CCASE:
CONSOLIDATION COAL V. MSHA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 24, 1990

CONSOLIDATION COAL COMPANY, Contestant	CONTEST PROCEEDINGS
v.	Docket No. WEVA 89-234-R Citation No. 3114001; 5/31/89
	Docket No. WEVA 89-235-R Citation No. 3114002; 5/31/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Docket No. WEVA 89-236-R Citation No. 3114003; 5/31/89
	Docket No. WEVA 89-237-R Citation No. 3114004; 5/31/89
	Docket No. WEVA 89-238-R Citation No. 3103921; 6/1/89
	Docket No. WEVA 89-239-R Citation No. 3103922; 6/1/89
	Docket No. WEVA 89-240-R Citation No. 3103923; 6/1/89
	Docket No. WEVA 89-241-R Citation No. 3103924; 6/1/89
	Docket No. WEVA 89-242-R Citation No. 3103925; 6/1/89
	Docket No. WEVA 89-243-R Citation No. 3103926; 6/1/89
	Docket No. WEVA 89-244-R Citation No. 3103927; 6/1/89
	Docket No. WEVA 89-245-R Citation No. 3103928; 6/1/89
	Blacksville No. 1 Mine
	Mine ID 46-01867

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 90-3 A. C. No. 46-01867-03815
v.	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	Docket No. WEVA 90-8 A. C. No. 46-0!318-03901
	Robinson Run No. 95

DECISION

Appearances: Henry Chajet, Esq., Jackson & Kelly, Washington, D.C.; and Walter J. Scheller, III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Contestant-Respondent; Page H. Jackson, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Respondent-Petitioner.

Before: Judge Merlin

The above-captioned twelve notices of contest have been filed by the operator, Consolidation Coal Company, pursuant to section 105(d) of the Mine Safety and Health Act of 1977, 30 U.S.C. 815(d), (hereinafter referred to as the "Act" or the "Mine Act"), challenging the validity of citations issued to it by the Secretary of Labor under section 104(a) of the Act, 30 U.S.C. 814(a), which allege violations of 30 C.F.R. 50.30-1(g)(3). 29 C.F.R. 2700.20 et seq. Docket No. WEVA 90-3, as captioned above, is the Secretary's petition for the assessment of civil penalties filed in accordance with section 105(d) supra, and sections 110(a) and (i) of the Act, 30 U.S.C. 820(a), and (i), for the assessment of civil penalties in the amount of $250 apiece for the violations disputed in the notices of contest. 29 C.F.R. 2700.25 et seq. Docket No. WEVA 90-8 is a petition filed by the Secretary seeking penalties of $250 each for twelve additional 104(a) citations, also based upon alleged violations of 30 C.F.R. 50.30-1(g)(3).

On January 24, 1990, I issued an order upholding the validity of Part 50 and determining that penalties could be assessed for violations thereunder. On February 14, 1990, I denied the operator's request to certify my order for interlocutory appeal. By order dated March 8, 1990, the Commission denied the operator's request for interlocutory appeal. Thereafter on March 22, 1990, a prehearing conference was held with counsel and on April 30, 1990, the parties submitted stipulations

of law and fact together with supporting briefs. On May 16, 1990, counsel appeared at oral argument.

The issue presented for resolution is whether the operator violated 30 C.F.R. 50.30-1(g)(3) as charged, and if so, the appropriate amount of civil penalties to be assessed.

Section 103(d), 30 U.S.C. 813(d), sets forth the recordkeepinq provisions of the Mine Act as followS:

> (d) All accidents, including unintentional roof falls (except in any abandoned panels or in areas which are inaccessible or unsafe for inspections), shall be investigated by the operator or his agent to determine the cause and the means of preventing a recurrence. Records of such accidents and investigations shall be kept and the information shall be made available to the Secretary or his authorized representative and the appropriate State agency. Such records shall be open for inspection by interested persons. Such records shall include man-hours worked and shall be reported at a frequency determined by the Secretary, but at least annually.

Part 50 of the Secretary's regulations, 30 C.F.R. Part 50, provides in pertinent part as follows:

> Subpart A--General
>
> 50.1 Purpose and scope
>
> This Part 50 implements sections 103(e) and 111 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq., and sections 4 and 13 of the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. 721 et seq., and applies to operators of coal, metal, and nonmetallic mines. It requires operators to immediately notify the Mine Safety and Health Administration (MSHA) of accidents, requires operators to investigate accidents and restricts disturbance of accident related areas. This part also requires operators to file reports pertaining to accidents, occupational injuries and occupational illnesses, as well as employment and coal production data, with MSHA, and requires operators to maintain copies of reports at relevant mine offices. The purpose of this part is to implement MSHA's authority to investigate, and to obtain and utilize information pertaining to, accidents, injuries, and illnesses occurring or originating in mines. In utilizing information received under Part 50, MSHA will develop rates of injury occurrence (incident rates or IR), on the basis of 200,000 hours

of employee exposure (equivalent to 100 employees working 2,000 hours per year). The incidence rate for a particular injury category will be based on the formula:

IR=no. of cases x 200,000
hours of employee exposure

MSHA will develop data respecting injury severity using days away from work or days of restricted work activity and the 200,000 hour base as criteria. The severity measure (SM) for a particular injury category will be based on the formula:

SM=sum of days x 200,000
hours of employee exposure

Subpart c--Reporting of Accidents, Injuries, and illnesses

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

(a) Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1. These may be obtained from MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in 50.20-1 through 50.20-7. * * *

Subpart D--Quarterly Employment and Coal Production Report

50.30 Preparation and submission of MSHA Form 7000- --Quarterly Employment and Coal Production Report.

(a) Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 in

> accordance with the instructions and criteria in 50.30-1 * * *
>
> 50.30-1 General instructions for completing MSHA Form 7000-2.
>
> (g) Employment, Employee, Hours, and Coal Production--
> (3) Total employee-hours worked during the quarter: Show the total hours worked by all employees during the quarter covered. Include all time where the employee was actually on duty, but exclude vacation, holiday, sick leave, and all other off-duty time, even though paid for. Make certain that each overtime hour is reported as one hour, and not as the overtime pay multiple for an hour of work. The hours reported should be obtained from payroll or other time records. If actual hours are not available, they may be estimated on the basis of scheduled hours. Make certain not to include hours paid but not worked.

Citation No. 311400 which is the citation in the notice of contest WEVA 89-234-R and the first citation in the penalty petition WEVA 90-3, is representative of all citations involved in this matter. It cites a violation of 30 C.F.R. 50.30-1(g)(3).1 In describing the condition or practice Citation No. 311410 provides as follows:

> Evidence gathered during a Part 50 Audit of this mine indicates that the operator significantly over reported Employee Hours on the Quarterly Employment and Coal Production Report (Form 7000-2) for the forth [sic] quarter of calendar year 1988. According to management 3/4 of an hour is turned in each day for each employee which covers time spent on mine property before and after work hours.

The parties have submitted the following stipulations:

1. Consolidation Coal Company ("Consol") is the owner and operator of the Blacksville No. 1 Mine located in Monongalia County, West Virginia.

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1/ Each citation in the notices of contest and in the two penalty petitions deals with a different calendar quarter in one of the two Consolidation mines involved.

2. Consol is the owner and operator of the Robinson Run No. 95 Mine located in Harrison County, West Virginia.

3. Consol, the Blacksville No. 1 Mine, and the Robinson Run No. 95 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (hereinafter "the Mine Act").

4. The Mine Safety and Health Administration, United States Department of Labor, (hereinafter "MSHA") has been the agency responsible for the enforcement of the Mine Act.

5. All of the citations at issue in these matters were issued by a duly authorized representative of the Secretary of Labor and properly served upon Consol, and can be resolved together upon the basis of these joint stipulations.

6. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction of these cases pursuant to Sections 105 and 113 (d) of the Mine Act, 30 U.S.C. 815, 823 (d).

7. With respect to the issues previously decided by the Administrative Law Judge in his Order dated January 24, 1990, the parties agree that they will not brief or reargue them at this time, but that they are preserved for appeal. Nothing contained herein shall serve to waive said issues or be alleged or deemed an admission against Consol or the Secretary with respect to said issues.

8. The violations alleged in the individual citations were abated by Consol within the time set for abatement.

9. Copies of the subject citations are authentic and may be admitted into evidence.

10. 30 C.F.R. 50.20 requires, inter alia, that mine operators and independent contractors, submit a MSHA Form 7000-1 (MSHA Mine Accident, Injury, and Illness Report Form) to MSHA within ten days after any accident, occupational injury, or occupational illnesses occurs at the mine or is diagnosed as having originated at the mine.

11. 30 C.F.R. 50.20 requires such reporting regardless of whether the event occurs during, before, or after a scheduled shift, and, in the case of an accident, regardless of whether the individual injured is a miner or employee of the mine operator.

12. 30 C.F.R. 50.30 requires each operator of a mine and independent contractors, which had any individual working any day at the mine during the calendar quarter, to submit a completed

MSHA Form 7000-2 ("Quarterly Employment and Coal Production Report").

13. Data from Forms 7000-1 and 7000-2 are used to calculate the MSHA injury incidence rate pursuant to the formula set forth at 30 C.F.R. 50.1. MSHA calculates such MSHA injury incidence rates for each mine each mine operator, each state, each MSHA District and Subdistrict office, and on a national basis, using this formula.

14. The hours reported on Form 7001-2 are also used by MSHA to calculate a "tons per hour worked" figure for the coal industry on a national basis. On occasion, MSHA has used such information to calculate a "tons per hour worked" figure for individual mines. The calculations of "tons per hour worked" statistics has no relationship to MSHA's statutory safety mission and is done only as a public informational service. Consol maintains that such use is not relevant to this case.

15. With respect to Consol, the hours reported on Form 7000-2 are not used for any statutory or regulatory purpose other than the calculation of an incidence rate. With respect to all independent contractors and operators of mines other than coal mines, MSHA uses the hours reported from Form 7000-2 for purposes of 30 C.F.R. Part 100. Such Part 100 use is not applicable to Consol. Consol maintains that such Part 100 use is irrelevant to this case.

16. The incidence rate is used by MSHA as one method to analyze injury and illness trends and allocate inspection resources.

17. In addition to the calculation of incidence rates, MSHA uses the information obtained from the Form 7000-1 to: (a) determine whether an accident should be investigated; (b) analyze injury and illness trends by type, occupation or location; and (c) allocate inspection resources and to focus inspections.

18. Accidents and occupational injuries occurring to miners off mine property, such as a coal truck driver injured in an accident on a public highway, are not subject to the reporting requirements of 30 C.F.R. 50.20.

19. MSHA does not require, and Consol has not recorded time spent on mine property by nonemployee visitors such as inspectors, manufacturer's representatives, or representatives of miners on nonscheduled shifts. Consol maintains that lack of reporting time estimates on MSHA Form 7000-2 for representatives of miners on nonscheduled shifts stems from an oversight if MSHA utilizes injuries of such personnel for incidence rate calculations.

20. The Secretary's accident and injury computer data summaries list events reported pursuant to 30 C.F.R. 50.20(a) by mine site, occupation, activity of injured, location of accident and equipment involved. The abstracts do not specify the time of the event, whether the event occurred on shift or off shift, or whether the employee was being paid when the event occurred. There are some occupations and certain time periods at the Blacksville No. 1 Mine and Robinson Run No. 95 Mine for which injuries did not occur in 1986, 87 and, 88. The following are summaries of the summaries for the mines and years during which the citations in this case were issued.

(a) At the Blacksville No. l Mine, for calendar year 1988, Consolidation Coal Company reported a total of fifty-one (51) reportable incidents; fourteen (14) of the reportable incidents were accidents without injuries; twenty-eight (28) were underground injuries to miners and foremen; three (3) were surface injuries to miners and foremen; and six (6) were compensation awards for occupational illnesses. While the location where some of the events which occurred were unknown, none of the reported injuries specified that they occurred at the bathhouse or the parking lot.

(b) At the Robinson Run No. 95 Mine, for calendar year 1988, Consolidation Coal Company reported a total of seventy-eight reportable Part 50 incidents. Fifteen (15) of the reportable incidents were accidents without injuries; forty-eight (48) were underground injuries to miners and foreman; four (4) were surface injuries; and eleven (11) were compensation awards for occupational illnesses. While some of the locations where the events occurred were unknown, one (1) of the reported injuries specified that it occurred at the bathhouse. The miner injured at the bathhouse was the "shower room employee" who was injured while cleaning the shower room. The time of the incident was unknown.

(c) At the Blacksville No. l Mine, for calendar year 1987 Consolidation Coal Company reported a total of seventy-eight (78) reportable incidents. Fourteen (14) of the reportable incidents were accidents without injuries; one was a non-occupationally related cardiac arrest; forty-three (43) were underground injuries; three (3) were surface injuries; and fourteen (14) were compensation awards for occupational illnesses. While the location of some of the injuries was unknown, one (1) of the reported injuries specified that it occurred at the bathhouse when an employee was struck in the head by a falling basket.

(d) At the Robinson Run No. 95 Mine, for calendar year 1987 Consolidation Coal Company reported a total of one hundred thirty incidents. Thirty-two (32) of the reportable incidents were accidents without injuries; fifty-two (52) were underground

injuries, ten (10) were surface injuries, thirty-six (36) were compensation awards for occupational illnesses. While some of the reported injuries occurred at unknown areas of the mine, one (1) of the reported injuries specified that it occurred at the lamp house. The miner injured at the lamp house got cleaning solution in his eyes while cleaning his protective glasses. One (1) of the reported injuries also specified that it occurred at the "bath unit". The miner in the bath unit injured his back while crawling on a screen. None specified that they occurred at the parking lot of the mine.

(e) At the Blacksville No. 1 Mine, for calendar year 1986 Consolidation Coal Company reported a total of forty-five (45) incidents. Fifteen (15) of the reportable incidents were accidents without injuries; fifteen (15) were underground injuries; three (3) were surface injuries; and, fourteen (14) were compensation awards for occupational illnesses. While some of the injuries occurred at unknown locations of the mine, none (0) of the reported injuries specified that they occurred at the bathhouse or parking lot of the mine.

(f) At the Robinson Run No. 95 Mine, for calendar year 1986 Consolidation Coal Company reported a total of seventy-two (72) incidents. Fifteen (15) of the reported incidents were accidents without injuries, nineteen (19) were underground injuries; four were surface injuries; thirty-four (34) were compensation awards for occupational illnesses. While some of the reported incidents occurred at unknown locations, one (1) of the reported injuries specified that it occurred at the bathhouse. The miner injured at the bathhouse was taking a shower when he struck his head on the shower water valve causing a laceration.

21. Examples of pre and post "shift" occupational injuries at the Blacksville No. 1 Mine and the Robinson Run No. 95 Mine during the years 1986, 1987, and 1988, that have been reported by Consol to MSHA, pursuant to 30 C.F.R. 50.20, by the filing of MSHA Forms 7000-1, and used to calculate Consol's incidence rates, include:

MINE	DATE	EMPLOYEE	INcIDENT DEscRIPTION
Robinson Run:	9/19/86	George Sandy	pre-shift; fell in parking lot; broke arm

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1 [Footnote 1 of the Stipulations] Consol has informed Counsel that this injury was reported on a Form 7000-1. The injury does not appear on the Secretary's accident and injury computer data summary referred to in Stipulation 20. Counsel have not been able to resolve this discrepancy.

Blacksville	4/07/87	John Raines	pre-shift; falling basket in bathhouse; laceration; sutures
Robinson Run	8/10/87	Mark Wentz	pre-shift; cleaning solution in eye; lost time
Robinson Run	9/18/86	W.D. McKinney	post-shift: showering in bathhouse; lacerations to right ear

22. Violations of mandatory safety or health MSHA standards at the Mine, caused by Consol employees, subject Consol to MSHA citations regardless of whether they occur during, before or after a scheduled shift. For purposes of MSHA jurisdiction and to promote a safe work place, Consol considers all employees to be on duty and subject to Consol's rules and policies whenever they are on mine property.

23. Whenever its employees are on mine property Consol considers such time to be "exposure time" during which defined injuries and illness are reportable to MSHA.

24. Consol requires that employees report to work prior to the beginning of their scheduled shift so that they can be fully prepared to begin their shift by obtaining necessary equipment or clothing (e.g., lamps, self-rescuers, dust sampling pumps).

25. Consol requires that employees remain on mine property after the end of their scheduled shift to return equipment and materials prior to departing from mine property.

26. While scheduled shift duration is eight hours in length, actual shift time can vary by 10-15 minutes, more or less, depending upon variables such as transportation availability or crew readiness.

27. The amount of pre and post shift time that employees spend on mine property is variable at Consol's mines, and at other mine sites, and no accurate record is kept of such time by Consol.

28. Hourly employees are not paid for pre and post shift exposure time on mine property and estimates of such time are not used for wage calculations.

29. Consol complies with 29 C.F.R. Part 516 and 29 C.F.R. 1904.21. Consol maintains that such fact is irrelevant to this case.

30. Salaried employees at Consol's Blacksville No. 1 Mine and Robinson Run No. 95 Mine are paid a predetermined salary bi-weekly, based on working five scheduled shifts per week. These salaried employees are estimated to be on the mine site an average of 1.5 hours per shift in excess of their scheduled eight hour shifts. This 1.5 hours includes exposure time spent in work activities and at the bathhouse and the parking lot, before and after scheduled shifts.

31. Consol maintains payroll records of the number of days worked by its salaried employees, but such records are solely for the purpose of payroll calculations and tracking absenteeism, sick leave and Vacation time. The records do not reflect actual time worked or time spent at the mine site.

32. To arrive at its estimate of hours to be reported on MSHA Form 7000-2 for salaried employees, Consol determines their reportable hours by multiplying the number of scheduled shifts at which salaried employees were present, times 8 scheduled hours plus 1.5 average additional on site hours [reportable hours = shifts present x(8+1.5)].

33. MSHA has not issued citations for violations of 30 C.F.R. 50.30 based on Consol's calculations of salaried employee hours on MSHA Form 7000-2 for the Blacksville No. 1 Mine and Robinson Run No. 95 Mine.

Because Consol's payroll records do not reflect actual hours of salaried employees, MSHA has always accepted for salaried employees at the Blacksville No. l Mine and the Robinson Run No. 95 Mine an estimate of reportable hours on Form 7000-2. The citations at issue in this proceeding are not predicated upon the hours reported by Consol for salaried personnel.

34. Consol maintains payroll records of 8 hour shifts scheduled, and overtime pay due for each hourly employee at the Blacksville No. 1 Mine and the Robinson Run No. 95 Mine. These records indicate, inter alias the eight hour shift the hourly employee was scheduled to work; whether the employee was present during the shift; and the total number of hours to be paid, including overtime due. If the hourly employee(s) did not appear for the scheduled shift, the record indicates the reason, and whether the employee is to be compensated for that time. Such records are prepared solely for the purpose of payroll calculations, tracking absenteeism, sick leave and vacation time and do not reflect actual time worked or time spent at the mine site.

35. To arrive at its estimate of hours to be reported on MSHA Form 7000-2 for hourly employees, Consol determines their mine site exposure hours by multiplying the number of scheduled shifts during which the employees were present, times the 8 scheduled shift hours plus the number of overtime hours to be

paid, plus .75 hour of average time on the site in excess of scheduled shift time and overtime paid [Reportable hours=shifts present x(8+overtime hours+.75)].

36. For both hourly employees and salaried employees the time paid or scheduled shifts do not, accurately reflect time actually worked since they do not account for the idle periods that are paid (e.g., lunch or awaiting transportation). Similarly, time paid or scheduled shifts do not reflect pre and post shift time spent on mine property.

37. The estimated 45 minute component of hourly employee exposure was determined by surveying a number of experienced and competent Consol officials who had observed employees at these Consol mines. The estimate constitutes Consol's best estimate of actual exposure time before and after scheduled shifts.

38. When the 45 minute estimate is combined with the scheduled shift time and overtime component, these components reflect the number of hours that Consol believes each hourly employee spends at the mine site on a daily basis.

39. MSHA maintains that since March 9, 1978, it has consistently interpreted the language of 30 C.F.R. 50.30-1(g)(3) to require the reporting of hours recorded on payroll records or other time records, such as time clocks, if those records were available. MSHA also maintains it has consistently allowed the submission of estimated hours as reportable hours only when payroll records or other records do not reflect actual hours worked. Counsel for the Secretary has no knowledge of any citation or order having previously issued for reporting pre and post shift time on MSHA Form 7000-2. Consol maintains that, among other things, the documents referred to in Stipulations 40 and 41 evidence inconsistent interpretation of reportable hours.

40. On November 7, 1975, the Mining Enforcement and Safety Administration issued a memorandum addressing the American National Standards Institute (ANSI) Z-16.1 (1967) and its role as: "an integral part of a uniform system for developing statistics by MESA. ..."

41. MSHA has published a series of.Information Reports interpreting the provisions of 30 C.F.R. Part 50. (hereinafter, called "Guidelines") None of the Guidelines were published in the Federal Register but they were distributed to mine operators. From March 1978 until December 1986 the Guidelines contained a definition of employee hours that provides as follows:

> "Employee hours" constitutes the total number of hours worked by all employees during the quarter covered. Include as employees those

> in operating, production, maintenance, transportation, mine office, supervision and administration. Overtime hours are to be reported on a straight time basis, i.e. actual exposure time only must be reported.

This definition was deleted by the December 1986 Guidelines. The December 1986 Guidelines, distributed to mine operators including Consol in January 1987, added a new sentence to the repetition of 30 C.F.R. 50.30-1(g)(3)

> Do not include time spent on mine property outside of regularly scheduled shifts, i.e. bathhouse, parking lot, etc.

42. Prior to the decision in Freeman United Coal. 6 FMSHRC 1577 (1984), Consol and other mine operators reported hours for hourly employees by reporting hours paid, including idle time and lunch time, but not pre and post shift exposure time spent on mine property. Prior to this change in reporting practices Consol and other operators did not report pre and post shift injuries since the operators considered them non-occupationally related. Prior to the change in reporting practices, Consol and other mine operators reported estimated time for salaried employees.

43. After the Review Commission's decision in Freeman United Coal, 6 FMSHRC 1577 (1984), Consol and other operators initiated reporting of pre and post shift incidents and exposure time hours on mine property.

44. Consol did not make any inquiry to the Secretary as to the effect of the Freeman United Coal decision on the reporting requirements of 30 C.F.R. 50.30. The Secretary did not issue any policy memorandum or other instructions to the industry regarding the effect of the decision. The Secretary did not make any inquiry of Consol regarding the effect of the decision. The Secretary asserts that the Freeman United Coal decision had no effect upon the reporting requirements of 30 C.F.R. 50.30 and thus no inquiries or pronouncements were appropriate.

45. Consol did not inform the Secretary that it had changed the method by which it determined reportable hours for purposes of 30 C.F.R. 50.30-1(g)(3) until MSHA inspectors inquired about the discrepancy betwee payroll records and the Form 7000-2s during the conduct of the audit which resulted in the issuance of the citations in this case.

46. The Secretary has insufficient knowledge to accept or deny that the components reported by Consol reflect the actual time spent by hourly employees on mine property each day. Accordingly, the parties stipulate that, for the disposition of

these cases, the Chief Administrative Law Judge can assume that these components when combined reflect the actual time spent by hourly employees at the Blacksville No. 1 Mine and the Robinson Run No. 95 Mine on the days when they are at the mine site.

47. Consol is a large coal mine operator and generally has an average history of violations under the Mine Act for a mine operator of its size.

48. The parties stipulate that, for the disposition of these cases, the Chief Administrative Law Judge can find that: (a) the proposed penalties, while not agreed to by the parties, will not affect Consol's ability to stay in business; and (b) the citations were abated in good faith. The parties are unable to stipulate as to the degree of negligence, if any, involved in causing the alleged violations.

However, Consol maintains that the change in its reporting practice was undertaken consistent with the advice of counsel and the Secretary has no evidence to the contrary.

49. The Parties agree that the Administrative Law Judge should take judicial notice of the documents referred to in these stipulations and include them in the record of this case.

Upon review I have determined that the stipulations submitted by the parties provide an appropriate and adequate basis upon which to decide this case. Accordingly, the stipulations are hereby ACCEPTED.

As set forth above, section 50.30-1(g)(3) requires each employer under the Mine Act to report total hours worked by all employees. The regulation subsequently directs that hours reported be obtained from payroll or other time records. Based upon the record before me, I conclude that MSHA has consistently interpreted 50.30(g)-1(3) to require reporting of hours recorded on payroll records or other time records whenever such records are available. As set forth in the stipulations, MSHA informational guidelines have been changed in certain respects, but not in a manner crucial to the determination of what constitutes employee hours worked for reporting purposes (Stipulation 41). The inclusion as employees of those in operation, maintenance, etc. was deleted in the 1986 Program Circular (Gov't. Exh. 1). Also, a new instruction was adopted in the 1986 Program Circular telling employers not to include time spent on mine property outside of regularly scheduled shifts (Gov't. Exh. l, p. 15). However, the instruction to obtain hours worked from payroll or other time records is the same in the 1978 manual (Gov't. Exh. 6, p. 16), the 1980 manual (Gov't. Exh. 7, p. 15) and the 1986 manual (Gov't. Exh. 1, p. 15). It is this provision which I find determinative.

I have carefully reviewed the operator's argument that the proper construction of the regulations would include in hours worked, unpaid hours spent on mine property (Operator's brief pp. 8-13). I do not find the operator's representations persuasive in light of the fact that until 1984 it accepted the Secretary's views and reported employee hours in the manner prescribed by the Secretary (Stipulation 43). I recognize that because of the Commission's decision in Freeman Mining Company, 6 FMSHRC 1577 (July 1984), the operator began to report off-shift on-site accidents under section 51.20 of the regulations, supra, which it had not done previously (Stipulation 42). However, I do not believe the Freeman decision justifies changing the interpretation of section 50.30-1(g)(3) regarding hours worked, when this is the interpretation the Secretary always has followed. In this connection, I bear in mind. that the Commission has been admonished that deference is due the Secretary's interpretation of her own regulations. Brock v. Cathedral Bluffs Shale Oil. Co., et. al., 796 F.2d 533, 538 (D.C. Cir. 1986). Secretary of Labor v. Cannelton Industries, 867 F.2d 1432, 1435 (D.C. Cir. 1989). Secretary of Labor v. Western Fuels-Utah, F.2d (D.C. Cir. April 6, 1990). Therefore, the operator's ex parte attempt to redefine hours worked by adding thereto 45 minutes per shift cannot be allowed.

A contrary result is not warranted because salaried workers are treated differently than hourly workers. Section 50.30-I(g)(3) provides that where actual hours are not available, they may be estimated on the basis of scheduled hours. The parties agree that salaried employees are paid a predetermined bi-weekly salary based on 5 scheduled shifts per week and that for purposes of reporting hours under section 50.30-1(g)(3) the operator adds, and the Secretary accepts, 1.5 hours per shift (Stipulations 30, 32, 33). The operator asserts that salaried and hourly employees should be treated the same and that since the Secretary accepts the operator's estimate of an extra 1.5 hours per shift for reporting of hours of salaried employees under 50.30-1(g)(3), it should accept the operator's estimate of 45 minutes per shift for hourly employees (Operator's brief pp. 12, 13). This argument cannot be accepted. It overlooks the fact that although payroll records for hourly employees may not be completely accurate insofar as hours worked are concerned (e.g. lunchtime, pre and post shift times), these records by and large do reflect the time hourly employees work and are paid, whereas this is not true of salaried employees. As the operator itself admits, renumeration of salaried employees is the same regardless of whether they work 8 hours or 15 hours a day (Operator's brief p. 12, Hearing Tr. 51-54). In allowing estimates for salaried employees for whom there are no records of actual hours worked, section 50.30-1(g)(3) is consistent with general principles. American National Standards Institute (ANSI) A2.2.2., p. 10 (1977); 3.2(2), p. 12 (1967). See also Solicitor's letter dated May 17, 1990.

In light of the foregoing, I find violations existed in the subject cases.

By no means, however, is this the end of the inquiry essential to proper consideration and disposition of the matters presented. The Mine Act requires not only that a finding be made whether or not a violation existed, but in addition directs that attention be given to six criteria, including gravity and negligence, for determining the appropriate amount of penalty to be assessed. Section 110(i) of the Act, supra. Accordingly, the nature, character and extent of these violations must be evaluated.

The subject cases are unusual because appraisal of the criteria, most particularly gravity, leads to what is in fact the heart of the dispute between the parties. The Solicitor admits the violations are not serious, but he does not adequately explain why (Solicitor's brief p. 30, Hearing Tr. pp. 39-41). A determination of the seriousness of the violations requires examination of the use to which the hours reported under 50.30-1(g)(3) are put. The parties agree that the hours reported under 50.30-1(g)(3) on Form 7000-2 together with accidents reportable under 50.20 on Form 7000-1 are used in the formula set forth in 50.1, supra, to arrive at the injury incidence rate for each mine and mine operator (Stipulation 13). The parties further agree that insofar as Consol is concerned the hours reported under 50.30-1(g)(3) are used only for inclusion in the formula (Stipulation 15). Despite the Solicitor's representations to the contrary at the oral argument (Hearing Tr. 17-20, 66-69), I believe that because of the data fed into it, the formula in 50.1 produces an inherently flawed injury incidence rate. The numerato of the equation consists of accidents reportable whenever they occur on the mine site regardless of when they happen, i.e. on-shift, pre-shift or post-shift. The denominator of the formula, however, is employee exposure hours which is equated by the Secretary with the hours worked as reported under 50.30 (Stipulations 12, 13; Solicitor's brief pp. 23-25; Hearing Tr. 16-17). As explained above, the 50.30 hours are paid, on shift hours. Accordingly, the numerator and denominator are mismatched with the former premised upon place but the latter predicated upon time and place. The operator's objection to the product of this formula as skewed data is well-taken (Operator's brief pp. 22-26).

The parties agree that for 1986-1988 there were only four off-shift reportable incidents at the two mines involved in these cases (Stipulation 21). The Solicitor does not specifically argue the formula should be upheld because these incidents are de minimis, but his statements seem to imply this (Solicitor's brief p. 25, footnote 10; Hearing Tr. 15). I am unconvinced because a three year sampling of only two mines is an

insufficient basis upon which to conclude that the infirmities in the formula are of no account. Indeed, the parties have agreed that the formula is a basis upon which MSHA directs its investigative resources as well as analyzes illness and injury trends (Stipulation 16).

That the formula is flawed is further demonstrated by the Solicitor's agreement that I may assume for purposes of deciding these cases that the 45 minutes added to hours worked by the operator reflect the time actually spent at the mine by hourly employees (Stipulation 46). If therefore, there were mutuality in the components of the formula, the incidence rate would be substantially affected, because the addition of 45 minutes would constitute almost a 9% increase in the denominator of the formula.

The Solicitor's representation that the injury incidence rate under the Mine Act is comparable to that under the Occupational Safety and Health Act, 29 U.S.C. 65, et seq. (hereafter referred to as "OSHA"), must be rejected (Solicitor s brief pp. 23-25). The incidence rate under OSHA like that under the Mine Act is arrived at by dividing the number of injuries by hour worked. Recordkeeping Guidelines for Occupational Injuries and Illnesses, Sept. 1986 (Gov't Exh. 3, p. 59). But the definition and application of these terms are far different under OSHA than under the Mine Act. Reportability of accidents under OSHA is not determined solely by reference to the work site as it is under the Mine Act. Rather under OSHA there is a rebuttable presumption of reportability applicable to accidents that occur on an employer's premises, but when the event happens off the premises reportability is determined by an evaluation of whether the activities were work related (Gov't Exh. 3, pp. 32, 34-35). In addition, events occurring on the parking lot or in recreational facilities are not reportable under OSHA. The other factor in the incidence equation, i.e., exposure hours, also is treated differently under OSHA than the Mine Act. Although employee hours worked are determined under OSHA initially by reference to payroll records, the concept is expanded in determining exposure hours (Gov't Exh. 3, A-4, p. 54). Thus the OSHA manual directs that:

> The figure for hours worked should reflect the actual hours of work-related exposure for all employees. If injuries and illnesses experienced during a particular activity are recordable, then the employee's time spent in the activity should be included in the hours worked estimate. Work-related exposures include most of the employees' activities on the employers' premises as well

> as situations off premises where the employees are engaged in job tasks or are there as a condition of employment.

(Gov't. Exh. 3, A-5, p. 54).

Accordingly, under OSHA there is a correlation between reportable events and the time during which they occur. It is just this correlation which is missing in the 50.1 formula under the Mine Act. The Solicitor's assertion that "actual hours of work-related exposure" applies only to paid time, is unsupported and therefore, rejected (Solicitor's brief p. 24, footnote 9; Hearing Tr. 35-36).

If the Secretary can achieve such correlation and balance under OSHA, it is difficult to see why she cannot do so under the Mine Act. I recognize that Stipulation 46 which agrees that the 45 minutes estimated by the operator accurately reflects time spent on mine property by hourly employees, has been entered into only for purposes of these cases. However, as a general matter composition of a meaningful formula for an injury incidence rate under the Mine Act would appear to be the Secretary's responsibility, at least in the first instance, rather than the operator's.

In sum therefore, the only effect of the operator's failure to report hours worked as defined by the Secretary under 50.30-1(g)(3) is that these hours were not included in the 50.1 formula. Because the formula as presently written and applied produces flawed data, I find the violations are non-serious and technical in nature. Indeed, what the violations highlight is the need for the Secretary to revisit the issues posed by those sections of the reporting regulations involved in these cases.

There is no question that after the Freeman decision the operator intentionally changed its reporting of hours worked under 50.30-1(g)(3) by adding 45 minutes to each shift and that it did not tell the Secretary what it was doing (Stipulations 43, 44 and 45). As set forth above, I appreciate the dilemma the operator found itself in because of the flawed incidence rate formula. However, this is no excuse for the operator's actions. Whatever difficulties may be presented by the Secretary's interpretation of the Act and regulations, no operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied. The egregious nature of the operator's conduct is augmented by the clandestine nature of its activities. The operator could have openly challenged the Secretary's position immediately after the Freeman decision. Instead, it chose to act in secret until the Secretary found out. This operator which is one of the largest in the mining industry, certainly knows better. Accordingly, I find negligence was high.

The other criteria have been stipulated. The violations were abated in a timely manner; prior history is average size is large; and imposition of penalties herein will not affect the operator's ability to continue in business (Stipulations 8, 47, 48).

It is ORDERED that the documentary exhibits (Gov't Exh. 1-8 and Operator's Exh. 1 and 2) be ADMITTED.

It is further ORDERED the operator's motion to strike be DENIED.

It is further ORDERED that insofar as the existence of violations and a finding of high negligence are concerned the Secretary's motion for summary judgment be GRANTED.

It is further ORDERED that a penalty of $100 be ASSESSED for each of the 24 violations involved in these cases.

It is further ORDERED that the operator PAY $2,400 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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