, submitted to MSHA on the 23rd, provided for the installation of a curtain on the third shield and an additional spray on the shear. The changes were not tested before the failure to abate order. After the 104(d) order company representatives met with MSHA personnel in Denver. MSHA declined to approve the plan until additional changes were made. MSHA finally approved the plan (Ex. E-23).

Mr. Cario could not evaluate the effect of the required changes. But MSHA officials issued their approval. Before the company could resume production, MSHA's approval ^{4/} and the dust plan had to be physically returned to the mine site (Ex. E-23).

Empire's program requires the shear operators to wear AIRSTREAM helmets. Spare helmets are kept on the section. Production is shutdown if helmets are not available.

^{4/} As required by 30 C.F.R. § 75.316.

JAMES B. DODD, Empire's Superintendent of Mining, develops methane ventilation and dust control plans. The witness submitted an amendment to the dust control and ventilation plan to MSHA (Ex. E-23). Originally the witness believed they would have time to develop a plan before a failure to abate order would issue.

MSHA thought the company's initial proposal was inadequate. Empire agreed to MSHA's counter-proposal to increase the sprays and the psi pressure.

After MSHA's approval the plan was carried back to the mine at Craig, Colorado.

The implementation of the changes was not successful. MSHA was advised and on the 25th a new plan was submitted. MSHA approved the revised plan (Ex. E-25).

There were so many changes it was difficult to see the contribution of each change.

Correspondence from Empire to MSHA's representative, John M. DeMichie^{5/} addresses the issues of moisture in the cassettes and the requirement of numerous controls without being able to test the results (Ex. E-27).

The dust control in the longwall is not an exact science and dust problems are solved by trial and error.

Further Findings and Evaluation of the Evidence

Certain threshold issues here involve whether MSHA properly selected Empire's respirable dust standards for sampling; further, whether MSHA adequately dried the respirable dust samples and, finally, whether the citation and order were properly issued under section 104(a) and 104(b) of the Act.

The uncontroverted evidence shows that in February 1988 Empire submitted seven respirable dust samples of the longwall shearer operator on the tailgate side to MSHA in compliance with 30 CFR § 70.100.

^{5/} MSHA District Manager, Denver, Colorado.

Section 70.207 requires each operator to submit five respirable dust samples to MSHA. However, it is the usual industry practice to submit seven samples to avoid not having submitted enough if any samples are voided (Ex. E-5).

The results of the samples as submitted were determined by MSHA to be as follows:

<u>Cassette</u>	<u>Date</u>	<u>MRE (Equivalent Concentration)</u>
46024406	2-12-88	3.0 mg/m ³
46024205	2-16-88	2.1 mg/m ³
46024403	2-17-88	2.2 mg/m ³
46024231	2-18-88	0.4 mg/m ³
46024209	2-18-88	2.5 mg/m ³
46024254	2-22-88	1.0 mg/m ³
46024225	2-23-88	3.3 mg/m ³ (P-2).

On March 1, 1988, MSHA sent Empire an "Advisory of Excessive Dust." The advisory stated that cassette number 46024209 had been voided for insufficient production (Ex. P-2). The advisory did not list the sample for February 22, 1988, which showed a concentration of 1.0 mg/m³ (Ex. E-2, P-18).

If the February 22 sample, rather than the later February 23 sample, had been included in MSHA's calculations the average concentration would have been 1.7 mg/m³. On this basis the concentration would be within the limits of the regulation (Tr. 94-5, Ex. E-2, P-18).

On March 4, 1988, MSHA Inspector Grant McDonald issued Citation No. 9996225 pursuant to section 104(a) of the Act for a violation of the respirable dust standard (Ex. P-1).

The citation directed Empire to sample each production shift until five valid samples were taken and submitted to MSHA.

After the citation was issued Empire raised with MSHA the absence of the February 22 sample. (Empire did not know of the exact concentration of the February 22 sample until the hearing (Tr. 160, Ex. E-5, P-18)).

The Secretary's standard concerning collection of the samples is contained in 30 C.F.R. § 70.207. It provides, in part, as follows:

Designated occupation samples shall be collected on consecutive normal production shifts each of which is worked on consecutive days.

The thrust of Empire's argument is that if MSHA had based its calculations on consecutive production shifts then the February 22, 1988, sampling would take precedence over the later sampling. Given such a sequence, Empire would have been in compliance with the regulation.

I reject Empire's position. MSHA's lab expert Raymond indicated the samples, if otherwise valid, are stamped and weighed in the sequence they are received. Cassettes in excess of the required five are automatically rejected from the computer's calculations. The operator benefits from being able to submit seven samples, two in excess of the required five. Accordingly, Empire's actions created the situation and Empire cannot complain of MSHA's unbiased approach, a first-come first-weighed basis.

I appreciate the situation: the February 22 sample was not used for the initial set of results because it reached the computer after the February 23 sample. At the same time it cannot be used for abatement because it was received before the citation was issued. However, as noted, the paradox was caused by Empire's submission of excessive samples. It was not caused by MSHA's approach to weighing the samples.

Empire further contends that MSHA failed to properly dry the samples.

Empire's evidence that MSHA's procedures were inadequate arises mainly from the fact that the Occupational Safety and Health Administration (OSHA) requires respirable dust standards to be dried for 24 hours (Ex. E-30). In contrast, MSHA only dries the samples at its weighing branch for 15 minutes.

On this credibility issue I credit the testimony of MSHA's expert Raymond.

Mr. Raymond indicated the surface moisture is removed when the cassettes are placed in a four-foot vacuum drier for 15 minutes. Several quality controls of MSHA's procedures exist in its lab.

When Empire complained that excessive moisture was not being properly dried from its cassettes, Mr. Raymond conducted several experiments. The summary of the evidence sets forth in detail Mr. Raymond's testimony. Expert testimony is commonly given greater weight than lay testimony, U.S. Steel Corporation v. OSHRC, 537 F.2d 780, 783 (3rd Cir. 1976). In this case I find the expert testimony of Mr. Raymond to be credible and persuasive.

Empire's evidence of OSHA's filter weighing procedures arise from Empire's Exhibit E-30, the OSHA Industrial Hygiene Technical Manual. On page II OSHA requires, in part, that it is necessary to "desiccate all filters at least 24 hours before pre-sample and post-sample weighing."

I do not find OSHA's procedures to be controlling or persuasive. There is no reason to remove inherent moisture in respirable coal dust because when the standard was set it took in account such moisture. OSHA also tests a broader number of substances than respirable coal dust. Hence, by desiccating for an hour it may be attempting to break down the substances for further chemical testing. In addition, there is no evidence here showing the similarities, or differences, between the filters themselves.

Further, as indicated, I credit the testimony of Mr. Raymond when he concluded that the method used at the MSHA lab in Pittsburgh is a valid scientific approach.

At the hearing, Empire's evidence established the company took samples to its own lab known as CT&E. At this lab the company obtained different results as compared to the MSHA lab.

I reject Empire's evidence because the Empire samples were taken of the headgate operator on the longwall while MSHA's samples were taken of the tailgate operator.

An additional threshold issue is whether the citation and order herein were properly issued under section 104(a) and 104(b) of the Act.

Section 104(a), under which the citation herein was issued, provides 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.

Section 104(b), under which the order herein was issued, provides as follows:

(b) If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, 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.

Section 104(f), which Empire claims to be the relevant enforcement section of the Act, provides:

(f) If, based upon samples taken, analyzed, and recorded pursuant to section 202(a), or samples taken during an inspection by an authorized representative of the Secretary, the applicable limit on the concentration of respirable dust required to be maintained under this Act is exceeded and thereby violated, the Secretary or his authorized representative shall issue a citation fixing a reasonable time for the abatement of the violation. During such time, the operator of the mine shall cause samples described in section 202(a) to be taken of the affected area during each production shift. If, upon the expiration of the period of time as originally fixed or subsequently extended, the

Secretary or his authorized representative finds that the period of time should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until the Secretary or his authorized representative has reason to believe, based on actions taken by the operator, that such limit will be complied with upon the resumption of production in such mine. As soon as possible after an order is issued, the Secretary, upon request of the operator, shall dispatch to the mine involved a person, or team of persons, to the extent such persons are available, who are knowledgeable in the methods and means of controlling and reducing respirable dust. Such person or team of persons shall remain at the mine involved for such time as they shall deem appropriate to assist the operator in reducing respirable dust concentrations. While at the mine, such persons may require the operator to take such actions as they deem appropriate to insure the health of any person in the coal or other mine.

The Commission has generally considered the overall enforcement scheme of the Act. Nacco Mining Company, 9 FMSHRC 1541 (1987) Cement Division, National Gypsum Company, 3 FMSHRC 822, 828 (1981). In reviewing the structure of the Act the Commission noted that it provides "for increasingly severe sanctions for increasingly serious violations or operator behavior." Sections 104(a) and 110(a) provide that the violation of any mandatory standard requires the issuance of a citation and assessment of a monetary civil penalty. Under section 104(b) and 110(b), if the operator does not correct the violation within the prescribed period, the more severe sanctions of a withdrawal order is required, and a greater civil penalty is assessed. Under section 104(d), if an inspector finds a violation and also finds that the violation is of a significant and substantial nature and

has resulted from the operator's unwarrantable failure to comply with the standard, a citation noting those findings is issued. Section 104(d) citations carry enforcement consequences potentially more severe than "section 104(b)" sanctions. If further unwarrantable failure violations occur within 90 days of the citations issued under 104(d), unwarrantable failure withdrawal orders are triggered. Issuance of the withdrawal orders does not cease until an inspection of the mine discloses that no unwarrantable failure violations exist.

Only section 104(a) of the Act authorizes the issuance of a citation. Such a citation may include any violation of a regulation or of the Act itself. In view of the established case law, it is apparent that MSHA properly issued its citation under section 104(a). For the reasons previously stated, it further properly issued its withdrawal order under section 104(b).

In her citation in the instant case the Secretary could have alleged a violation of section 104(f) of the Act but instead she alleged a violation of her regulation, 30 C.F.R. § 70.100. Empire claims that MSHA's enforcement of the respirable dust standard deprived the company of certain remedies provided under Section 104(f). Specifically involved is a matter of assistance by MSHA to the operator. On this point Empire relies on that portion of section 104(f) which provides that:

As soon as possible after an order [of withdrawal] is issued, the Secretary, upon request of the operator, shall dispatch to the mine involved a person, or team of persons, to the extent such persons are available, who are knowledgeable in the methods and means of controlling and reducing respirable dust. Such person or team of persons shall remain at the mine involved for such time as they shall deem appropriate to assist the operator in reducing respirable dust concentrations. (Emphasis added)

I agree with Empire that the requirements of the Secretary's regulation must be read in conjunction with section 104(f) of the Act. It is a clearly established principle of statutory construction that specific language in one provision controls over general language in another provision. General Electric Company v. Occupational Safety and Health Review Commission, 583 F.2d 61, 65 (2nd Cir. 1978); American Telephone & Telegraph Co. v. FCC, 487 F.2d 865, 877, n. 26 (2d Cir. 1973); Sutherland Stat. Const. § 47, 17-20, (4th Ed).

The issue then evolves whether Empire triggered the obligation of MSHA to furnish assistance to deal with the respirable dust concentrations. I conclude the record does not support Empire's claim. The conversation about assistance from MSHA is totally lacking in any reference to the statutory requirements of section 104(f) (Tr. 120-121, 220-223). But in any event the request was made on May 20, 1988 and the 104(b) failure to abate order was issued on May 23, 1988 (Ex. P-9).

The obligation to furnish assistance under 104(f) can arise only after an order of withdrawal had been issued to Empire.

Since Empire raises the lack of assistance from MSHA to defeat the citation it is obliged to prove that it fits the statutory requirements. It has not done so.

Empire further contends that if a violation exists it should not be designated significant and substantial.

Empire's view that the violation was not S&S is based on the Commission's decision in Consolidation Coal Company, 8 FMSHRC 890 (1986), aff'd 824 F.2d 1071 (D.C. Cir. 1987). In support of its position Empire relies on the following portions of the Commission decision:

We also find repeated observations in the legislative history that a respirable dust standard at or below 2.2 mg/m³ would produce no danger of miner's developing disability disease. 8 FMSHRC at 897.

The Commission also commented as follows:

With regard to its ultimate decision to adopt a 2.0 mg/m³ respirable dust standard, Congress recognized that in a dust environment below approximately 2.2 mg/m³, there would be virtually no probability of a miner's contracting complicated coal worker's pneumoconiosis, even after 35 years of exposure at that level. H. Rep. No. 563, supra, at 18, reprinted in 1969 Legis. Hist. 1197-98. The legislative also reflects awareness that a standard at or below 2.2. mg/m³ would produce no danger of miners developing disability disease. Id; 1969 Legis. Hist. 1277. 8 FMSHRC at 896.

The Commission has also noted that 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." 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., supra

In Mathies Coal Company, 6 FMSHRC 1, 3-4 (January 1984), the Commission further 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 view of case law as enumerated by the Commission it is apparent that Citation 9996225 was erroneously designated as an S&S violation. This designation should be stricken: the evidence indicates the respirable dust concentration was 2.2 mg/m³. Such a concentration fails to establish elements (3) and (4) of the Mathis Coal formula.

Empire also argues that it provided personal protective equipment to its miners and, further, it contends section 104(f) does not designate a respirable dust violation as S&S. Since the allegations concerning S&S are to be stricken, it is unnecessary to consider these additional issues.

Empire also argues the 104(b) order was improperly issued because Inspector Gibson made no investigation; further, an extended abatement time would not endanger the health and safety of the miners and, in addition, the inspector failed to consider the difficulty of abating the condition.

These arguments are rejected. Inspector Gibson relied on the report from MSHA's lab in Pittsburgh. This constituted

a sufficient investigation particularly where the respirable coal dust concentrations are rising rather than falling. In support of its position, Empire cites McCoy Elkhorn Coal Corporation, 2 FMSHRC 3196, 3207 (1980) (Steffy, J.); U.S. Steel Corp., 2 FMSHRC 1515, 1520 (1980) (Stewart, J.); David Cabrera, Inc., 2 FMSHRC 338, 341 (1980); (Merlin, J.); Old Ben Coal Co., 6 IBMA 292 (1976); and Consolidation Coal Company, 2 FMSHRC 2665, 2667 (1980) (Merlin, J.); Reliable Coal Corp., 1 IBMA 97, 113 (1972); Freeman Coal Mining Corp., 1 IBMA 1, 27, (1970); Consolidation Coal Company, 2 FMSHRC 2665, 2667-8 (Merlin, J.); Consolidation Coal Company, 1 FMSHRC 1638, 1640-1 (Broderick, J.); Consolidation Coal Company, 4 FMSHRC 747, 752 (1982) (Koutras, J.); Youghiogheny and Ohio Coal Company, 8 FMSHRC 330, 339 (Maurer, J.).

The above cases do not cause me to conclude that Inspector Gibson abused his discretion. There had already been a number of extensions to the original abatement date as noted, infra. Further, the dust concentrations were obviously rising.

Empire states it was diligent in attempting achievement. I conclude otherwise.

The initial citation was issued on March 4, 1988, based on samples taken in February 1988. An abatement date of March 28 was set. New samples taken March 28 indicated Empire remained out of compliance. The abatement date was further extended to April 22, 1988. A few days before April 22 the inspector had difficulty sampling and an extension of the abatement date was allowed until May 14. By May 14 additional sampling showed a significant increase, to an average concentration of 2.9 mg/m³. Finally, the 104(b) order was issued some 80 days after the initial citation. At about this point in time Empire acted and presented its amended dust plan to MSHA. The changes made by the company were not expensive and they took approximately four hours to be put into place (Tr. 215). On the foregoing evidence, I am unable to conclude that Empire acted diligently. In sum, this violative condition should have been remedied before 80 days had expired.

Civil Penalty

The statutory criteria to access a civil penalty is contained in section 110(i) of the Act.

The criterion of gravity and negligence have already been discussed in the context of the S&S findings and in the failure to abate findings.

The parties have stipulated that Empire is a large operator and that imposition of a penalty will not affect its ability to continue in business. The operator's history is favorable to Empire: it paid 126 violations in the previous two years. Four violations of this specific regulation were paid in that period. On balance, I deem that a civil penalty of \$100 is appropriate.

For the foregoing reasons I enter the following:

ORDER

1. The contest filed by Cyprus Empire Corporation in WEST 88-247-R is dismissed.
2. The designation of Citation No. 9996225 as a significant and substantial violation is stricken.
3. Citation No. 9996225, as amended, is affirmed and a civil penalty of \$100 is assessed.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 89-57
Petitioner : A. C. No. 46-02845-03621
v. :
 : Portal No. 1
LAUREL RUN MINING COMPANY, :
Respondent :

DECISION

Appearances: Nanci A. Hoover, Esq., Office of the Solicitor,
U.S. Department of Labor, for the Secretary;

Marshall S. Peace, Esq., for Respondent.

Before: Judge Fauver

The Secretary of Labor brought this case for a civil penalty for an alleged violation of a safety standard, under § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Having considered 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 and additional findings in the Discussion below:

FINDINGS OF FACT

1. The parties have stipulated that Respondent's Portal No. 1 Mine is subject to the Act.

2. Prior to June 20, 1988, a two-mile overland belt conveyor at the mine was owned and operated by Debco Power Company and was treated by the United States Department of Labor as being subject to the jurisdiction of its Occupational Safety and Health Administration, rather than its Mine Safety and Health Administration.

3. On June 20, 1988, the ownership and operation of the overland belt were taken over by Respondent without a stoppage of the belt operation. Under the Department of Labor's guidelines, the belt became subject to the jurisdiction of MSHA instead of OSHA on that date. Because of this change, Respondent requested

MSHA to conduct a "compliance assistance inspection" (or "courtesy inspection") of the overland belt. Such an inspection, also known as a "compliance assistance visit" (CAV), is intended to assist an operator who is starting up new equipment or a new process, by pointing out conditions that require correction to comply with mine safety or health standards. On such visits, MSHA does not issue penalty citations, but points out conditions that would be cited as violations in an ordinary inspection.

4. Before it began operation of the overland belt on June 20, 1988, Respondent did not conduct an electrical inspection of the belt.

5. An MSHA team conducted a CAV at the mine on June 23, 1988, to inspect the overland belt. They found and pointed out numerous conditions that would have been cited as violations in a regular inspection, including the observation that, under 30 C.F.R. § 77.502, Respondent had been required to conduct a complete electrical inspection of the overland belt before it began operation of the belt on June 20, 1988, and that, since it had failed to do so, Respondent was required to conduct such an electrical examination immediately, and to make and keep a record of it. MSHA personnel also advised Respondent that the other specific conditions found by MSHA should be abated in a timely manner, and that in any future inspection any violative conditions would be cited as violations.

6. On June 29, 1988, MSHA Inspector Michael Kalich, who had been part of the MSHA CAV on June 23, 1988, inspected the overland belt and found that a complete electrical examination of the belt had still not been conducted and recorded by Respondent. Based upon that finding, he issued § 102(d)(2) Order 3107213 charging a violation of 30 C.F.R. § 77.502, alleging that the violation was "significant and substantial" and was due to an "unwarrantable" failure to comply with the standard.

7. MSHA Inspectors Michael Kalich and Wayne Fetty, both electrical inspectors from MSHA's Morgantown District Office, Charles Wotring, a mine inspector from MSHA's Oakland Field Office, and Barry Ryan, a supervisor from the Oakland Field Office, conducted the CAV on June 23, 1988. They found and pointed out fifteen different electrical deficiencies on the overland belt, in addition to a number of other unsafe conditions on the belt, which would have been cited as violations if this had been a regular inspection.

8. At the conclusion of the CAV on June 23, 1988, a close-out conference was held. The problems noted were gone over and discussed with mine management and union representatives. It was emphasized by the MSHA electrical inspectors that a complete electrical examination of the overland belt was required by 30 C.F.R. § 77.502. They pointed out that part of the reason

that this failure was deemed important to MSHA was the existence of the many electrical and other unsafe conditions on the overland belt. Respondent was also told that the complete electrical examination, which should have been performed upon takeover of the belt, had to be done immediately, and that all the other items noted must be corrected in a timely fashion. No particular date was given for the return inspection, but it was made clear by the MSHA personnel that enforcement citations and orders would be issued if violative conditions were found during the next inspection.

9. On June 29, 1988, Inspector Kalich returned for a normal spot inspection. He found that a complete electrical examination had still not been made of the overland belt. Only four of the items previously noted on June 23, 1988, had been corrected. Inspector Kalich issued six citations and one order for the conditions he found to be violations of safety standards. The order charged a violation of 30 C.F.R. § 77.502.

DISCUSSION WITH FURTHER FINDINGS

Section 77.502 provides that:

Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept.

Subsections of this standard provide further clarification of what is required: § 77.502-1 defines who is a qualified person, and § 77.502-2 states that the required examinations and tests "shall be conducted at least monthly."

Respondent contends that it was in its initial "month" of responsibility for the overland belt and therefore had until the end of the month, i.e., June 30, to complete the examination. The Secretary contends that the regulation requires a complete electrical examination before starting up a new (or newly acquired) conveyor belt system.

I find that Respondent's interpretation is not a logical position. Upon the takeover or start up of newly acquired equipment, the operator must be in compliance with the laws and regulations. There is no grace period applicable in this type of situation. The purpose of the Mine Act and its implementing regulations is to ensure the safe working conditions of those who work in the mining industry. To allow an operator a month in which to come in compliance with safety standards while the equipment is being operated would thwart the strong public policy behind the Act. The Secretary's requirement that an operator

conduct a complete electrical examination upon takeover of a conveyor belt is a logical and reasonable interpretation of § 77.502.

Respondent argues that there is no requirement for a complete electrical examination. This reading of the regulation is not a reasonable interpretation. If the regulation did not require a complete examination, the purpose behind the examination would be thwarted. Section 77.502 states that an electrical examination shall be conducted to "assure safe operating conditions." If the examination is not complete, there can be no reasonable assurance that the equipment is safe.

The Secretary presented uncontradicted expert opinion testimony that this violation was "significant and substantial." This violation presented many risks to the miners' safety. Without an adequate electrical examination and the required tests, operation of the belt could result in an overload, a short circuit, overheating, or a fire causing serious injuries or even fatalities.

In addition, the Secretary presented uncontradicted expert opinion testimony that the violation was an "unwarrantable" failure to comply with the safety standard. In order to make a finding of an unwarrantable violation, aggravated conduct constituting more than ordinary negligence must be shown. Emery Mining Corporation v. Secretary, 9 FMSHRC 1997 (1987). The operator was clearly more than just negligent in this case. On June 23, 1988, MSHA personnel observed the absence of the required electrical examination, explained what had to be done, and stated that it should be done immediately. However, six days later, on June 29, 1988, Inspector Kalich found that a complete electrical examination had still not been made and the belt system was operating with numerous safety violations. In view of the clear prior notice by MSHA, the operator's subsequent operation of the belt without a complete examination constituted an unwarrantable failure to comply with § 77.502.

Considering each of the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of \$500 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.
2. Respondent violated 30 C.F.R. § 77.502 as alleged in Order 3107213.

ORDER

Respondent shall pay the above civil penalty of \$500 within 30 days of this Decision.

William Fauver

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

SEP 28 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 88-206
Petitioner	:	A. C. No. 15-12672-03510
v.	:	
	:	River Dredge
LOUISA SAND AND GRAVEL,	:	
COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,
U.S. Department of Labor, for the Secretary;

Mr. Gene A. Wilson, Louisa, KY, for Respondent.

Before: Judge Fauver

This proceeding was brought by the Secretary of Labor for civil penalties for alleged violations of safety standards, under § 110 (a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

The case involves two citations. At the hearing the parties moved for approval of a settlement of Citation 2773586, for a civil penalty of \$20. The settlement was approved, and the amount is included in the Order below.

Having considered 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 and additional findings in the Discussion below:

FINDINGS OF FACT

1. Respondent and its predecessors-in-interest have operated a river dredging operation year-round on the Big Sandy River, near Louisa, Kentucky, for more than eight years. Legal Identity Forms filed with the Mine Safety and Health Administration show that the operation was called Gene A. Wilson Enterprises on December 22, 1980, the name was changed to Rivco Dredging Corporation on November 28, 1983, and changed again on

February 1, 1988, to Louisa Sand and Gravel Company, Inc. 1/ Despite the name changes, the Federal ID number has been the same since its inception, and there is a clear continuity of successors-in-interest at this dredging site.

2. The Big Sandy River is the boundary between Kentucky and West Virginia. Respondent dredges sand, coal and debris from the river bottom to its processing plant on the Kentucky shore. Interstate sales and distribution of coal are regular.

3. At all relevant times, near the center of Louisa's operations, between the preparation plant and the garage, there was a 3,000-gallon fuel tank used to fuel Respondent's vehicles. An electrical box on a utility pole was next to the tank. A #10 wire ran from the pole to a fuel pump near the tank.

4. During an electrical spot inspection on June 21, 1988, Federal Mine Inspector Thomas E. Goodman, an electrical inspector, observed that proper overload or short-circuit protection was not provided for the #10 wire, which transmitted 110/220 volt single-phase power to the plugs on the utility pole and beyond to the fuel pump. The #10 wire was connected to a 220-amp circuit breaker. The inspector believed that, in the event of a fault in the electrical current, the wire probably would have burned with a high danger of a fuel explosion at the tank. He issued Citation 2769952, under § 104(a) of the Act, charging a violation of 30 C.F.R. § 77.506, which provides:

Automatic circuit-breaking devices or fuses of the correct type and capacity shall be installed so as to protect all electric equipment and circuits against short circuit and overloads.

DISCUSSION WITH FURTHER FINDINGS

Respondent has challenged the jurisdiction of MSHA's Division of Coal Mine Safety and Health, and the characterization of its dredging operation as a "mine." It contends that, although it is subject to the Act, its operations should come under the Metal/Nonmetal Mining regulations (30 C.F.R. Part 56) instead of the Coal Mining regulations (Part 77), and it should be investigated by MSHA's Division of Metal and Nonmetal Mine Safety and Health, and not the Coal Mine Division.

1/ To conform to the evidence as to the correct corporate name, the name of Respondent in this Decision and in the caption is changed to read "Louisa Sand and Gravel Company, Inc."

The Act has a broad definition of a "coal or other mine" as follows (30 U.S.C. § 802):

(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 areas, 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 making a determination of what constitutes minimal milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

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

Respondent acknowledges that most of what it sells is coal and that at all times relevant it did not sell the sand dredged from the river. Six to eight per cent of what is dredged from the river is coal and "the remainder is sand and other debris and stuff" (Tr. 137-138).

In Marshall v. Stoudt's Ferry Preparation Co., 602 F. 2d 589 (3rd Cir. 1979), the court held that the process of separating from dredged refuse a burnable product "akin" to coal, sold as a low-grade fuel, came within the Act's definition of "mining." A fortiori, Respondent's work of dredging material from a river and separating coal for sale is "mining" within the meaning of the Act. As the court stated, the legislative history of the Act shows that "what is to be considered a mine and to be regulated under the Act is to be given the broadest possible interpretation and . . . doubts [are] to be resolved in favor of inclusion of a facility within the coverage of the Act." 602 F. 2d at 592.

Respondent does not dispute that its dredging business is engaged in commerce and is therefore subject to the Act. If contends, however, that it is mining sand, and the coal dredged is only an incidental product. It relies upon the decision in Kanawha Dredging and Minerals Co., Ltd. v. U.S., 47 CCH Federal Excise Tax Reports 7045 (U.S.D.C. S.D. WV 1987), holding that a coal dredging operation was not subject to the Black Lung Excise Tax Law and regulations. The law involved in that case imposed an excise tax on "coal sold by the producer from mines in the United States at the rate of [\$1.00] per ton in the case of coal from underground mines" and "[50] cents per ton in the case of coal from surface mines." The court found that the coal dredged had spilled into the river in the transportation of coal produced by other companies, that the required tax on the coal had already been paid by the original coal producers, and that the dredging company therefore was not a "'producer' of coal from a mine within the meaning of the Black Lung Excise Tax Law and regulations" That case is not relevant to the question of jurisdiction in this proceeding.

The same issue involved here was raised by Respondent in an opinion request to MSHA before the instant citation was issued. In a letter to Respondent dated February 11, 1987 (a copy of which is attached to the Secretary's posthearing brief), MSHA stated that Respondent's selling of clean coal processed from material removed from the river is sufficient to bring its operation under the jurisdiction of MSHA's Coal Mine Division rather than its Division of Metal and Nonmetal Mine Safety and Health.

On September 8, 1988, in a civil penalty case against Respondent's predecessor-in-interest (Rivco Dredging Corporation), Commission Judge Maurer held that its dredging and preparation operations were covered by the Act. Judge Maurer declined to rule on the company's contention that the operations should be investigated by MSHA's Division of Metal and Nonmetal Safety and Health instead of its Division of Coal Mine Safety and Health.

I hold that (1) Respondent's dredging and preparation operations are covered by the Act and (2) such operations are

subject to 30 C.F.R. Part 77. It follows from this that MSHA's Division of Coal Mine Safety and Health is an appropriate agency to conduct safety and health inspections of Respondent's operations.

Gene A. Wilson testified that he had notice of a problem with the wiring to the fuel tank in 1986, when MSHA's Field Office Supervisor Wayne Wefenstette inspected the area and told him, "I want this cord off the ground. I want you to put it in [a] conduit Somebody could get electrically shocked here." Tr.38. The wire was put into a conduit.

Mr. Wefenstette testified that he conducted a courtesy inspection 2/ of Respondent's operations in the summer of 1986; that he is not qualified to do an MSHA electrical inspection (Tr. 7); that he checked only the "outside areas" of electrical installations, not the circuit breakers (Tr. 7), and that he does not recall observing the electrical pump wire during his courtesy inspection (Tr. 54), or talking to Mr. Wilson about wiring to a fuel tank (Tr. 35). Mr. Wefenstette also stated that, had he seen the extension cord lying in the dirt with a plug nearby, he would have advised the operator that the cord should have been off the ground and in a conduit.

Respondent contends that putting the electric cord into a conduit and getting it off the ground was done to comply with an MSHA directive and that MSHA should not be penalized for the the absence of a proper circuit breaker discovered in a later inspection.

Protection of the cord by a conduit is unrelated to the safety requirements for an appropriately-sized circuit breaker. The two situations are covered by different sections of the Code of Federal Regulations. I reject Respondent's contention that a nonelectrical inspector's courtesy advice about the need for a conduit excused Respondent from having a certified electrician ensure that the circuit breaker was the right size for the wire to the fuel pump.

I find that the violation was due to moderate negligence. I also find that it was a substantial and significant violation. The use of an excessive circuit breaker created a serious risk of an electric shock or fire causing serious injuries, with a reasonable likelihood that such injuries would occur if mining operations continued without abatement of the violation.

2/ A courtesy inspection, also known as a compliance assistance visit (CAV), is like a regular MSHA inspection, but enforcement citations are not issued. Instead, the inspector informally advises to the operator of any conditions he observes that require correction to comply with safety or health standards.

An updated compliance history of this mining operation (marked as an update of Government Exhibit 2) shows delinquent civil penalties of \$488 out of total assessments of \$1,547 in the two-year period before the subject citation. If the non-payment record is accurate, Respondent is responsible for these delinquencies either as the named operator or as a successor-in-interest and the delinquencies would be considered as part of Respondent's compliance history. However, Respondent's attorney states in a letter of September 11, 1989, that "all citations have been taken care of" and "No citation penalties are known to be outstanding." This representation has not been rebutted by the Secretary. Therefore, it is presumed there are no delinquencies of penalties due.

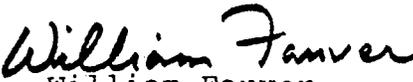
Considering all of the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of \$130 is appropriate for the violation found herein.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.
2. Respondent violated § 77.506 as alleged in Citation 2769952.
3. Respondent violated § 77.204 as alleged in Citation 2773586.

ORDER

Respondent shall pay the above civil penalties of \$150 within 30 days of this Decision.


William Fauver
Administrative Law Judge

Distribution:

Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Gene A. Wilson, President, Louisa Sand and Gravel Company, Inc., 101 Madison Street, Louisa, KY 41230 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 26, 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 89-96
Petitioner	:	A. C. No. 46-01453-03841
v.	:	
	:	Humphrey No. 7 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Docket No. WEVA 89-159
	:	A. C. No. 46-01968-03800
	:	
	:	Blacksville No. 2 Mine
	:	
	:	Docket No. WEVA 89-162
	:	A. C. No. 46-01318-03872
	:	
	:	Docket No. WEVA 89-170
	:	A. C. No. 46-01318-03873
	:	
	:	Docket No. WEVA 89-171
	:	A. C. No. 46-01318-03877
	:	
	:	Robinson Run No. 95 Mine
	:	
	:	Docket No. WEVA 89-183
	:	A. C. No. 46-01453-03848
	:	
	:	Humphrey No. 7 Mine

DECISION

Appearances: Ronald Gurka, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Petitioner; Michael R. Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Merlin

When the above-captioned cases came on for hearing counsel for both parties advised that settlements had been reached. With the permission of the bench these settlements were placed upon the record. Other cases scheduled for hearing at the same time were heard on the merits.

WEVA 89-96

This case involves eight violations which were originally assessed at \$6,650. The proposed settlement is for \$5,800.

Order No. 3106712 was issued for a violation of 30 C.F.R. § 75.208 because a visible warning sign or a physical barrier was not installed to impede travel beyond permanent roof supports in the face areas of a section. The penalty was originally assessed at \$850 and the proposed settlement is for \$700. The Solicitor represents that the penalty reduction is warranted because negligence is somewhat less than originally thought. The parties agree that there was a dispute about how this standard was to be interpreted. The foregoing representations were accepted from the bench and the proposed settlement was approved.

Order No. 3113111 was issued for a violation of 30 C.F.R. § 75.400 because loose coal, coal dust and float coal float were permitted to accumulate in twelve different locations in the intake air escapeway. The penalty was originally assessed at \$850 and the proposed settlement is for \$650. The Solicitor represents that the penalty reduction is warranted because negligence is less than originally thought. Although there had been an inspection, there was not conclusive proof that the operator knew the extent of this condition immediately prior to the order being issued. The foregoing representations were accepted from the bench and the proposed settlement was approved.

Order Nos. 3113118 and 3113119 were issued for violations of 30 C.F.R. § 75.1403-9(c) because shelter holes were not being maintained free of obstructions. The penalties were originally assessed at \$750 each and the proposed settlement for each is \$500. The Solicitor represents that the penalty reductions are warranted because gravity is less than originally thought. Only one miner would be affected and the hole probably could protect him. Also the track was straight so there would be increased warning. The foregoing representations were accepted from the bench and the proposed settlements were approved.

The operator has agreed to pay the original assessments for the remaining four violations involved in this case. The circumstances of these violations were explained on the record and I accepted the proffered amounts from the bench.

WEVA 89-159

This case involves one violation which was originally assessed at \$850 and the operator has agreed to pay the original assessment in full. The circumstances of this vio-

lation were explained on the record and I accepted the proffered amount from the bench.

WEVA 89-162

This case involves two violations which were originally assessed at \$2,100. The proposed settlement is for \$1,850.

Order No. 2943933 was issued for a violation of 30 C.F.R. § 75.400 because combustible material was permitted to accumulate at a belt starter box. The penalty was originally assessed at \$1,000 and the proposed settlement is for \$750. The Solicitor represents that the penalty reduction is warranted because negligence is less than originally thought. This condition existed for only a short time before the order was issued. The foregoing representations were accepted from the bench and the proposed settlement was approved.

The operator has agreed to pay the original assessment of the \$1,100 for the other violation involved in this case. The circumstances of the violation were explained on the record and I accepted the proffered amount from the bench.

WFVA 89-170

This case involves two violations which were originally assessed at \$1,900. The proposed settlement is for \$1,300.

Order No. 3119763 was issued for a violation of 30 C.F.R. § 75.303 because an inadequate preshift examination was performed on a bleeder section construction area. The penalty was originally assessed at \$900 and the proposed settlement is for \$700. The Solicitor represents that the penalty reduction is warranted because negligence is less than originally thought. The company was uncertain whether a preshift examination was required because this was a construction area. The foregoing representations were accepted from the bench and the proposed settlement was approved.

Order No. 3119498 was issued for a violation of 30 C.F.R. § 75.400 because combustible material was allowed to accumulate on a longwall section. The penalty was originally assessed at \$1,000 and the proposed settlement is for \$600. The Solicitor represents that the penalty reduction is warranted because negligence is less than originally thought. This condition existed for only a short time before the order was issued. The foregoing representations were accepted from the bench and the proposed settlement was approved.

WEVA 89-171

This case involves one violation which was originally assessed at \$1,100. The proposed settlement is for \$700.

Order No. 2944262 was issued for a violation of 30 C.F.R. § 75.400 because combustible material was allowed to accumulate in a section. The Solicitor represents that the penalty reduction is warranted because negligence is less than originally thought. There is some dispute, depending on where samples were taken, as to whether the area was adequately rock dusted. The foregoing representations were accepted from the bench and the proposed settlement was approved.

WEVA 89-183

This case involves one violation which was originally assessed at \$206 and the operator has agreed to pay the original assessment in full. The circumstances of this violation were explained on the record and I accepted the proffered amount from the bench.

ORDER

In light of the foregoing the recommended settlements are APPROVED and the operator is ORDERED TO PAY the following amounts within 30 days from the date of this decision.

WEVA 89-96

<u>Citation No.</u>	<u>Amount</u>
3106712	\$ 700
3113111	\$ 650
3113114	\$1,000
3113115	\$ 850
3113116	\$ 750
3113117	\$ 850
3113118	\$ 500
3113119	\$ 500
Total	<u>\$5,800</u>

WEVA 89-159

3100883 \$ 850

WEVA 89-162

2944067 \$1,100
2943933 \$ 750
Total \$1,850

WEVA 89-170

3119763 \$ 700

3119498		\$ 600
	Total	\$1,300
	<u>WFVA 89-171</u>	
2944262		\$ 700
	<u>WFVA 89-183</u>	
2943993		\$ 206
	Grand Total	\$10,706



Paul Merlin
Chief Administrative Law Judge

Distribution:

Ronald Gurka, Esq., Page H. Jackson, Esq., Jack Strausman, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

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Robert Stropp, Esq., General Counsel, UMWA, 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SEP 27 1989

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 89-70-DM
ON BEHALF OF KEVIN BUREAU,	:	
Complainant	:	MD 87-46
v.	:	
	:	Ropes Gold Mine
CALLAHAN MINING CORP.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
AND DISMISSING PROCEEDING

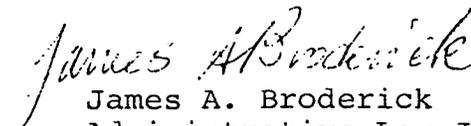
Before: Judge Broderick

On September 25, 1989, the Secretary filed a motion to dismiss this proceeding and to approve a settlement between the parties. Kevin Bureau was discharged by Respondent on July 1, 1989. He has worked for several other employers since that date and is presently employed. He does not wish to be reinstated to his former position or any other position with Respondent.

The settlement agreement provides that Respondent will pay Bureau the sum of \$20,000; that it will not discriminate against any employee who asserts rights under section 105(c) of the Act; that it will post a notice at the mine for 30 days to that effect; that none of Bureau's personnel records refer to the incidents of June 30, 1987 and July 1, 1987, leading to his discharge. The Secretary withdraws her petition for a civil penalty.

I have considered the motion in the light of the purposes of section 105(c) of the Act and conclude that the motion should be granted and the settlement approved.

Accordingly, the settlement is APPROVED, the motion is GRANTED and this proceeding is DISMISSED.


James A. Broderick
Administrative Law Judge

Distribution:

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Ronald D. Keefe, Esq., Kendricks, Bordeau, Adamini, Keefe, Smith & Girard, P.C., 128 W. Spring Street, Marquette, MI 49855 (Certified Mail)

slk

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 28 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 89-28-M
Petitioner : A.C. No. 21-00562-05502
v. :
: Lyon Washed S&G
LYON WASHED SAND AND GRAVEL, :
Respondent :

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Secretary of Labor (Secretary); Ted Anderson, Owner, for Lyon Washed Sand and Gravel (Lyon).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks civil penalties for five alleged violations by Lyon of mandatory safety standards. Pursuant to notice, the case was called for hearing in Marshall, Minnesota, on September 6, 1989. Michael Roderman testified on behalf of the Secretary. Ted Anderson testified on behalf of Lyon. The parties waived their right to file posthearing briefs, and each argued its case on the record. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Lyon is the owner and operator of a sand and gravel pit in Lyon County, Minnesota. The mine is a small mine, employing approximately four persons and producing approximately 60 to 80 thousand tons of gravel per year. During the two years prior to the violations alleged here, Lyon had no paid violations of mandatory standards.

Three of the violations charged involve the failure to have cover plates on electrical equipment; the other two involve inadequate splices in power cables. All violations were abated promptly in good faith.

COVER PLATES

30 C.F.R. § 56.12032 provides as follows:
Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

On July 7, 1988, Federal mine inspector Michael Roderman issued citation 3078987 during a regular inspection of the subject mine. The citation charged that the door to an electrical control cabinet was left open, exposing 480 volt electrical circuits. The cabinet was in a trailer but access to it was not restricted. Neither testing nor repairs were being performed at the time. I conclude that a violation of the standard was established. It was moderately serious and, since it was known or should have been known to Lyon, it was the result of negligence. Based on the criteria in section 110(i) of the Act, I conclude that \$75 is an appropriate penalty for the violation.

On the same day the inspector issued Citation 3078988 because a cover plate was missing from a 480 volt stoker conveyor motor. The motor was in a small metal box, about 5 or 6 inches square. Electrical connections were exposed. The motor was about 8 feet above a walkway and therefore employee exposure was limited. Ted Anderson testified that the cover plate was left off to dry the motor out, because 90 percent of motor failures are caused by moisture. I conclude that the evidence establishes a violation of the standard. Because of the location of the motor it was not serious and was not caused by negligence. An appropriate penalty for the violation is \$20.

On the same day the inspector issued citation 3078989 because a cover plate on a rock picker motor was left off. 480 volt electrical wires were protruding from the junction box. The motor was about 10 feet above the ground and was unlikely to be contacted by persons. I conclude that a violation of the standard was established, that it was not serious, but was the result of Lyon's negligence. \$30 is an appropriate penalty for the violation.

PERMANENT SPLICES

30 C.F.R. § 56.12013 provides:

Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be:

(a) mechanically strong with electrical conductivity as near as possible to that of the original;

(b) insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and

(c) provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

On July 7, 1988, Inspector Roderman issued citation 3078990 because a 480 volt power cable feeding the rock picker motor had a splice made with wire nuts, not sealed to prevent moisture. The splice was not mechanically strong, was not insulated to a degree equal to that of the original, and was not bonded to the outer jacket. The cable was subject to vibration and was in an area where it could be contacted by persons, and a serious, even a fatal injury could result. I conclude that a violation of the standard was established. It was moderately serious and was the result of Lyon's negligence. I conclude that \$100 is an appropriate penalty for the violation.

On the same day the inspector issued citation 3078991 because a splice in a 480 volt cable leading to an electrical motor junction box about 12 inches from the box was made with wire nuts, not sealed to prevent moisture. The splice was not mechanically strong, was not insulated to a degree equal to that of the original, and was not bonded to the outer jacket. Because of its location, it was not normally accessible to persons, and was unlikely to cause injury. I conclude that a violation of the standard was established. It was not serious, but was caused by negligence. \$20 is an appropriate penalty for the violation.

ORDER

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

1. Citations 3078987, 3078988, 3078989, 3078990 and 3078991 are AFFIRMED.

2. Within 30 days of the date of this decision Lyon Washed Sand and Gravel shall pay the following penalties:

<u>CITATION</u>	<u>PENALTY</u>
3078987	\$ 75
3078988	20
3078989	30

3078990
3078991

100
20
\$245

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Miguel J. Carmona, Esq., U.S. Department of Labor, Office of the Solicitor, 230 S. Dearborn Street, Chicago, IL 60604 (Certified Mail)

Mr. Ted Anderson, Owner, Lyon Washed Sand and Gravel, 703 South Bend Avenue, Marshall, MN 56258 (Certified Mail and Regular Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 28 1989

SOUTHERN OHIO COAL COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEVA 88-349-R
: Order No. 3105926; 8/2/88
: :
: Martinka No. 1 Mine
: Mine ID 46-03805
: :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
Petitioner : Docket No. WEVA 89-10
v. : A. C. No. 46-03805-03876
: :
: Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY, :
Respondent :
:

DECISION

Appearances: David M. Cohen, Esq., American Electric Power Service Corporation, Lancaster, Ohio, for the Secretary;
Thomas A. Brown, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases, the Secretary (Petitioner) seeks a civil penalty for an alleged violation of the Operator (Respondent) of 30 C.F.R. § 75.1003-1. Pursuant to notice, these cases were heard in Morgantown, West Virginia, on May 31, 1989. At the hearing, Homer Delovich and Albert Kirtchartz testified for Petitioner, and Fred Rundle, III, and Dewey Ice testified for Respondent. Proposed Findings of Fact and Briefs were filed by Petitioner and Respondent on September 7 and 8, 1989, respectively.

Stipulations

1. The Administrative Law Judge had jurisdiction over this proceeding.

2. The Martinka No. 1 Mine of Southern Ohio Coal Company is affiliated with the American Electric Power Service Corporation.

3. Martinka No. 1 Mine and the Southern Ohio Coal Company are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

4. Order No. 3105926 was properly served by a duly authorized representative of the Secretary of Labor upon the agent or the respondent on the date, time and at the place stated therein.

5. Copies of the Order No. 3105926 are authentic and may be admitted into evidence for the purpose of establishing the issuance.

6. The Assessment of civil penalty for this proceeding will not affect the Respondent's ability to continue in business.

7. The annual coal production of the Martinka No. 1 Mine was 2,872,018 tons for 1988.

8. There was no intervening inspection prior to the issuance of the August 2, 1988 Order No. 3105926. The printout of the civil penalty complaint reflects the Secretary of Labor's history of violations of the Martinka No. 1 Mine.

9. There were approximately 934 inspection days of the Martinka No. 1 Mine in the 24 month period prior to the issuance of Order No. 3105926.

Findings of Fact and Discussion

I.

During the weekend of July 29 - 30, 1988, two flat cars containing a 1000 foot section of belting were placed in the 13 left track chute, after having been transported two miles from the surface of the mine on July 28, 1988. On August 1, 1988, Homer Delovich, an MSHA Inspector, performed an inspection of Respondent's Martinka No. 1 Mine in response to a request that has been filed for a section 103(g) inspection, alleging that the height of the loaded belting was 57 inches above the track rail. Delovich testified that on August 1, he measured the distance between the track rail and the trolley wire, which was suspended from the roof by hangers. At five locations at the 13 left switch and outby and inby that location, the distance was between 56 1/2 and 54 inches. On August 2, 1988, Delovich continued his inspection in the first shift (12:00 p.m. to 8:00 a.m.), and indicated that, using a tape measure, he measured the distance

from the track rail to the top of the belting at its highest point. This distance was 57 inches. Albert Kirtchartz, a plant mechanic for Respondent, who accompanied Delovich as a member of the Safety Committee of the Local Union, indicated that he agreed with Delovich's measurements of the distance between the track and the trolley wire. Dewey Ice, Respondent's Accident Prevention Officer, essentially agreed that the belting in the flat cars was 57 inches high, and the trolley wire was 56 or 56 1/2 inches. Delovich issued a section 104(d)(2) Order alleging a violation of 30 C.F.R. § 75.1003-1 which provides as follows: "Adequate precaution shall be taken to insure that equipment being moved along haulageways will not come in contact with trolley wires or trolley feeder wires."

Respondent, in essence, argues that the belting in question is not "equipment" within the purview of section 75.1003-1, supra. Webster's New Collegiate Dictionary, 1979 edition, defines equipment, as pertinent, as "2a: the set of articles or physical resources serving to equip a person or thing; as (1): the implements used in an operation or activity" Accordingly, inasmuch as the testimony indicates that the belting is used to transport materials in Respondent's mining operation, it is clear that it comes within the definition of "equipment," and thus is within the purview of section 75.1003-1, supra. According to the uncontradicted testimony of Ice, as depicted in SOCO Exhibit 2, the trolley wire was 5 to 7 inches beyond the track in the direction of the rib; the flat car extended 18 inches beyond the track toward the rib; and the belting was 19 inches "inside the most outside part of the car" (Tr. 106). Thus, the wire was at least 5 to 7 inches removed from the belt in a horizontal direction. Ice further indicated that he had not observed the belting shifting from side to side while it was being transported. However, the evidence unequivocally establishes that the height of the belting exceeded that of the trolley wire, and Ice indicated, in essence, that, due to the shifting of the track, the distance between the flat car and the trolley wire could be further decreased. As testified to by Delovich and Kirtchartz, and not contradicted by Respondent's witnesses, should the belting come in contact with the trolley wire, it could cause a hanger to come loose, thus knocking the trolley wire down, creating a fire hazard. Respondent argues that the fact that the belting was transported over two miles, on July 28, without any problems, establishes that adequate precaution had been taken. Although the two mile trip, on July 28, might have been fortuitous, the record fails to indicate that Respondent took any

precaution prior to the transporting of the belting to insure that it would not come in contact with the wires.^{1/} Accordingly, I find that Respondent herein did violate section 75.1003-1, supra.

II.

In essence, it was Delovich's testimony that the violation herein should be considered significant and substantial, inasmuch as the height of the belting exceeded that of the trolley wire, and ". . . that it did come in contact and the continuance of this practice with this piece of equipment, eventually lead to an accident" (Tr. 39). (sic). He was asked to indicate the hazards of this condition, and he indicated that damage of the trolley wire ". . . leads to a fire or electrical shock to the persons working" (Tr. 39). In its brief, Petitioner cites the testimony of Kirtchartz who indicated that if material is loaded above the end of the cars it "could" contact the trolley wire (Tr. 74). Petitioner also cites the testimony of Ice and Fred Rundle, III, Respondent's midnight shift supervisor, who indicated that if the belting is high enough to contact the trolley wires, there exists the possibility of a hazard. Although this testimony tends to establish that the hazard of contact with the trolley wire could occur, it does not establish that such a hazard was reasonably likely to occur.^{2/} As such, I find that the violation herein was not significant and substantial (See, Consolidation Coal Company, 6 FMSHRC 189, at 180, 193 (February 1984)); Mathies Coal Co., 6 FMSHRC 1 (January 1984)).

III.

According to the testimony of Delovich, when he investigated the section 103(g) complaints on August 1, 1988, he interviewed Bill Lucas and Danny Wade, who were the motormen who moved the belting on July 28, 1988, from outside the mine, a distance of 2 miles to the 13 left track chute. In essence, he indicated

^{1/} In its brief, Respondent argues that adequate precautions were taken inasmuch as Rundle, the shift supervisor, indicated that when belting is transported the tail motorman's job is to see if the belting shifts. Rundle indicated that in the event the belting would shift, the motorman would stop the cars and lighten the belt. The record does not establish that the miners who actually transported the belting in question were specifically told of their duties to continuously monitor the belting to insure that it would not contact the trolley wire. I find that Rundle's testimony is insufficient to establish that "adequate" precautions were taken.

^{2/} In concluding that the hazard of contact of the belting with the trolley wire was not reasonably likely, I accorded considerable weight to the uncontradicted testimony of Ice that the belting was at least 5 to 7 inches removed from the trolley wire in a horizontal plane.

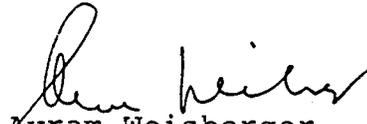
that the latter told him that the day shift motormen, Rudy Baker and Larry Stafford, had questioned the height of the belting, and their foremen Steve Shaffer had told them not to move the belting. None of the sources interviewed by Delovich testified. Further, the record is not clear as to the source of Delovich's testimony with regard to conversations Baker and Stafford had with their foreman with regard to the height of the belting. Accordingly, I do not find this testimony sufficiently reliable to support a finding that Respondent's managers, prior to the transporting of the belting, knew that it was too high. Delovich testified that Lucas and Wade had told him that when transporting the belting on July 28, they may have knocked out a trolley wire hanger. However, in a report of his investigation, Government Exhibit 3, he indicated that Lucas and Wade told him that in transporting the belting they ". . . did not observed (sic) or no happenings if the belting touched the trolley wire." (sic). I place more weight on Delovich's version of the conversation with Lucas and Wade as contained in the report of the investigation, rather than on his testimony, as the investigation report was written the same day or a day after his interview of Lucas and Wade. Rundle indicated that the belting was bound down in the flat car to keep it from shifting, and he asked Lucas and Wade if they had any problems transporting the belting, and they indicated that they did not. Also, I note, that the testimony of Ice has not been contradicted which establishes as discussed above, infra, II, that the belting was approximately 5 to 7 inches horizontally removed from the trolley wire. Thus, based on all of the above, I conclude that it has not been established that the violation herein was the result of Respondent's "unwarrantable failure," as it has not been established that it acted with any aggravated conduct of a degree higher than mere negligence. (See, Emery Mining Corp., 9 FMSHRC 1997 (1987)).

In assessing a penalty herein, I find the violation herein to be of only a moderate degree of gravity, and find that Respondent herein acted with only a low degree of negligence. I have also taken into account the remaining factors set forth in section 110(i) of the Act as stipulated to by the Parties. Based upon all of the above, I conclude that a penalty herein of \$200 is appropriate for the violation of section 75.1003-1, supra.

ORDER

The Respondent shall, within 30 days of this Decision, pay \$200 as a civil penalty for the violation found herein.

It is further ORDERED that Order No. 3105926 be AMENDED to a Section 104(a) citation, and to reflect the fact that the cited violation was not significant and substantial


Avram Weisberger
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 29, 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 89-115
Petitioner : A. C. No. 15-15180-03506
v. :
: No. 2 Mine
FLAGET FUELS INCORPORATED, :
Respondent :

ORDER OF DISMISSAL

Before: Judge Merlin

The order of default having been vacated, this case is hereby DISMISSED.



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 29, 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 89-70
Petitioner : A. C. No. 01-01401-03743
v. :
: No. 7 Mine
JIM WALTER RESOURCES, INC., :
Respondent :

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor,
U. S. Department of Labor, Birmingham,
Alabama, for Petitioner;
Robert Stanley Morrow, Esq., Jim Walter
Resources, Inc., Birmingham, Alabama, for
Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Jim Walter Resources, Inc., under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820. A hearing was held on August 24, 1989, and post-hearing briefs now have been filed.

At issue in this case is Citation No. 3187963, dated November 28, 1988, issued pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), and charging a violation of 30 C.F.R. § 75.220 for the following condition or practice:

"The current Roof Control Plan was not being followed on the No. 5 section in that the face of the crosscut being cut from No. 2 entry to No. 1 entry had been mined from 23 feet 3 inches to 29 feet 6 inches from the last row of permanent roof supports, or until the crosscut holed through into the No. 1 entry. The controls of the continuous mining machine in use on this section measured 20 feet 3 inches from the cutting head. This shows that the continuous miner operator was from three (3) feet to nine (9) feet three (3) inches in by the last row of roof bolts during this cut. The current Roof Control Plan states that controls of the continuous

mining machine or loading machine shall not advance inby the last row of roof bolts except with approved extended cut plan (pages 13 note 1, page 14, note, 1, page 15, page 16 note 1 page 17 note 1). An approved extended cut plan is not in force at this mine at this time. This is the second violation of this type since November 10, 1988, indicating that this problem may be a practice and indicating that the mining machine operator, helper and section foreman are not fully aware of the serious consequences that may result from working under unsupported roof."

Also in issue is Order No. 3187964 dated November 28, 1988, issued pursuant to section 104(d)(1) of the Act, supra, and charging a violation of 30 C.F.R. § 75.220 for the following condition or practice:

"The current Roof Control Plan was not being followed on the No. 5 section in that the face of the crosscut being cut from No. 2 entry to No. 3 entry had been mined up to 23 feet 6 inches inby the last row of permanent roof supports. The controls of the continuous miner measured 20 feet 3 inches from the cutting head. This shows that the continuous miner operator was up to 3 feet 3 inches inby the last row of roof bolts during this cut. The current Roof Control Plan states that controls of the continuous miner or loading machine shall not advance inby the last row of roof bolts except with an approved extended cut plan (pages 13-18 note 1). An approved extended cut plan is not in force at this mine at this time. This is the third violation of this type since November 10, 1988 and the second such violation observed on this shift on No. 5 section. This strongly indicates that this may be a practice on this section. This also shows a lack of awareness to the hazards involved in working under unsupported roof by the miner operator, helper and section foreman."

At a pre-hearing conference the parties agreed to the following stipulations.

(1) The operator is the owner and operator of the subject mine;

(2) The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;

(3) The administrative law judge has jurisdiction of this case;

(4) The inspector who issued the subject citation and order was a duly authorized representative of the Secretary;

(5) True and correct copies of the subject citation and order were properly served upon the operator;

(6) Copies of the subject citation and order and terminations thereof are authentic and may be admitted into evidence for purposes of establishing their issuance, but not for the purpose of establishing the truthfulness or relevancy of any statements asserted therein, except as agreed to by stipulation;

(7) The operator is large in size;

(8) Payment of any penalty herein will not affect the operator's ability to continue in business;

(9) The roof control plan in effect on November 28, 1988, requires that the controls of a continuous mining machine shall not be advanced in by the last row of roof bolts;

(10) The conditions described on the face of Citation No. 3187963 are accepted as written therein and constitute a violation of the operator's roof control plan pursuant to 30 C.F.R. § 75.220;

(11) The conditions described on the face of Order No. 3187964 are accepted as written therein and constitute a violation of the operator's roof control plan pursuant to 30 C.F.R. § 75.220;

(12) Citation No. 3187963 and Order No. 3187964 are properly characterized as significant and substantial violations;

(13) During the 24-month period prior to the issuance of the citation and order in this case, i. e., November 28, 1988, the operator was issued 21 104(a) citations, and two 104(d)(2) orders for violations of its approved roof control plan.

The foregoing stipulations were accepted (Tr. 8).

The operator having stipulated to the existence of the violations and to their being significant and substantial, the parties agreed at the pre-hearing that the issues to be determined in this matter are the existence of unwarrantable failure in the subject citation and order, and the appropriate amount of civil penalties (Tr. 8).

The Commission has defined unwarrantable failure as "aggravated conduct constituting more than ordinary negligence." Emery Mining Corporation, 9 FMSHRC 1997, 2001 (December 1987), Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, (December 1987). Southern Ohio Coal Company, 10 FMSHRC 138 (February 1988); Quinland Coals, Inc., 10 FMSHRC 705 (June 1988). The existence of unwarrantable failure may be adjudicated in these proceedings. Quinland Coals, Inc., 9 FMSHRC 1614 (September 1987).

The inspector testified that the excess cut which was from 3 feet to 9 feet 3 inches, cited in the citation, was visibly obvious and that it would have taken about 1½ hours to make that cut (Tr. 28). According to the inspector, it is the practice of the operator's section foreman to be in the area where coal is being mined (Tr. 36, 38). It was the inspector's opinion that the section foreman was in the cited area for at least a portion of the time when the excess cut was made and that he had to have known of it (Tr. 36, 38). Four to six cars of coal were taken from the excessive portion of the cut (Tr. 45). The cut was so excessively deep that it penetrated through the crosscut to the next entry where the bolts in that entry made it clear that the cut had gone much too far (Tr. 42-44). Finally, a citation had been issued for the same type of violation a few weeks previously (MSHA Exh. 7, Tr. 71). The inspector's testimony is uncontradicted and I accept it.

That roof falls are the leading cause of fatalities and injuries in underground mining, has long been recognized. See most recently, U.M.W. v. Dole, 870 F.2d 662 (D.C. Cir. 1989). Compliance with the roof control plan is therefore, a critical priority. In Youghiogheny and Ohio Coal Company, supra, the Commission in upholding a finding of unwarrantable failure, held that the section foreman is responsible for compliance with the roof control plan and that in discharging this responsibility he is held to a demanding standard of care in safety matters. In the instant case the section foreman fell far short of what reasonably could have been required of him. The extent of the cut, the length of time taken to make it, and its visible nature demonstrate conduct of a most aggravated nature. After consideration of the foregoing circumstances, I conclude that under applicable Commission criteria unwarrantable failure was present here. The finding of unwarrantable failure in Citation No. 3187963 is Affirmed.

The second excessive cut which was cited in Order No. 3187964 was not as deep as the first one, but according to the inspector the foreman would have seen it any time after the continuous miner operator went beyond the last roof supports (Tr. 40). Up to four cars of coal were involved in the excessive portion of this cut (Tr. 46-47). Moreover the second cut was made immediately after the one cited in the citation (Tr. 49).

When the inspector saw both cuts he concluded that the roof control plan did not mean as much to the operator as it should have (Tr. 49). The Commission's decision in Youghiogheny and Ohio Coal Company, cited supra, also is in point here. In that case the Commission noted the judge's finding that the inspector had cited the operator for the same violation three days previously, 9 FMSHRC at 2010. Insofar as the element of time is concerned, the back-to-back cuts here are even more compelling. I believe the second cut constituted the kind and degree of conduct the Commission has identified as aggravated. Accordingly, it must be found that unwarrantable failure was present here also. The finding of unwarrantable failure in Order No. 3187964 is AFFIRMED.

Based upon the circumstances set forth herein, I find the operator guilty of a high degree of negligence in both instances and that both violations were very serious. The remaining criteria in section 110(i) are covered by the stipulations.

The post-hearing briefs filed by the parties have been received. To the extent they are inconsistent with this decision, they are rejected.

ORDER

In light of the foregoing it is ORDERED that the findings of unwarrantable failure in Citation No. 3187963 and Order No. 3187964 be AFFIRMED.

It is further ORDERED that a penalty of \$1,200 be ASSESSED for Citation No. 3187963.

It is further ORDERED that a penalty of \$1,600 be ASSESSED for Order No. 3187964.

It is further ORDERED that the operator PAY the foregoing amounts within 30 days from the date of this decision.



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 29, 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION, (MSHA) : Docket No. VA 89-28-M
Petitioner : A. C. No. 44-02965-05518
: :
v. : Louisa Plant
: :
A. H. SMITH STONE COMPANY, :
Respondent :

DECISION

Appearances: Jack Strausman, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for Petitioner;
Lisa M. Wolff, Representative for A. H. Smith
Stone Company, Branchville, Maryland, for
Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil
penalty filed by the Secretary of Labor against A. H. Smith
Stone Company pursuant to the Federal Mine Safety and Health
Act of 1977. An evidentiary hearing was held on August 30,
1989, and post-hearing briefs have been filed.

Order No. 3045441 dated July 17, 1988, alleges a
violation of 30 C.F.R. § 56.14006 for the following
condition:

"This is an order of withdrawal, the
employee shoveling under the feeder shaker
under the #1 jaw crusher shall be withdrawn
immediately. The employee was shoveling
within a foot of the unguarded V-belt drive
and drive motor of the shocker feeder. This
is an imminent danger situation."

30 C.F.R. § 56.14006 provides as follows:

Except when testing the machinery,
guards shall be securely in place while
machinery is being operated.

At the hearing the parties agreed to the following stipulations (Tr. 5-6):

(1) the operator is the owner and operator of the subject mine;

(2) the operator and mine are subject to the Federal Mine Safety and Health Act of 1977;

(3) the administrative law judge has jurisdiction of this case;

(4) the inspector who issued the subject order was a duly authorized representative of the Secretary;

(5) a true and correct copy of the order was served upon the operator;

(6) a copy of the subject order is authentic and may be admitted into evidence for the purpose of establishing its issuance, but not for the purpose of establishing the truthfulness or relevancy of any statements asserted therein;

(7) the alleged violation was abated in good faith;

(8) the history of prior violations is as set forth in the Solicitor's prehearing statement;

(9) the operator's size is as set forth in the Solicitor's prehearing statement.

The inspector testified that when he arrived, the plant was running (Tr. 11). He saw and heard material being dumped into the feeder hoppers for the crushers and then coming off at the end of the conveyor belts (Tr. 11-12). After greeting the foreman who was sitting on a front end loader, the inspector turned and saw an employee shoveling at an unguarded belt (Tr. 13). This belt ran from the pulley on the motor to the pulley on the shaker (Tr. 16, MSHA Exhs. 4-6). There was no guard on the drive or on the pulleys (Tr. 28). The employee who was shoveling was within one foot of the unguarded drive (Tr. 14). The jaw crusher was above his head and the shaker feeder was in front of him (Tr. 27). The foregoing testimony is uncontradicted and I accept it.

The inspector further stated that the belt was not being tested. He explained that testing of this belt is done by running the belt for 10 minutes with a small amount of material

on it (Tr. 33, 42-43). Unlike a conveyor belt which carries material, the V-belt in this case only drives machinery (Tr. 70-71). In addition, no one told the inspector the belt was being tested and from his seat on the front-end loader the foreman was too far away to have observed whether the belt was operating properly (Tr. 33-35, 41-42, 59). Finally, if testing were being done, an employee would not have been assigned to do the normal work of shoveling so close to the unguarded belt drive (Tr. 33, 41-42). I accept this uncontradicted testimony and based upon it find that the belt was not being tested.

In light of the foregoing I conclude a violation existed.

As already set forth, the employee was shoveling one foot away from the unguarded belt which was running. I accept the inspector's description of the floor as slippery due to the presence of dust, water, oil and grease (Tr. 36). The inspector stated that if an employee were caught in the belt he could lose his fingers, hand, arm or life (Tr. 37). Under the circumstances the violation presents the discrete safety hazard of slipping and becoming caught. Because of the proximity of the employee to the moving, unguarded belt a reasonable likelihood existed that the feared hazard of becoming caught in the machinery would occur. And as set forth above, if an injury resulted it would be of a serious nature. Accordingly, under Commission criteria the violation was significant and substantial. Mathies Coal Co., 6 FMSHRC 1 (1984), Consolidation Coal Company, 6 FMSHRC 34 (1984). For the same reasons I find the violation was very serious indeed. 1/

According to the inspector, the foreman on the front end loader saw the employee shoveling near the unguarded belt (Tr. 38). The foreman therefore was guilty of a high degree of

1/ The violation was cited in a 107(a) imminent danger withdrawal order/104(a) citation. The operator has not contested the order. However, the record demonstrates that the inspector was correct in issuing it. Cf. Freeman Coal Mining Co., 2 IBMA 197, 212 (1973) aff'd, 504 F.2d 741 (7th Cir. 1974); Eastern Associated Coal Corp., 2 IBMA 128 (1973) aff'd, Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, et al., 491 F.2d 277 (4th Cir. 1974); Cyprus Empire Corporation, 11 FMSHRC 368, 374-376 (1989).

negligence and his negligence is imputable to the operator.
Southern Ohio Coal Company, 4 FMSHRC 1459 (1982) 2/.

The remaining 110(i) criteria are covered by the stipulations of the parties.

The post-hearing briefs filed by the parties have been reviewed. To the extent they are inconsistent with this decision, they are rejected.

ORDER

In light of the foregoing it is ORDERED that Order/Citation No. 3045441 be AFFIRMED.

It is further ORDERED that a penalty of \$1,250 be ASSESSED.

It is further ORDERED that the operator PAY \$1,250 within 30 days from the date of this decision.



Paul Merlin
Chief Administrative Law Judge

2/ As set forth herein, the testimony of the inspector, who was the only witness to testify, was undisputed. At the hearing the operator's representative moved for a continuance and requested a subpoena because the foreman was not present to testify (Tr. 72-73). However, the notice of pre-hearing and hearing was issued more than two months in advance of the hearing, and in her prehearing statement the representative identified the foreman as the operator's witness who would testify at the hearing. At the hearing the representative did not know why the foreman, who is still in the operator's employ, did not appear (Tr. 74). Her belated request for a continuance and subpoena was untimely and unfounded and as such, it was denied from the bench (Tr. 74).

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Ms. Lisa M. Wolff, Director of Safety/Government Affairs, A. H. Smith Stone Company, 9101 Railroad Avenue, Branchville, MD 20740 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

SEP 29 1989

DENNIS R. HILDERBRANDT, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 88-258-DM
HECLA MINING COMPANY, : MD 87-37
Respondent : Republic Unit

DECISION

Appearances: Theresa D. Thompson, Esq., Maxey Law Offices,
Spokane, Washington,
for Complainant;
Fred M. Gibler, Esq., Evans, Keane, Koontz, Boyd,
and Ripley, Kellogg, Idaho,
for Respondent.

Before: Judge Cetti

This case is before me upon the complaint by Dennis R. Hilderbrant under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", alleging that he was constructively discharged by Hecla Mining Company, (Hecla) on April 17, 1987 in violation of section 105(c)(1) of the Act. 1/

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

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

Statement of the Case

Complainant Dennis Hilderbrandt filed a complaint with the Commission under Section 105(c) of the Act on September 21, 1987, alleging in essence that he quit working in the mine on April 17, 1987 because he believed that his health and safety were endangered by his work assignment. Complainant alleges he was constructively discharged. He complains that his employer the, Hecla Mining Company, treated him in a discriminatory manner in retaliation for his having engaged in protective activities. He also alleges that working conditions in the mine were so intolerable he had no alternative but to quit. Complainant seeks reinstatement, back pay, attorneys fees and any other allowable compensation that the Commission may order.

The parties have filed post-hearing briefs and proposed findings and conclusions of law. At the hearing the parties presented oral and documentary evidence and seven stipulations as follows:

Stipulated Facts

1. The employee, Dennis R. Hildebrandt, worked for Hecla Mining Company since 1981 when Hecla acquired the mine from Mr. Hildebrandt's previous employer. Mr. Hildebrandt worked in the Republic mine for several years until April 17, 1987. Mr. Hildebrandt worked as an underground miner with his partner, Clarence E. Heideman.
2. On April 3, 1987, Mr. Hildebrandt and his partner worked the graveyard shift and at the conclusion of the shift, he received a disciplinary notice for insufficient work during the shift.
3. During that shift, Mr. Hildebrandt and his partner encountered difficulties including (a) necessary equipment was not at the work site (b) smoke and gas at the unventilated work site, and (c) two separate groups of misfires (unblasted explosives in drilled holes).
4. Mr. Hildebrandt made a written hazardous condition complaint to MSHA alleging violations of mandatory MSHA standards during the April 3, 1987 shift.
5. A federal investigator inspected the mine, spoke with a number of persons and issued two citations for violations of MSHA mandatory standards.
6. On April 16, 1987, Mr. Hildebrandt was again working the graveyard shift with his partner. Following this shift, he was advised that he was not making sufficient work progress at his work station.

7. Later that same day, April 17, 1987, Mr. Hildebrandt advised Hecla that he was quitting work for Hecla.

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

Findings and Conclusions

The complainant Hilderbrandt, commenced work for Hecla Mining Company (Hecla) at its Republic Unit mine near Republic, Washington, in 1981 when Hecla acquired it from prior owners. Hilderbrandt had approximately 13 1/2 years experience as a miner at the mine. On April 17, 1987, Hilderbrandt terminated his employment with Hecla.

Hilderbrandt alleges he was discriminated against because of his status or perceived status by Hecla as a union operative, because he was safety representative and because he made safety-related complaints to the company and to the Mine Safety and Health Administration between April 3 and April 17, 1987. Hilderbrandt contends that because of such activity on his part he was assigned to work in an area of the mine which was unsafe and in which he could not earn a production bonus. He claims that as a result, he was compelled to terminate his employment.

Hecla denies that Hilderbrandt was disciplined for engaging in protected activity. It is Hecla's position that he voluntarily quit his job. Based upon the preponderance of the evidence and the record as a whole I find that Hilderbrandt was not disciplined for engaging in protected activity that he voluntarily quit his job on April 17, 1987 and suffered no adverse action that was motivated in any part by protected activity.

In 1983 Hilderbrandt was elected safety representative for purposes of the Mine Safety and Health Act. Hilderbrandt's claim that he was discriminated against because of his status as safety representative is, however, based primarily upon events occurring between April 3 and April 17, 1987 (Tr. 165). It is Hilderbrandt's position that he made safety complaints regarding his work areas in the mine to MSHA and to Hecla as the safety representative.

Conflicting evidence was presented by Hilderbrandt on the issue regarding his claim of discrimination for Union activities. Hilderbrandt testified at the hearing that he was not a supporter of the union during a certification election in May 1987, but he believed that Hecla thought he was a union supporter (Tr. 169). Hilderbrandt presented other evidence in which he stated that he was a supporter of the union certification in the May 1987 election. In Exhibit 11, pages 10 and 11, Hilderbrandt told the

MSHA special investigator investigating his discrimination claim that he was "one of the biggest supporters" of the union.

The three individuals Hilderbrandt claims were responsible for forcing him to terminate his employment were Mine Superintendent Tom Graham, Supervisor Bill Greenland, and Mine Manager Doug Wollant. None of these three individuals had any involvement with union certification matters (Tr. 390). Mr. Greenland and Mr. Wollant had only arrived at the Republic Union approximately one month before Mr. Hilderbrandt terminated his employment (Tr. 170). Mr. Graham had arrived only shortly before the union certification election in 1987 (Tr. 360). No evidence other than Hilderbrandt's suspicion was presented to show that these three individuals or anyone else from Hecla believed Hilderbrandt was involved with union activities.

Commencing approximately the middle of March 1987, Hilderbrandt and his partner, Clarence Heideman, began work in an area of the mine known as the GP3 drift (Tr. 456). This was an old area of the mine the company intended to use for future mining operations. In preparation for mining and development activities, it was necessary to rehabilitate the GP3 drift (Tr. 454).

Hilderbrandt was a contract or "gypo" miner. This designation means the miner has the opportunity to earn a bonus based on work performed over and above his hourly rate, which is commonly known as "day's pay." The bonus is paid when mining or development work begins. During the rehabilitation phase, the employee is paid at his "day's pay" rate (Tr. 454).

On the graveyard shift which commenced at 11 p.m. on Friday, April 3, 1987, Hilderbrandt and his partner were required to work in a area of the mine that was different from the GP3 drift in which they previously worked. Prior to going underground for the shift, Mr. Greenland, as Hilderbrandt's supervisor, instructed Hilderbrandt and his partner that their duties were to level off the muck pile which resulted from the prior crews blasting and to begin rock bolting the mined out area (Tr. 255).

When Hilderbrandt and his partner arrived at the underground work site, it became obvious that, as a result of lack of necessary equipment and smoke caused by the prior shift's blasting activities, they would not be able to accomplish the work originally assigned (Tr. 258).

Upon encountering these conditions, Hilderbrandt and his partner were instructed by their supervisor Mr. Greenland to begin setting up equipment for the next shift, which would have entailed placing rock bolts, mats, and wire in the area and to transport a slusher and bucket to the area (Tr. 262). They

failed to perform these tasks by the end of the shift. This work, had it been completed, would have taken approximately two hours (Tr. 269, 461-462).

Hilderbrandt complained during the shift to Greenland about the gassy conditions in the mine. He was not, however, required to work in the gassy conditions (Tr. 186). The mine had a gas or smoke problems. These conditions were the subject of frequent complaints by the miners and management personnel. MSHA was aware of the problem and was working with Hecla to correct the problem (Tr. 396).

At the conclusion of the Friday, April 3 graveyard shift, Supervisor Greenland informed Hilderbrandt he intended to suspend him for two days for failing to perform adequate work during that shift (Tr. 274). Hilderbrandt requested a conference with the mine superintendent, Mr. Graham, and Graham was called to the work site. Following a conference between Mr. Greenland and Mr. Graham, Graham ordered that Hilderbrandt not be suspended but instead that he be issued a Step 2 Employee Improvement Act Report (EIAR) (Tr. 275-276).

The Employee Improvement Action Report (EIAR) Step 2 did not result in any loss of work or pay to Hilderbrandt (Tr. 277). Under Hecla's progressive system of discipline, it would have been necessary for Hilderbrandt to receive a similar report for similar conduct during the next six-month period before he could have been disciplined. If he received no similar EIAR for three months, it would be reduced to a Step 1 (oral warning), and if he received no EIAR for six months, the EIAR Step 2 would be removed (Tr. 279-280). Hilderbrandt worked the graveyard shift on April 4, 1987, in the same area of the mine as on April 3, 1987, but never worked in that area of the mine again.

Commencing with his next-scheduled shift on April 5, 1987, Hilderbrandt returned to work in the GP3 drift doing the identical rehabilitation work he had been performing before April 3, 1987 (Tr. 369). He continued to work in this area of the mine (GP3 drift) until he voluntarily terminated his employment on April 17, 1987 (Tr. 369-370).

During the week of April 5, 1987, Hilderbrandt made a telephone call to the Mine Safety and Health Administration reporting safety complaints with regard to conditions he encountered on April 3, 1987 graveyard shift (Tr. 90). Specifically, he claimed that smokey conditions existed in the mine and that misfires were not refired during the shift. As a result of the telephone call, MSHA investigated and issued two citations - one for the April 3rd failure to fire the misfires and one for the April 3rd failure to monitor smoke in the mine.

During the period from April 3 through April 17, Hilderbrandt and his partner were doing the same work as members of the opposite crews on other shifts in the same area of the mine (Tr. 457-462).

On the shift which began at 11:00 p.m. on April 16, 1987, and continued over to the morning of April 17, Hilderbrandt and his partner had completed the rehabilitation work in the GP3 area and began development work (Tr. 455). Commencing with that shift, Hilderbrandt began to earn a production bonus, which is reflected on Hilderbrandt's Exhibit 16.

Mine Superintendent Graham had expected Hilderbrandt and his partner to be able to complete a cycle once they completed their rehabilitation efforts and began extending the drift (Tr. 376). During the initial mining stages in the GP3 drift Hilderbrandt and his partner were unable to complete a full cycle (Tr. 377-378). This was primarily because of muddy conditions in the area. Mr. Graham had instructed Mr. Greenland that if a full cycle was not completed he wanted to see Hilderbrandt and his partner to discuss the situation (Tr. 377). Accordingly, at the end of shift on the morning of April 17, Graham, Greenland, and Wollant met with Hilderbrandt and his partner. There was a discussion, the content of which is in dispute. Hilderbrandt claims that he stated he could not work safely and at the same time perform the amount of work required by Mr. Graham. Graham and Greenland, on the other hand, testified that Hilderbrandt made no complaints relating to safety. They testified that Hilderbrandt complained that because of the muddy conditions in the mine he could not complete a cycle. I credit the testimony of Graham and Greenland. At the end of the conversation, Greenland asked Hilderbrandt if he could commit to a half cycle. Hilderbrandt replied that with another 20 - 30 feet of rehabilitation work it might be possible (Tr. 121).

Hilderbrandt received no discipline for his work performance during the shift of April 16, 1987, and in fact received no disciplinary action after the April 3, 1987 EIAR (Tr. 388-389).

After the meeting with Hilderbrandt on the morning of April 17, 1987, Mine Superintendent Graham went to the GP3 drift where Hilderbrandt had been working to experience the working conditions first hand to determine what amount of work could be performed. He concluded that because of the muddy conditions in the drift he had expected too much work from his employees (Tr. 384).

During the afternoon of April 17, 1987, Hilderbrandt and his partner returned to the mine (Tr. 385). When Hilderbrandt

returned, Mine Superintendent Graham informed him that he owed him an apology regarding the amount of work which could be completed (Tr. 387). Hilderbrandt denies such a conversation. He testified that the only conversation was Hilderbrandt informing Graham that he (Hilderbrandt) quit. Other evidence submitted by Hilderbrandt supports the truth and accuracy of Graham's testimony of what was said at the meeting. In Hilderbrandt's Exhibit 11, page 9, Hilderbrandt informed the MSHA investigator investigating his discrimination claim that Graham stated as follows: "You guys are right. I apologize at this time for riding you so hard". Ed Sinner, another supervisor, overheard this conversation (Tr. 466). Although Graham apologized, Hilderbrandt quit without giving Graham the opportunity to explain what he intended to do with respect to Hilderbrandt's work area in the future.

Hilderbrandt terminated his employment on April 17, 1987. He took no steps to inform the Mine Safety and Health Administration of the alleged unsafe conditions in the mine, and he did not, as safety representative, take any steps to protect opposite crews of what he contends he felt was an unsafe condition.

Since he terminated his employment on April 17, 1987, Hilderbrandt has not requested employment with Hecla. He testified that he could not work there under the present management (Tr. 143).

The Mine Safety and Health Act, 30 U.S.C. 815(c), prohibits an employer from discriminating against a miner for engaging in protected activity.

In a discrimination case, the burden of proof is upon the complainant to show that (1) he engaged in protected activity and (2) that adverse action was taken against him which was motivated in any part by the protected activity. The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone.

A constructive discharge can occur under the provisions of section 105(c) of the Act. For a miner to sustain his claim of a constructive discharge, he must show that the operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. Hilderbrandt failed to do this.

With respect to the events of April 3, 1987, Hilderbrandt engaged in protected activity in making safety complaints. Hilderbrandt's complaints about the smokey conditions were not unique to him. Many employees complained about smoke in the mine, and MSHA was aware of the condition. Hilderbrandt was not required to work in the smokey area of the mine. Hecla reasonably determined that an insufficient amount of work was performed by Hilderbrandt during his April 3rd work shift. It is concluded that the operator had valid nondiscriminatory reasons for issuing the April 3rd Employee Improvement Action Report which cost Hilderbrandt neither time nor money.

The complaints made by Hilderbrandt to the Mine Safety and Health Administration during the week of April 5, 1987, constitute protected activity, and if Hilderbrandt had made safety complaints to management on April 17, 1987, such complaints would also be protected activity. However protected activity in and of itself is not actionable. It is necessary for the miner to show that adverse action resulted in some part from that protected activity to establish a prima facie case. Hilderbrandt has failed to establish a prima facie case, since he has not shown that any adverse action was taken against him which in any part was motivated by his protected activity.

Hilderbrandt's claim that because of the events of April 3 through April 17, 1987, he was forced to work in undesirable area of the mine at which he could not earn a production bonus are not supported by the facts. Hilderbrandt worked in the same area (GP3 drift) before April 3, 1987, as well as afterward doing the identical work for the identical pay. Moreover, his Exhibit 16 shows that he was able to earn a production bonus. No adverse action was taken against him for engaging in protected activity.

Even if Hilderbrandt believed conditions in the mine or the GP3 drift, where he worked before and after April 3rd and 4th were so intolerable that he could no longer safely work there, his belief was not reasonable. The objective evidence, including the fact that he took no steps to protect miners on the opposite shift, which he had an affirmative duty to do as safety representative, the fact he did not report to MSHA any alleged unsafe conditions of the GP3 drift where he worked and the fact other miners worked under identical conditions, and did not feel compelled to resign, tend to show that Hilderbrandt did not have a good faith reasonable belief that the work was unsafe or unhealthful and I so find. Moreover, an employer is only required to provide a reasonable option. Although Graham on the afternoon of April 17, 1987 apologized for his high work expectations, Hilderbrandt without further discussion quit his job. He failed to report back to work and did not ever seek employment with Hecla again.

Hilderbrandt was not discriminated against in violation of section 105(c) of the Act. He was not subjected to a discriminatory constructive discharge. The preponderance of the evidence does not establish that Hecla created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. Accordingly, Hilderbrandt's claim is denied.

ORDER

Based on the above findings of fact and conclusions of law IT IS ORDERED that the complaint of discrimination filed herein is DISMISSED.


August F. Cetti
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

September 1, 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 88-235
Petitioner : A. C. No. 46-03805-03854
v. :
: Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY, :
Respondent :
:

ORDER DENYING MOTION FOR SUMMARY DECISION

Statement of the Case

On February 17, 1988, Respondent was served with Order No. 2895699 which alleged as follows: "The 24 inches of unobstructed clearance is not being provided over the E2 track overcast where the long run coal conveyer belt cross's, (sic) due to no steps provided to cross safely over, concrete blocks, empty can being used on the inby side and a wooden pallet on outby side with broken runners being used to climb top of the overcast, creating a tripping, stumble or falling hazard. One person slipped while trying to cross this overcast on 2/16/88 also this has been reported for steps since 2/15/88. Safeguard issued 5/8/87 no. 2699584."

Safeguard No. 2699584, which was issued on May 8, 1987, and which was referred to in Order No. 2895699, provides as follows:

"The clearance space along the vacuum breaker located near the top of the hill is restricted with loose rock. This creates a tripping or stumbling hazard.

This is a notice to provide safeguards requiring that all vacuum breakers, similar equipment and where miners are required to work or travel to complete their duties, shall be provided no less than 24 inches of unobstructed clearancspace."

On June 13, 1988, Petitioner filed a Petition for Assessment of Civil Penalty, and Respondent filed its Answer on September 19, 1988. A Prehearing Order was issued on September 26, 1988, directing the Parties to confer for the purpose of discussing settlement. The Parties advised that the case could not be settled, and pursuant to notice the case was set for hearing on

June 7 - 8, 1989. On May 18, 1989, in a telephone conference call with the undersigned initiated by Counsel for both Parties, it was indicated by Counsel that the case might be settled or submitted on stipulated facts or a motion for summary decision. Counsel accordingly requested that the hearing set for June 7 - 8 be adjourned. The request was granted and the hearing previously set was adjourned.

On June 28, 1989, Respondent filed a Motion for Summary Decision, and Petitioner filed its Response on July 31, 1989.

Discussion

In order to prevail in its Motion, Respondent has the burden of establishing, pursuant 29 C.F.R. § 2700.64(b), that, considering the entire record, there is no genuine issue of any material fact and that it is entitled to summary judgment as a matter of law.

I

Respondent has advanced a number of arguments in support of this Motion. It first argues that the safeguard herein is invalid as it is of general applicability. In essence, Respondent refers to the language of the safeguard requiring an unobstructed clearance space of not less than 24 inches with regard to "vacuum breakers," and "where miners are required to work or travel to complete their duties," and argues that all mines have areas where miners are required to work. Respondent also refers to Petitioner's admission that breakers are common in underground mines.

In order to prevail, and to justify a holding that the safeguard herein is invalid, Respondent must establish that there are no material facts at issue disputing its assertions that the safeguard is of general applicability. In order to resolve this issue an inquiry must initially be made as to whether there is any genuine issue as to the circumstances under which the underlying safeguard was issued, and the existence of or need for similar safeguards at other mines. (See Southern Ohio Coal Company, 10 FMSHRC 963, at 966, 967 (1988)). Petitioner in its response to Respondent's request for admissions, has specifically denied that the hazard of not having steps to the cross over at the overcast, was not greater at the subject mine than at other mines on the ground that the subject mine ". . . is known to have a greater amount of water seeping into the entries on the mine floor and equipment, thereby increasing the likelihood of slip, trip, and fall hazards." Respondent argues that the issue of the presence of water at the subject mine is not material on the ground that water is common in mines. Respondent also argues that the original safeguard was not issued because of any water accumulation.

The initial sentence of the original safeguard indicates essentially that a "clearance space" along the vacuum breaker was restricted with loose rock thus creating a tripping or stumbling hazard. Nonetheless, I conclude that it would be unduly harsh at this juncture to deprive Petitioner of the opportunity to present evidence on the issue of the extent if any, of any water accumulation at the subject mine, and whether this was a factor peculiar to the subject mine which provided a hazard which the original safeguard was intended to cure.

II

In essence, it is Respondent's position, in the alternative, that if the safeguard in question is accorded a narrow construction, it does not encompass the conditions set forth in the Order. In this connection Respondent maintains that an overcast is clearly not a vacuum breaker, which was admitted to be an electrical device approximately 19 feet in length, 72 inches or more in width and 34 inches height. Respondent also argues that an overcast is manifestly not "similar equipment" as referred to in the safeguard which would relate to other electrical devices of the same approximate size as the breaker. Further, Respondent argues that the phrase in the safeguard "where miners are required to work or travel to complete their duties," cannot refer to all areas of the mine, but is to be limited to requiring 24 inches of clearance only in situations where vacuum breakers or similar pieces of equipment are placed in areas where miners are required to work or travel. Petitioner, on the other hand, has argued that there is a genuine issue as to whether a track overcast is "similar equipment" as envisioned by the safeguard. In this connection, Petitioner essentially indicates that the inspector who issued the safeguard in question will testify that the breaker in the safeguard and "inter alia" overcast present tripping or stumbling hazards unless they provide no less 24 inches of unobstructed clearance space. While it is clear that safeguards should be given a strict construction (See Southern Ohio Coal Company, 7 FMSHRC 509 (1985); Jim Walter Resources, Incorporated, 7 FMSHRC 493), it is premature to dispose of this issue presently without affording the Petitioner the opportunity to present evidence as to the applicability of the original safeguard to the cited condition.^{1/}

^{1/} In this connection, I note that the record presently does not contain any evidence to a physical description of the overcast in question. Nor is there adequate evidence of its use and location.

III

Respondent next argues, in the alternative, that the safeguard should be declared to be invalid as it does not clearly set forth the conduct required by Respondent in order for it to comply with the safeguard. In this connection it argues that the phrase "similar equipment" is "indeterminately vague." Respondent also argues that the reference in the safeguard to areas where men are required to work or travel "compounds the problem of determining what the safeguard is addressing." Respondent is correct that under established case law, a safeguard is invalid if it does not identify with specificity the nature of the hazard at which it is directed and the conduct required of the Operator to remedy such hazard. (Southern Ohio, supra, at 512). However, Petitioner indicates that it intends to call at an evidentiary hearing the inspector who issued the underlying safeguard, and the inspector who issued the subject 104(d)(2) Order. Petitioner argues that the question as to whether the Respondent was on notice that the overcast was required to be maintained free of debris when miners regularly traveled over the overcast, is a issue that requires the taking of testimony with regard to conditions present at the overcast as well as the testimony of the inspector who issued the safeguard.

In general, Petitioner has the burden of establishing a prima facie case of a violation. (Miller Mining Company Incorporated v. Federal Mine and Health Review Commission, 713 F.2nd 487 (9th Cir. 1983. See also, Old Ben Coal Corporation v. IBMA, 523 F.2nd 25, 39 (7th Cir. 1975)). As such, Petitioner has the burden of establishing all elements of the Order including the validity of the underlying safeguard. Therefore, I find that it would be unfair at the juncture to deprive Petitioner of the opportunity to adduce evidence on the issue of whether the safeguard was sufficiently clear to have put the Respondent on notice that the alleged violative condition with regard to the overcast fell within the safeguard's prohibition.

IV

Lastly, Respondent argues, in the alternative, that the subject safeguard should be deemed invalid as it is inconsistent with the intent of section 314 of the Federal Mine Safety and Health Act of 1977 (the Act). In this connection, Respondent argues, in essence, that the authority to issue safeguards, contained in section 314(b), supra, pertains to components of mechanical devices similar to those enumerated in section 314(a), whereas in contrast the subject safeguard pertains to clearance next to an item of equipment. Petitioner, in its response to Respondent's Motion, indicates essentially that its position on this issue is predicated upon its argument that "Congress intended that individual inspectors would have broad authority to issue safeguards addressing hazards encountered by miners entering into, traveling in, and exiting mines." Petitioner's Response does not allege that there is any genuine issue as to any material fact with regard to this issue.

The safeguard at issue was based on 30 C.F.R. § 75.1403, but not on any of the criteria set forth in 30 C.F.R. § 75.1403-1 through §§ 75.1403.11. (Respondent's First Set of Admissions, Request No. 7, admitted by Petitioner). The language in section 75.1403 is the same as that contained in section 314(b) of the Act. This section provides as follows: "Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." (Emphasis added.)

The safeguard at issue requires that breakers, similar equipment "and where miners are required to work or travel" shall be provided with proper clearance. Respondent, in Section II of its Memorandum asserts that the safeguard should be read as requiring proper clearance for breakers and similar equipment when these items are located where miners work and travel. Should the safeguard be accorded this interpretation it would appear to regulate the clearance next to an item in a mine. As such, it would not regulate transportation, and would be beyond the grant of authority contained in section 314(b), supra.

Respondent, is the Party moving for Summary Decision, and as such has the burden of establishing its right to a summary decision. I find Respondent has not met this burden. The safeguard is somewhat ambiguous, but, on its face, relates to areas where miners travel, and thus might be within the grant of authority, set forth in section 314(b), supra, to issue safeguards relating to transportation of men and materials. At this stage of the proceedings, I can not conclude as a matter of law, that Respondent's interpretation of the safeguard is correct. Petitioner shall be allowed to present evidence on this issue.

Therefore, for all the above reasons, Respondent's Motion for Summary Decision is not allowed.

ORDER

It is ORDERED that Respondent's Motion for Summary Decision is DENIED.


Avram Weisberger
Administrative Law Judge
(703) 756-6210

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 12 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 89-192
Petitioner : A. C. No. 46-01456-03825
v. :
: Docket No. WEVA 89-199
EASTERN ASSOCIATED COAL : A. C. No. 46-01456-03824
CORPORATION, :
Respondent :
: Federal No. 2 Mine
:

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

On January 26, 1989, a Federal Mine Safety and Health Inspector issued Respondent two section 104(d)(2) orders in conjunction with two section 107(a) orders (issued under sections 104 and 107 of the Federal Mine Safety and Health Act of 1977 (The Act)). On August 18, 1989, Respondent filed a Motion for Summary Decision and Memorandum in Support thereof, and on September 5, 1989, Petitioner filed its Reply.

Respondent's Motion is predicated upon its assertion that as a matter of law, only a 104(a) Citation may be issued in conjunction with a 107(a) imminent danger order. Respondent argues that the plain language of section 107(a), supra, allows for only the issuance of a citation under section 104(a), supra, and that the issuance of a 104(d)(2) order is improper. Respondent by implication, refers to the following language from section 107(a), supra: "The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110." Respondent argues that, inasmuch as section 104 distinguishes between order and citation, had Congress intended orders to be included in section 107(a), supra, it would have so stated.

The legislative history of the Act does not contain any statement or discussion relevant as to whether the language in section 107(a), supra, was intended to preclude the issuance of a section 104(d) order.^{1/} Thus, I have no basis to conclude, as

^{1/} The relevant legislative history cited by Respondent at pages 4 - 5 of its Memorandum merely reiterates the statutory language.

argued by Respondent, that by explicitly not precluding the issuance of a citation under section 104(a), supra, Congress intended thereby to preclude the issuance of a section 104(d) order. Such a construction is not supported by the legislative history of the Act, nor does a plain reading of the language of section 107(a), supra, unequivocally dictate such a construction.

I do not find any support for Respondent's argument that it is "obvious" that the language of section 104, supra, is intended to be mutually exclusive of section 107(a), supra. There is no language in section 104(d)(2), supra, which makes reference to section 107(a), supra. Nor is there support for Respondent's position in any legislative history of the Act. I do not find merit in Respondent's argument that inasmuch as section 104(d)(1), citations may be issued only where there is no imminent danger, it follows that similarly a section 104(d)(2) order may not be issued in conjunction with a section 107(a) order. Section 104(d)(1), supra, as pertinent, provides if an inspector finds a violation of a mandatory health or safety standards and ". . . if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause of effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act." (Emphasis added). I find this language insufficient to base a conclusion that Congress intended that a section 104(d)(2) order may not be issued in conjunction with a section 107(a) order.

A reading of the plain language of section 104(d)(1) and (2) indicates that, as set forth in Petitioner's Memorandum:

[I]f an inspector finds a violation constituting an unwarrantable failure on the part of the operator within ninety days after the issuance of a Section 104(d)(1) citation, the inspector "shall" issue an withdrawal order under Section 104(d)(1). Thereafter, the inspector "shall" issue a Section 104(d)(2) order for each violation found similar to the violation found in the Section 104(d)(1) order if the new violation also constitutes an unwarrantable failure on the part of the operator. This "chain" continues until a complete inspection of the mine reveals no further unwarrantable violations.

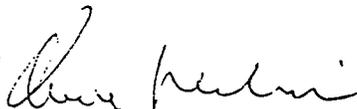
I find, accordingly, that, as argued by Petitioner, if Respondent's interpretation of the Act is adopted, it will result in the frustration of the statutory scheme embodied in section 104(d)(1) and (2), supra, as an inspector would be prevented from issuing orders required by section 104, supra. As correctly argued by Petitioner in its Memorandum, "If the Section 104(d)(1)

or (2) order(s) constitutes an imminent danger, or a portion of an imminent danger, then the inspector is forced to choose which portion of the statute he will not enforce. He can issue the Section 107(a) order or the order(s) under Section 104(d), but not both. An interpretation forcing such a decision, which could result in the unjustified release of an operator from the Section 104(d) "chain" or the unjustified failure to issue an imminent danger order when such a danger exists, cannot be justified."

Thus, for all these reasons, I conclude that, as a matter of law, it is not true that only a 104(a) citation may be issued in conjunction with a 107(a) order. Hence, I find it has not been established, that, as a matter of law, the section 104(d)(2) order herein was improperly issued, and should be amended to a section 104(a) citation.

ORDER

It is ORDERED that Respondent's Motion for Summary Decision is DENIED.


Avram Weisberger
Administrative Law Judge
(703) 756-6210

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 20, 1989

JIM WALTER RESOURCES, INC., : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. SE 89-16-R
: Citation No. 3012039; 10/25/88
: :
SECRETARY OF LABOR, : No. 3 Mine
MINE SAFETY AND HEALTH : Mine I.D. # 01-00758
ADMINISTRATION (MSHA), :
Respondent :
:
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 89-42
Petitioner : A.C. No. 01-00758-03732
v. :
: No. 3 Mine
JIM WALTER RESOURCES, INC., :
Respondent :

DECISION
AND
ORDER DENYING
MOTION TO DISMISS

Before: Judge Melick

By oral motion at hearings in these consolidated cases and by subsequent written motion the Secretary of Labor moved to dismiss the "Notice of Contest". The Secretary argues in her motion that mine operator Jim Walter Resources, Inc., (Jim Walter) cannot obtain review of the Secretary's decision denying a modification to a ventilation plan for the reason that the proposed modification is also the subject of another mandatory standard.

The pleadings show that on September 29, 1988, Jim Walter submitted for the Secretary's review a supplement to its ventilation plan in which it stated as follows: "a ventilation change of 25,000 cfm or greater of any section split will be considered a major air change and the change will be made according to 75.322." The Secretary through the Mine Safety and Health Administration (MSHA) did not approve the request and Jim Walter thereafter informed MSHA that it

no longer adopted its existing ventilation plan under 30 C.F.R. § 75.316. MSHA thereafter issued a citation alleging a violation of that standard. The violation was abated when Jim Walter readopted its prior approved plan without incorporating the requested change.

Section 303(o) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," requires, in relevant part, that a mine operator must adopt a ventilation plan which has been approved by the Secretary. These provisions are restated in the regulatory standard at 30 C.F.R. § 75.316 under which the subject citation was issued. In this case it appears that Jim Walter is seeking through modification of its ventilation plan to obtain clarification and objectivity in the application of the regulatory standard at 30 C.F.R. § 75.322. The latter standard provides that "changes in ventilation which materially affect the main air current or any split thereof and which may affect the safety of persons in the coal mine shall be made only when the mine is idle."

As Jim Walter noted in its Brief it is apparent that this regulatory standard was written with the understanding that ventilation changes which may materially affect the main air current in one mine may not have the same effect in another mine. As Jim Walter further observes, whether a change in air quantity of, for example, 9,000 cfm, has a material effect will depend upon the particular mine's layout and conditions, as well as upon the ventilation plan it adopts for meeting the requirement of the Act.

Jim Walter alleges in this case that it performed studies of changes in ventilation in the subject No. 3 Mine and that the resulting data demonstrated that ventilation changes of up to 25,000 cfm had no material affect upon the main air current or any split thereof, because of the particular ventilation system and manner of ventilating that mine. Jim Walter maintains that the data obtained was submitted to MSHA by letter dated January 19, 1988, and that it requested a determination by MSHA that such a change (of up to 25,000 cfm) was not a major change at the subject mine.

MSHA responded to the request by letter dated February 11, 1988, which stated in part as follows:

The National Coal Mine Health and Safety Inspection Manual for underground coal mine states, in part, that any ventilation change in which any split of air is increased or decreased by an amount equal to or in excess of 9,000 cfm is considered a major

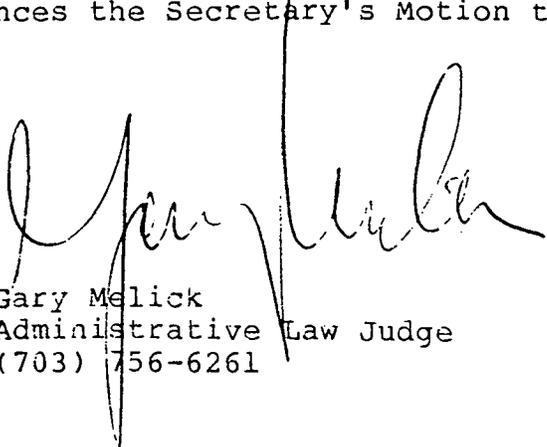
change. Historically, this 9,000 cfm limit has been established for about 17 years; therefore this request is denied.

Subsequently Jim Walter submitted a revision to its approved ventilation plan pursuant to 30 C.F.R. § 75.316 stating that because of the particular ventilation system utilized at this particular mine, ventilation changes of up to 25,000 cfm would be made while the No. 3 Mine was still operating. MSHA refused to approve the change. Jim Walter, nevertheless briefly adopted this change thus leading to the issuance of the citation by MSHA and the readoption of the prior approved plan.

In her Motion to Dismiss the Secretary argues that Jim Walter is impermissibly attempting to expand the scope of its ventilation plan in this case in that ventilation plans may not infringe upon subject matter which could have been readily dealt with in mandatory standards of universal application" citing Zeigler Coal Company v. Kleppe, 536 F.2d 398 at 407 (D.C. Cir. 1976).

In the instant case Jim Walter maintains that it has generated data which indicate that changes in ventilation of up to 25,000 cfm can be made at its No. 3 mine while the mine is operating since such changes do not materially affect the main air current. Whether or not the allegation may subsequently be proven in this case the issue is clearly mine specific in that it concerns the particular conditions at the Jim Walter No. 3 mine and is not a matter which can be dealt with by a single mandatory standard applicable to all mines. The Secretary's argument herein is accordingly without merit.

The Secretary also appears to claim in this case that because of the existence of another regulatory standard, 30 C.F.R. § 75.322, the subject matter of that standard cannot be the subject of any portion of Jim Walter's ventilation plan. This argument is without legal support and is likewise rejected. Under the circumstances the Secretary's Motion to Dismiss is denied.



Gary Melick
Administrative Law Judge
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