

NOVEMBER 2003

THERE WERE NO COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

11-10-2003	Colorado Lava, Inc.	EAJ 2001-2	Pg. 667
11-17-2003	Eddie M. Jeanlouis, Sr. V. Morton International	CENT 2002-279-DM	Pg. 673
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ADMINISTRATIVE LAW JUDGE ORDERS

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NOVEMBER 2003

No cases were filed in which Review was granted during the month of November:

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

Secretary of Labor, MSHA, on behalf of Wyman Owens, Gary Watson and Henry Johnson and United Mine Workers of America v. Drummond Company, Inc., Docket Nos. SE 2002-134-D, 135-D, 136-D. (Judge Weisberger, October 8, 2003)

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, Suite 9500
Washington, DC 20001

November 10, 2003

COLORADO LAVA, INC.,	:	EQUAL ACCESS TO JUSTICE
Applicant,	:	PROCEEDING
	:	
v.	:	Docket No. EAJ 2001-2
	:	
SECRETARY OF LABOR,	:	Mine ID No. 05-04232
MINE SAFETY AND HEALTH	:	
ADMINISTRATION	:	Mine: Antonito Plant
Respondent.	:	

DECISION

Appearances: Mark W. Nelson, Esq., Mark W. Nelson, Esq., Hall & Evans, LLC, 1200 17th Street, Suite 1700, Denver, CO, for the Applicant;
Mark R. Malecki, Esq., U.S. Department of Labor, Arlington, VA, for the Respondent.

Before: Judge Weisberger

This proceeding is before me based upon an Application for Award of Fees and Expenses under the Equal Access to Justice Act, 5 U.S.C. Section 504 (EAJ Act), and a subsequent Amended Application. In the underlying discrimination proceeding brought under Section 105(c)(2) of Federal Mine Safety and Health Act of 1977 (the Act), a decision was issued sustaining Colorado Lava's Motion to Dismiss, which had been made at the conclusion of the Secretary's case, and finding that the Secretary had not established its prima facie case. 23 FMSHRC 213 (Feb 13, 2001). The Secretary petitioned the Commission for discretionary review which was granted by the Commission. In its decision, the Commission vacated the dismissal of the Discrimination Complaint, and sustained the initial findings of protected activities and adverse actions. 24 FMSHRC 350 (April 2002). The Commission also held that circumstantial evidence of discriminatory motivation and reasonable inferences drawn therefrom may be used to sustain the prima facie case. The Commission noted findings in the initial decision that pointed to evidence of indicia of disparate treatment and also noted other evidence of record that could support a finding of disparate treatment. 24 FMSHRC, *supra*, at 355. The Commission remanded the matter for further proceedings to consider all the evidence tending to show improper motivation including that of disparate treatment.

Colorado Lava prevailed in the Decision on Remand in that it was found that the Secretary failed to establish, by a preponderance of evidence, that the adverse action taken by

Colorado Lava was motivated in any part by the miner's protected activity.¹

The EAJ Act, which is implemented by the Commission at 29 C.F.R. Section 2404.00 *et. seq.*, provides that a prevailing applicant may be awarded attorney's fees and expenses unless the position of the Secretary was substantially justified. In addition, the Act as implemented by the Commission provides that an eligible party may receive an award of fees and expenses if the demand of the Secretary is substantially in excess of the decision of the Commission and unreasonable when compared with such decision. In essence, it is the position of Colorado Lava that it is entitled to attorney's fees and expenses on the ground that it prevailed in the proceeding brought against it by the Secretary, and that the Secretary's decision to commence the proceeding was not substantially justified. As a further basis for the award of fees, Colorado Lava asserts that the Secretary's demand was substantially in excess of the Commission's decision and was unreasonable. The Secretary argues that an award should be denied regarding the first statutory basis asserted by Colorado Lava since the Secretary's position was reasonable in law and fact. The secretary also seeks to avoid an award by asserting, in essence, that since Colorado Lava prevailed in the underlying proceeding, it is not entitled to an award under Section 2704.105(b), *supra*. The Secretary also argues that an award under this Section should be denied as its demand was not unreasonable. For the reasons set forth below I agree with the Secretary's position, and find that Colorado Lava's application should be denied.

I. Whether the Secretary's Position was Substantially Justified (29 C.F.R. §105(a))

A. The underlying Discrimination Proceeding.

In October 1999 Andrew Garcia, who was employed at Mountain West Colorado Aggregates (MWCA) Antonito bagging facility made safety complaints regarding some equipment to his supervisor, David McCarroll, the plant manager. Subsequently, Garcia complained to MSHA about the condition of this equipment. McCarroll acknowledged being upset with Garcia for complaining to MSHA.

On June 5, 2000, Colorado Lava purchased the Antonito site from MWCA. Prior to that time, Ronald Bjustrom, the 80 percent owner of Colorado Lava, informed McCarroll that he would be retained as plant manager. Also, prior to June 5, 2000, Bjustrom retained Terry Kissner, who is not an employee of Colorado Lava, to do the hiring. Kissner interviewed all MWCA employees, and made the final decision to rehire all of them except Garcia and Ernie Lucero, a mechanic. Bjustrom did not participate in that decision.

¹The miner complainant, Andrew Garcia, appealed the decision to the United States Court of Appeals, Tenth Circuit. Subsequently, Garcia and Colorado Lava filed before the Tenth Circuit, a stipulation to dismiss, asserting that pursuant to the agreement of the parties they stipulated that the appeal may be dismissed with prejudice.

B. The Parties' Arguments

1. Colorado Lava's Arguments

In essence, Colorado asserts, in support of its argument that the Secretary's position was not substantially justified, that at the time the depositions were taken, prior to the trial of the discrimination proceeding, MSHA's special investigator admitted he did not have any evidence that McCarroll was involved in deciding who Colorado Lava was going to hire. He also admitted he did not have any evidence that McCarroll shared with Bjustrom information regarding Garcia's protected activities. Further, Colorado Lava asserts that the deposition testimony indicates there was not any evidence that MSHA had investigated why Kissner chose another employee, Robert Duran over Garcia. Lastly, Colorado Lava asserts that during MSHA's investigation of Garcia's discrimination complaint, it discovered that Bjustrom and Kissner were not made aware of Garcia's protected activities until after Duran was hired instead of Garcia. Additionally, Kissner told MSHA during its investigation that he had never heard of Garcia until June 5, 2000, when he interviewed him.

2. The Secretary's Arguments

In response, the Secretary refers to the fact that it was found in the initial decision, and concurred in by the Commission, that Garcia had engaged in protected activities and that Colorado Lava had taken adverse action against him. Further, the Secretary argues that its position that Garcia was discriminated against was reasonable in fact, based on inferences of disparate treatment by Colorado Lava of Garcia, which raises an inference of discriminatory motivation.

C. Discussion

The burden of proof is on the Secretary to establish that her position was substantially justified, Section 105(b), supra. In Secretary v Black Diamond Construction Inc., 21 FMSHRC 1188, 1194 (Nov. 1999), the Commission, citing Pierce v Underwood, 487 U.S. 552, 565 (1988), noted that in Pierce, the Supreme Court "... set forth the test for substantial justification as follows: 'a position can be justified even though it is not correct, and we believe it can be substantially (i.e. for the most part) justified if a reasonable person could think it correct, that is, if it had a reasonable basis in law and fact.' Id. at 566 n.2."

In support of the Secretary's position, I note that in the initial decision in this matter it was found that Garcia had engaged in protected activities and that Colorado Lava had taken adverse action against him. (21 FMSHRC, supra.) These findings were concurred in by the Commission. (21 FMSHRC, supra.) I take cognizance of the fact that prior to the hearing on the underlying discrimination complaint, the MSHA's special investigator who investigated Garcia's discrimination complaint testified in a deposition that in his investigation he did not learn of any evidence that McCarroll ever shared any information with Bjustrom concerning any

protected activity that Garcia engaged in while an employee of MWCA. The investigator also admitted that he did not have any “understanding of what information, if any” that Bjustrom gave to Kissner concerning any employees prior to Kissner’s conducting his interviews (Colorado Lava’s Amended Application, Exhibit C). The MSHA Investigator also indicated he was not aware of any evidence that McCarroll had any role or involvement in deciding who was doing to be hired by Colorado Lava. Further, he conceded that no attempt was made by MSHA to determine how much experience Garcia had versus anyone else who was retained by Colorado Lava. Also, Bjustrom testified at the temporary reinstatement hearing that McCarroll told him that Garcia had filed grievances, but he (Bjustrom) did not take any part in the decisions by Kissner regarding whom Colorado Lava should hire from among MWCA’s employees. Further, Kissner testified at the temporary reinstatement hearing that McCarroll had not provided him with any information regarding the interviewees, and that he decided to hire Duran over Garcia because the former had more experience at the specific work site in question.

It is the position of Colorado Lava, in essence, that based on these facts, known to the Secretary prior to the filing of its complaint of discrimination, no reasonable person could conclude that there was any causal connection between Garcia’s having engaged in protected activities while an employee at MWCA, and the adverse action taken by Colorado Lava not to rehire him.

The Commission, in vacating the initial decision in the discrimination proceeding, held that “... the consideration of indirect evidence when examining motivation and intent necessarily involves the drawing of inferences. As the Commission stated in Bradley v. Belva Coal Co., ‘circumstantial evidence [of discriminatory motivation] and reasonable inferences drawn therefrom may be used to sustain a prima facie case’ 4 FMSHRC 982, 992 (June 1982).” 24 FMSHRC, supra, at 354. The indicia discriminatory intent include the disparate treatment of the complainant. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (Nov. 1981) In this connection, the Commission in vacating the initial discrimination decision, noted the indicia of disparate treatment found in that decision. Specifically, it noted that although Garcia was not chosen by Colorado Lava to be hired as a loader operator position because another employee had more experience, 24 FMSHRC, supra. However, a mechanic with less experience than another employee was offered a position with Colorado Lava, and the latter, who was not rehired, was subsequently offered another position with the Company, but Garcia was not, 24 FMSHRC, supra. Also, when considering which positions to eliminate, Bjustrom only evaluated the loader operator and mechanic positions, but no other positions, 24 FMSHRC, supra. Further, the Commission noted other evidence of record that could support a finding of disparate treatment, 24 FMSHRC, supra.

In the remand decision, it was held, based on the above evidence, that it may be inferred that Garcia was the subject of disparate treatment, 24 FMSHRC, supra. However, the probative weight to be accorded inference evidence of disparate treatment, when considering all the remaining indicia of motivation set forth in Chacon, supra, is strictly a matter of judgement. Thus, the fact that it was concluded in the decision on remand that the Secretary failed to

establish by a “preponderance of the evidence ... that the adverse action taken by Colorado Lava was motivated in any part by Garcia’s protected activities” 25 FMSHRC 144, 151 (March 2003), does not mean that a reasonable person could not have reached a contrary conclusion by weighing the evidence differently. Under these circumstances it is clear the Secretary could not have been expected to predict how a judge would weigh inferences versus live testimony, and all the various Chacon factors. See Concrete Aggregates, LLC, 25 FMSHRC 500, 503 (Aug. 2003) (Judge Manning).

For all these reasons I conclude the Secretary had met its burden in establishing that its position in this case was substantially justified.

II. Entitlement to an Award Under Section 2704.105(b), supra.

Colorado Lava also predicates an award under Section 105(b), supra, asserting that the Secretary’s demand was substantially in excess of the decision of the Commission, and was unreasonable when compared with that decision.

Section 105(b), supra, provides, as pertinent, that where the Secretary’s demand is substantially in excess of the Commission’s decision “... the Commission shall award to an eligible applicant fees and expenses.” (Emphasis added.) In contrast, an award under 105(a), supra, is to be awarded to a “prevailing applicant” where the Secretary’s position was not substantially justified.

29 C.F.R. § 2704.100 sets forth the purpose of regulations implementing the EAJ as follows: “[A]n eligible party may receive an award when it prevails over the Mine Safety and Health Administration unless the Secretary’s position is substantially justified.” (Emphasis added) Section 2704.100, supra, next provides as follows: “In addition to the foregoing ground of recovery, an eligible party may receive an award if the demand of the Secretary is substantially in excess of the decision of the Commission.” (Emphasis added.)

It appears that under the Commission’s rules it is contemplated that a prevailing party, such as Colorado Lava herein, who seeks an award of fees is eligible to apply only under Section 105(a), supra. This conclusion is borne out by the fact that Section 2704.104 sets forth the different eligibility requirements of applicants for awards of fees under Sections 105(a) and (c), supra. The criteria for eligibility under Section 105(b), supra, pertain solely to the applicants net worth, number of employees or annual receipts, Section 2700.104(c). In contrast, 29 C.F.R. § 2704.104(b) sets forth eligibility criteria “[f]or purposes of awards under Section 2704.105(a) for prevailing parties [.]” (Emphasis added). Thus, as stated by the Commission in L & T Fabrication and Construction, Inc., 22 FMSHRC 509, 513 (Apr. 2000), in discussing eligibility for an award under Section 504(a)(4) of the EAJ Act, which is implemented in Section 105(b), supra, as follows: “the 1996 Amendments to the EAJ [which added Subsection 4 to Section 504(a) of the Act] expanded the basis for covering fees and expenses to include certain claims against private parties who did not prevail against the government.”

Considering all the above, I conclude that a prevailing party is entitled to an award under Section 105(a), supra. In contrast, an award under Section 105(b) is available for those eligible entities who were not a prevailing party. Inasmuch as Colorado Lava was the prevailing party therein, I find that it is not entitled to any award under Section 105(b), supra.

D. Conclusion

For all the above reasons, I conclude that Colorado Lava is not entitled to an award of fees and expenses under the Equal Access to Justice Act. Accordingly, its application is denied.

ORDER

It is **Ordered** that this case be **Dismissed**.


Avram Weisberger
Administrative Law Judge

Distribution (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 17, 2003

EDDIE M. JEANLOUIS, SR.,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. CENT 2002-279-DM
v.	:	SC MD 2002-04
	:	
MORTON INTERNATIONAL,	:	Weeks Island Mine & Mill
Respondent	:	Mine ID 16-00970

SUPPLEMENTAL DECISION
AND
FINAL ORDER APPROVING SETTLEMENT

Appearances: Toni K. Jeanlouis, St. Martinsville, Louisiana, for the Complainant;
Willa B. Perlmutter, Esq., Patton Boggs, LLP, Washington, DC for the Respondent.

Before: Judge Feldman

This case is before me based on a discrimination complaint filed pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (1994) (the "Act"), by Eddie M. Jeanlouis, Sr., against Morton International ("Morton"). This discrimination proceeding concerns Jeanlouis' March 23, 2001, two week suspension without pay. Jeanlouis seeks to recover lost wages and related expenses.

Following an evidentiary hearing, it was determined that Morton's suspension of Jeanlouis violated section 105(c) of the Act. *Decision on Liability*, 25 FMSHRC 536 (Sept. 2003) (ALJ). In the initial liability decision, the parties were directed to agree on the specific relief that should be awarded, or, alternatively, to file documentation in support of their separate proposals for relief. *Id.* at 548-49. After several telephone conferences, the parties advised that they had reached a settlement agreement. On November 13, 2003, Morton filed a Motion to Approve Settlement.

The settlement provisions include Morton's waiver of its right to appeal the *Decision on Liability*, Jeanlouis' withdrawal of his discrimination complaint, and other confidential provisions concerning consideration and the release of claims. I have reviewed the settlement terms and I conclude the parties' agreement is reasonable and in the public interest.

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



Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

Toni K. Jeanlouis, Eddie M. Jeanlouis, Sr., 1502 Lubre Lane, St. Martinsville, LA 705882

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/hs

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

November 18, 2003

DRUMMOND COMPANY, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. SE 2003-99-R
	:	Order No. 7679499; 3/19/2003
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Shoal Creek Mine
Respondent	:	Mine ID: 01-02901

DECISION

Appearances: Timothy M. Biddle, Esq., and Bridget E. Littlefield, Esq., Crowell & Moring, LLP, Washington, DC, for the Contestant.
Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN 37215, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Notice of Contest filed by Drummond Company, Inc. (Drummond) challenging the issuance to it by the Secretary of Labor of an Order alleging a violation of Section 107(a) of the Federal Mine Safety and Health Act of 1977 (the Act). After an Answer was filed by the Secretary of Labor, a hearing was held in Birmingham, Alabama on July 22, 2003, and continued in Washington, DC, on September 3, 2003. Subsequent to the hearing, each party filed proposed findings of fact and a brief.

Findings of Fact

Drummond operates the Shoal Creek Mine, an underground coal mine. On March 19, 2003, at approximately 1:50 p.m., after MSHA Inspector John Terpo had completed an inspection of part of the mine and was preparing to leave, he entered the office of Drummond safety inspector Ed Sartain. Sartain informed him that Wayne Cox, a certified examiner, had found 6.4% methane in Entry No. 1 of the G-2 longwall (old faces). Terpo testified that Sartain indicated to him that some ventilation controls were missing or damaged, that in the last open cross-cut the curtains had been rolled up, and that a permanent stopping separating Entries No. 2 and No. 3 was down. Terpo and Sartain then went to look at the mine map in order for Terpo to determine what area was affected by the methane. Terpo determined that the problem affected

Entries No. 1, No. 2, and No. 3 in the old faces area of the G-2 longwall panel. At 2:05 p.m., Terpo orally issued an imminent danger order to Sartain identifying the affected area as Entries No. 1, No. 2, and No.3 of the old faces of the G-2 longwall panel.

According to Terpo, when he was informed by Sartain about the existence of 6.4% methane, which is in the explosive range, he was concerned because he knew the mine liberated eight million cubic of methane in a twenty-four hour period, and there had been three methane ignitions during the quarter in which he issued the imminent danger order. Also, he knew that the Shoal Creek Mine was mining the Blue Creek Seam, the same seam of coal in which the Jim Walter No. 5 Mine, approximately 30 miles from the site in question, was mining when it experienced a fatal explosion. Further, he was concerned about the presence of electrical water pumps in the area where the excessive methane had been located. He explained that these electrical pumps constituted an ignition source in the presence of methane in the explosive range, i.e., between five and fifteen percent. Additionally, he testified that Sartain told him there were eight people working in the area.

Terpo opined that the presence of methane in an explosive range is an imminent danger if there is "power in the area" (Tr. 157), and personnel working in the area. He explained that, accordingly, he issued the 107(a) order "... because there was methane in excess of five percent in an area where personnel were working and where there was power." (Tr. 178). In essence, he further explained the basis of his order by noting that at approximately 2:00 p.m. he had been told that methane existed, and no one told him that the condition had been corrected and no longer existed.

Discussion

The Secretary argues, in essence, that in determining the validity of a Section 107(a) withdrawal order the standard to be applied is, citing Blue Bayou Sand and Gravel, 18 FMSHRC 853 (1996), and V-P Mining Co., 15 FMSHRC 1531 (1993), is whether the inspector abused his discretion. Thus, the Secretary argues that the legitimacy of the 107(a) order must be measured "... against what the inspector reasonably and in good faith found – through his investigation – to be occurring at the mine at the moment when he issued the order." Thus, the Secretary argues that Terpo acted reasonably and in good faith in issuing the withdrawal order after he was told by Sartain, a Drummond safety inspector, that an explosive amount of methane had been found in Entry No. 1, G-2 longwall panel (old faces). In further arguing that Terpo's decision was not an abuse of his discretion, the Secretary refers to all the surrounding circumstances that concerned Terpo, including the mine's high rate of methane liberation, history of ignitions, its location in the same seam as another mine that had experienced a fatal explosion, the presence of electrical water pumps in the area in question, and the presence of eight miners underground. The Secretary further asserts, citing Terpo's testimony, that the only information he had when he issued the order in question was the presence of an explosive level of methane without any notification that its cause had been identified and corrected. Thus, at the time he issued his order, he had not found that the "conditions or practices which caused some imminent danger no longer

exists [ed]” (Section 107(a), supra, of the Mine Act).

Further Discussion

Section 107(a) of the Act requires an inspector to issue a withdrawal order upon a finding by inspection or investigation that “an imminent danger exists”. Section 3(j) of the Act defines an “imminent danger” as “... the existence of any condition ... in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated [.]”

In a recent decision, I reviewed the current body of commission law regarding the standard to be applied in deciding whether the Secretary met its burden of establishing the existence of an imminent danger as defined in Section 3(j) of the Act, supra. Drummond Co. Inc., 25 FMSHRC –, (October 14, 2003). I concluded that Commission doctrine requires that it be established by a preponderance of evidence that a hazardous condition or practice has a reasonable potential to cause death or serious injury within a short period of time. Drummond Co. Inc., supra, –, slip op. at 7, and cases cited therein.

On the other hand, the Secretary asserts that the correct standard to be applied, under recent Commission case law, is whether the inspector acted reasonably and in good faith. I find, that for the reasons that follow, applying either standard the Secretary has failed to establish that the 107(a) Order herein was validly issued.

Assuming arguendo that the standard to be applied is whether the inspector acted reasonably and in good faith in concluding that an imminent danger existed when he issued his order, the Secretary has failed in its burden in establishing that the facts known to Terpo or were reasonably available to him supported the imminent danger order (see Wyoming Fuel Co., supra). Thus, the evidence adduced fails to establish that the facts known to Terpo or were reasonably available to him supported the issuance of the imminent danger order. (See, Wyoming Fuel Co., supra, at 1292). The only facts known to Terpo regarding excessive methane readings consist of statements made to him by Sartain regarding the finding of methane at six point four percent in the areas at issue. However, Terpo indicated that Sartain did not tell him at what time the excessive methane readings were taken. In addition, there is no evidence that he knew what the methane readings were at the time he issued his order. In evaluating Terpo’s exercise of discretion it is also necessary to focus on the specific facts Terpo took into account in reaching the decision that conditions in the area in question constituted an imminent danger. His testimony on direct examination is unclear regarding specifically what facts supported his imminent danger order. In his initial testimony on direct examination regarding the sequence of events, he testified that after he learned the existence of methane in an explosive range and determined the affected area, he issued the 107(a) order. He did not further elaborate on any other facts supporting the order. In subsequent testimony on direct examination, Terpo indicated “concerns” he had after being informed of the presence of methane. He was concerned that the mine liberates more than eight million cubic feet of methane, that the mine experienced three

methane explosions in the same quarter as the issuance of his order and that methane was liberated from the same coal seam located in a neighboring mine causing a fatal explosion. Terpo agreed that the former two facts “[had] an impact on his decision to issue ... the danger order (Tr. 151-152). (Emphasis added.)

In evaluating the reasonableness of Terpo’s issuance of the 107(a) Order, it is necessary to consider his specific findings regarding the existence of an imminent danger. The only testimony in this regard is found in his cross-examination, which according to the Secretary, summarizes these findings. He was asked as follows: “Is it an imminent anytime [methane between five and fifteen percent] exists?” (Tr. 167). He answered as follows: “If there are personnel working in the area and there is power in the area, yes it is an imminent danger.” (Tr. 167).

It thus appears that there is not any clear indication in Terpo’s testimony that he considered the presence of methane in an explosive amount, alone, to constitute an imminent danger. In his opinion, such a finding is conditioned on the presence of: (1) personnel working in the area, and (2) power in the area. Terpo’s knowledge of the existence of these factors is based solely on what Sartain told him regarding these conditions. It is significant to note that Sartain told him that Drummond had de-energized all power to the area, and that he, Sartain, had told personnel to withdraw, “with the exception of personnel needed to determine the problem and correct it” (sic.) (Tr. 173). There is no evidence that Terpo had knowledge of any fact to contradict Sartain’s statements to him. Terpo did not conduct any other investigation to learn if men had already been withdrawn.

In summary, Terpo’s testimony indicates methane is an imminent danger if there is power in the area. However, the only facts he knew indicated that there was no power in the area. Within this framework, I find that his decision to issue a 107(a) order was, accordingly, not reasonable.

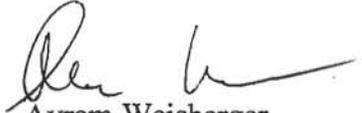
Further, had Terpo made a reasonable investigation, he would have found that according to Norwood Brown, the day-shift longwall production foreman, on the date in question, after it was discovered that various ventilation controls were missing or improperly installed, and prior to the issuance of the imminent danger order, these conditions were rectified, methane testing revealed levels below one point five percent, and there was not any electrical power to the longwall area.

Thus, the record fails to establish that there was a reasonable potential of a methane explosion or ignition causing death or serious injury occurring within a short period of time at the time the order was issued.

Accordingly, for all the above reasons, I find that it has not been established that the 107(a) Order herein was validly issued. Therefore the Notice of Contest is sustained, and the Order is Dismissed.

Order

It is **Ordered** that Drummond's Notice of Contest be **Sustained** and that Order No.7679499 be **Dismissed**.



Avram Weisberger
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, NW
Suite 9500
Washington, DC 20001

November 24, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-285-M
Petitioner	:	A.C. No. 41-00009-05550
	:	
	:	Docket No. CENT 2001-286-M
	:	A.C. No. 41-00009-05551
v.	:	
	:	Docket No. CENT 2001-363-M
	:	A.C. No. 41-00009-05552
	:	
	:	Docket No. CENT 2001-364-M
CACTUS CANYON QUARRIES OF	:	A.C. No. 41-00009-05553
TEXAS, INCORPORATED,	:	
Respondent	:	Docket No. CENT 2001-379-M
	:	A.C. No. 41-00009-05554
	:	
	:	Docket No. CENT 2002-80-M
	:	A.C. No. 41-00009-05555
	:	
	:	Docket No. CENT 2002-124-M
	:	A.C. No. 41-00009-05556
	:	
	:	Mine: Fairland Plant and Quarries

DECISION APPROVING SETTLEMENT

Appearances: Thomas A. Paige, Esq., U.S. Department of Labor, Office of the Solicitor,
Dallas, Texas, for the Petitioner;
Andy Carson, Esq., Marble Falls, Texas, for the Respondent.

Before: Judge Schroeder

These cases came before me for hearing on November 12, 2003, in Burnett, Texas. At the beginning of the hearing the parties informed me that a settlement had been agreed upon between them. The terms of the settlement were presented in open court as reflected by the transcript filed in the record. This Decision is intended to summarize the terms of the settlement as I approved it at the hearing. I found the terms of the settlement to be reasonable and in the public interest.

The settlement is best described by considering each mine inspector citation of concern to the parties in terms of any changes to both the Civil Penalty amount and the assessment factors. Taking the cases in order results in the following tabulation of amounts and changes:

In CENT 2001-285-M

Citation	Orig. Assess.	Settled Assess.	Changes to Citation
7896108	\$55.00	\$55.00	Modify gravity to "no lost workdays"
7896110	\$55.00	\$55.00	No change
7896112	\$55.00	\$0.00	Vacated
7896113	\$55.00	\$55.00	Modify negligence to "low"
7896115	\$242.00	\$55.00	Modify gravity to "unlikely" (now non-S&S)
7896116	\$242.00	\$0.00	Vacated
7896117	\$277.00	\$0.00	Vacated
7896118	\$173.00	\$55.00	Modify gravity to "unlikely" (now non-S&S)
7896119	\$317.00	\$0.00	Vacated
7896120	\$475.00	\$55.00	Modify gravity to "unlikely" (now non-S&S)
7896121	\$55.00	\$0.00	Vacated
7896122	\$55.00	\$55.00	No change
7896123	\$55.00	\$55.00	Modify gravity to "no lost workdays"
7896124	\$475.00	\$55.00	Modify gravity to "unlikely" (now non-S&S)
7896125	\$55.00	\$0.00	Vacated

7896128	\$475.00	\$0.00	Vacated
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In CENT 2001-286-M

Citation	Orig. Assess.	Settled Assess.	Changes to Citation
7896129	\$55.00	\$55.00	No change
7896130	\$242.00	\$55.00	Modify gravity to “unlikely” (now non-S&S)
7896131	\$55.00	\$0.00	Vacated
7896132	\$55.00	\$55.00	No change
7896133	\$242.00	\$55.00	Modify gravity to “unlikely” (now non-S&S)
7896135	\$317.00	\$317.00	No change
7896136	\$55.00	\$55.00	No change
7896137	\$242.00	\$0.00	Vacated
7896138	\$55.00	\$55.00	No changes. Modified in conference

In CENT 2001-363-M

Citation	Orig. Assess.	Settled Assess.	Changes to Citation
6207806	\$161.00	\$161.00	No change
6207807	\$55.00	\$55.00	No change
6207808	\$161.00	\$161.00	No change
6207809	\$55.00	\$55.00	Modify negligence to “moderate”
6207810	\$55.00	\$55.00	No change to citation as modified in conference

6207811	\$113.00	\$113.00	No change to citation as modified in conference
6207812	\$55.00	\$55.00	Modify gravity to "lost workdays or restricted duty"
6207813	\$207.00	\$0.00	Vacated
6207814	\$55.00	\$55.00	Modify gravity to "lost workdays or restricted duty"
6207815	\$161.00	\$55.00	Modify gravity to "unlikely" (now non-S&S)
6207816	\$55.00	\$0.00	Vacated
6207817	\$55.00	\$0.00	Vacated
6207818	\$55.00	\$55.00	No change to citation as modified in conference
6207819	\$55.00	\$55.00	No change
6207820	\$55.00	\$55.00	Modify gravity to "lost workdays or restricted duty"
6207821	\$55.00	\$0.00	Vacated
6207822	\$55.00	\$0.00	Vacated
6207823	\$259.00	\$55.00	Modify gravity to "unlikely" (now non-S&S)
6207824	\$55.00	\$55.00	No change

In CENT 2001-364-M

Citation	Orig. Assess.	Settled Assess.	Changes to Citation
6207825	\$55.00	\$0.00	Vacated
6207826	\$161.00	\$161.00	No change to citation as modified in conference

6207827	\$259.00	\$55.00	Modify gravity to “unlikely” and negligence to “moderate” (now non-S&S)
6207828	\$55.00	\$55.00	No change to citation as modified in conference
6207829	\$161.00	\$55.00	Modify gravity to “unlikely” (now non-S&S)
6207830	\$55.00	\$0.00	Vacated
6207834	\$259.00	\$0.00	Vacated
6207839	\$55.00	\$55.00	No change

In CENT 2001-379-M

Citation	Orig. Assess.	Settled Assess.	Changes to Citation
7896126	\$700.00	\$500.00	No change to citation as modified in conference
7896127	\$1,500.00	\$500.00	Modify to allege violation of section 104(a) instead of 104(d); no other change in citation as modified in conference.

In CENT 2002-80-M

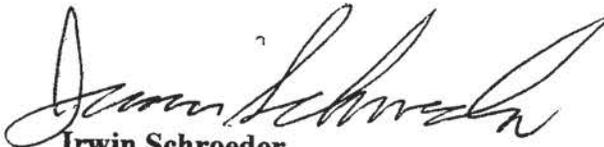
Citation	Orig. Assess.	Settled Assess.	Changes to Citation
6209870	\$55.00	\$55.00	Modify negligence to “moderate”

In CENT 2002-124-M

Citation	Orig. Assess.	Settled Assess	Changes to Citation
6209922	\$55.00	\$0.00	Vacated

The total amount originally proposed by the Secretary as a Civil Penalty was \$9,581.00. The settlement results in a total Civil Penalty of \$3,618.00. Therefor, it is

ORDERED that the Joint Motion to Approve Settlement is granted. The Respondent is directed to pay a Civil Penalty of \$3,618,00 within 30 days of the date of this Order. The parties will bear their own costs.


Irwin Schroeder
Administrative Law Judge

Distribution:

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/mh

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, N.W., Suite 9500

Washington, D.C. 20001-2021

Fax No.: (202) 434-9949

November 18, 2003

JOSEPH SPENCER,	:	DISCRIMINATION PROCEEDING
Complainant	:	Docket No. SE 2003-183-DM
	:	MSHA Case No. SE MD-03-08
v.	:	
	:	
JAHNA INDUSTRIES, INC.,	:	Independent Mine
Respondent	:	Mine ID 08-01021

ORDER DENYING MOTION TO DISMISS
NOTICE OF HEARING
AND
PREHEARING ORDER

Joseph Spencer, a pro-se claimant, has filed the subject discrimination complaint against Jahna Industries, Inc. (Jahna) alleging that he was illegally discharged by Jahna on January 16, 2003, in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(c)(1)). In its answer, Jahna denies it violated the Mine Act when it terminated Mr. Spencer. Further, it moves to dismiss Mr. Spencer's complaint, asserting that the complaint fails to state a claim upon which relief may be granted. Jahna points out that Mr. Spencer states in his complaint, "I was fired because of a workman's comp[ensation] claim," and Jahna correctly notes that "the filing of a Workers' Compensation claim is not within the [Mine Act's] definition of prohibited discrimination" (Discrimination Complaint 2; Answer and Mot. To Dismiss 6).

While I recognize the valid argument raised by Jahna, I also recognize that Mr. Spencer is representing himself, and that it has long been the practice of the Commission's judges to liberally construe the pleadings of pro-se complainants. This has meant that in identifying the protected activity that is alleged to be the cause of discrimination, the Commission and its judges have at times looked beyond the immediate cause of termination to the cause or causes from which the immediate cause was derived. They have found that a cause which facially was not prohibited by the Act, was in fact prohibited when it was the direct result of a safety complaint or other protected activity.

In his complaint, Mr. Spencer asserts that the particular equipment which injured him and caused him to file his compensation claim was "wrote up several times in inspection sheet[s] by operators and me," that the compensation claim "should not have happened, if... the [equipment] had been fixed," and that "the employees and other managers did not like my thorough examination of equipment ... because it gave them a bigger work load" (Discrim. Compl. 2,5).

Liberally construing Mr. Spencer's complaint, it may be that he is alleging his termination would not have happened but for his complaints and reports about the safety of said equipment. Because this is not an unreasonable construction of Mr. Spencer's complaint, I cannot grant Jahna's motion and dismiss the case. Mr. Spencer is instructed, however, that at trial he will be required to establish a prima facie case. To do so, he must prove that he engaged in protected activity and the activity in some part motivated his termination.

Therefore, this case is set for hearing on the merits on **Tuesday, February 24, 2004**, at **8:30 a.m.**, in the vicinity of **Orlando, Florida**. The specific courtroom in which the hearing will be held will be designated at a later date. The issues are whether Jahna violated section 105(c) of the Mine Act when it terminated Mr. Spencer on January 16, 2003, and, if so, the damages and costs relating thereto.

In preparation for the hearing, the parties are directed to complete the following on or before **January 23, 2004**: (a) confer on the possibility of settlement and endeavor to stipulate as to all relevant matters which are not in substantial dispute; (b) endeavor to stipulate the issues remaining for hearing, and, if unable to stipulate the issues, exchange written agreements of the issues as contended by the respective parties; (c) exchange lists of exhibits, and, at the request of a party, produce exhibits for inspection and copying; (d) stipulate as to those exhibits which may be admitted into evidence without objection and, as to others, indicate whether the exhibit is accepted as an authentic document; and (e) exchange witness lists with a synopsis of the testimony expected of each witness.

The parties are further directed to file with the undersigned Administrative Law Judge on or before **February 10, 2004**, a preliminary statement setting forth: (a) lists of exhibits and witnesses, together with the parties' synopses of expected testimony; (b) any stipulations entered into; and (c) the parties' statement of the issues.

Any party requiring subpoenas for the attendance of witnesses or the production of documents shall file their requests at least fifteen (15) days in advance of the scheduled hearing.

Any person planning on attending this hearing who requires special accessibility features and/or any auxiliary aids (such as sign language interpreters) must request those in advance (subject to the limitations set forth in 29 C.F.R. § 2706.150(a)(3) and § 2706.160(e).)


David F. Barbour
Administrative Law Judge
(202) 434-9980

Distribution: (Certified)

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