

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 26, 1995

MADISON BRANCH MANAGEMENT, Contestant	:	CONTEST PROCEEDINGS
v.	:	
	:	Docket No. WEVA 93-218-R
	:	Order No. 3976643; 3/1/93
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
	:	Docket No. WEVA 93-219-R
	:	Citation No. 3976644; 3/1/93
	:	
	:	Docket No. WEVA 93-220-R
	:	Citation No. 3976647; 3/4/93
	:	
	:	Job. No. 3
	:	Mine ID 46-05815
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	
	:	Docket No. WEVA 93-373
	:	A.C. No. 46-05815-03520
	:	
	:	Docket No. WEVA 93-412
MADISON BRANCH MANAGEMENT, Respondent	:	A.C. No. 46-05815-03521
	:	
	:	Job No. 3
	:	
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	
	:	Docket No. WEVA 93-415
	:	A.C. No. 46-05815-03501HWZ
	:	
	:	Job No. 3
PROTECTIVE SECURITY SERVICES, Respondent	:	

DECISION ON REMAND

Before: Judge Feldman

Statement of the Case

These proceedings concern Petitions for the Assessment of Civil Penalties filed by the Secretary, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. ' 820(a), against Protective Security Services (PSSI) and Madison Branch Management (Madison). The Secretary's case is based on alleged training and defective equipment violations related to the March 1, 1993, carbon monoxide death of PSSI employee Allen Garrett, a night watchman. PSSI is an independent contractor that provided security services at Madison's Job No. 3 surface mine.

These cases were remanded on June 12, 1995, after Madison petitioned the Commission for interlocutory review of orders denying the parties' motions for approval of settlement. Commission's *Remand Decision*, 17 FMSHRC 859. The parties' motions were denied because of outstanding issues of fact concerning what, if any, actions the respondents had taken to avoid the carbon monoxide hazard that resulted as a consequence of the alleged violations. These issues impact upon the degree of negligence and the gravity associated with the alleged violative conduct.¹ They also impact upon whether the civil penalties proposed by the Secretary, and accepted by the respondents, are adequate to "accomplish the underlying purpose of the civil penalty--to encourage and induce compliance with the Mine Act and its standards." 17 FMSHRC at 867.

In view of the parties prior Motions for Summary Decision and their responses to my June 19, 1995, Order on Remand evidencing that they have no further evidence to submit, I have determined that there are no factual disputes related to the fact of occurrence of the subject violations. The respondents' submissions have also resolved all factual issues concerning their actions to address the hazard posed by these violations. Consequently, I am basing this decision concerning the appropriate civil penalties to be assessed on the record evidence. As noted below, the degree of negligence, gravity, and, the lack of evidence that the proposed civil penalties have had an adequate deterrent effect on the respondents, convince me that the penalties proposed by the parties are inadequate.

¹ Negligence and gravity are two of the six civil penalty criteria set forth in Section 110(i) of the Act, 30 U.S.C. ' 820(i).

Background

Carbon monoxide is a colorless, odorless, non-irritating gas that has been labeled "the perfect asphyxiant." With the exception of ethyl alcohol (liquor), carbon monoxide is the most frequent cause of fatal accidental poisoning in this country. Hemoglobin is the substance in red blood cells that is responsible for transporting oxygen to body organs including the brain. Carbon monoxide has an affinity (bonding capacity) for hemoglobin that is 200 to 300 times that of oxygen. Therefore, a very small concentration of carbon monoxide effectively blocks the normal function of hemoglobin, thus depriving the body of oxygen. The concentration of carbon monoxide in the body is dependent on its concentration in the air and the duration of exposure. Carbon monoxide accumulates in body tissues with prolonged exposure. Standard automobile engine exhaust fumes contain approximately 13 percent carbon monoxide. A concentration of 0.4 percent of carbon monoxide in atmospheric air is lethal within one hour of exposure. As carbon monoxide levels in the body increase with exposure, symptoms range from slight headache to confusion, fainting, unconsciousness and ultimately death. Irvin M. Sofer, M.D., D.D.S. & William C. Masemore, *The Investigation of Vehicular Carbon Monoxide Fatalities*, Traffic Digest & Review, Nov. 1970, at 1-3.²

The facts surrounding the fatal accident in these matters are not in dispute. Allen Garrett was employed by PSSI as a part-time security guard at Madison's surface mine facility located near Lynco, in Wyoming County, West Virginia. Garrett was assigned to work on weekends and routinely reported to work on Saturday nights at 10:00 p.m. Garrett was relieved by another security guard on Sunday mornings at 10:00 a.m. Garrett would report back to work on Sunday nights at 10:00 p.m. and work until 6:00 a.m. on Mondays, at which time Madison personnel reported to work to resume the week's mining activities. Garrett's security duties included preventing unauthorized mine entry, which Garrett accomplished by remaining on the haulage road in his parked vehicle for extended periods of time.

² The publications on carbon monoxide poisoning cited in this decision were provided to the parties with the September 9, 1994, Notice of Hearing Site in these proceedings.

On Sunday, February 28, 1993, at approximately 10:00 p.m., Garrett arrived at Madison's No. 3 Mine in his vehicle, a 1986 Ford Bronco II. Garrett's shift was scheduled to end the following morning on Monday, March 1, 1993, at 6:00 a.m. At approximately 6:10 a.m. that morning, a truck driver reporting for work observed Garrett's vehicle parked at the top of the main haulage road. The truck driver approached Garrett to ask him to move his vehicle. He found Garrett unconscious, lying on the floor board between two bucket seats with his head toward the front of the vehicle. Garrett was immediately transported via ambulance to a local hospital where he was pronounced dead on arrival. The cause of death was carbon monoxide intoxication. At the time of Garrett's death the weather had been cold, approximately 25 degrees Fahrenheit, and it had been snowing.

Investigating authorities concluded Garrett fell asleep and succumbed to carbon monoxide poisoning between 12:48 a.m., when the last entry in Garrett's log book was made, and 6:00 a.m., when he was found by the truck driver. At the time Garrett was discovered, the engine in his vehicle was running, the dome light was on, and, the heater was running on high. The investigation revealed Garrett's vehicle had one large crack at the exhaust manifold located near the firewall and large cracks on the exhaust pipe on each side of the muffler.

As a result of Garrett's fatality, the Mine Safety and Health Administration (MSHA) issued 107(a) Order No. 3976643 to Madison for the imminent danger created by Garrett's vehicle. MSHA also issued 104(a) Citation Nos. 3976644 and 3976646 to both Madison and PSSI, respectively, for their alleged violations of section 77.404(a), 30 C.F.R. ' 77.404(a). This mandatory safety standard requires, in pertinent part, that mobile equipment must be maintained in safe operating condition. The Secretary proposed civil penalties of \$2,000 against Madison and \$3,000 against PSSI for these violations.

In addition, MSHA issued Citation No. 3976647 to Madison for an alleged violation of section 48.31(a), 30 C.F.R. ' 48.31(a). This mandatory safety standard requires that hazard training must be provided to all miners. Section 48.31(a) requires hazard training to include instruction on "hazard recognition and avoidance" and "safety rules and safe working procedures." The Secretary proposed a civil penalty of \$88 for this alleged violation.

The Secretary filed separate Motions to Approve Settlement with Madison and PSSI on March 31, 1994. The settlement terms included substantial reductions in the civil penalties proposed

against Madison and PSSI. In support of the reduction in penalties with respect to PSSI, the Secretary stated:

Although the Secretary asserts that the damaged exhaust system was the proximate cause of the fatality, the Secretary acknowledges the existence of other [mitigating] factors which contributed to the fatality (i.e. the windows being tightly closed, Mr. Garrett possibly haven fallen asleep). Secretary's Motion at 3.

Given my reluctance to blame the victim, the Secretary's motions were denied by Order dated April 7, 1994, because the Secretary had not demonstrated "adequate mitigating circumstances to justify the significant reductions in the proposed penalties."

On April 8, 1994, the Secretary filed Amended Motions to Approve Settlements that provided that Madison and PSSI would pay the full penalties initially proposed by the Secretary. The proposed settlement with respect to PSSI stated:

. . . Protective Security agrees that they will designate an employee to be responsible for inspecting and ensuring the safe operating condition of the exhaust systems of all vehicles used by employees in the performance of their work duties at least once every ninety days. Protective Security further agrees that they will maintain (and produce when requested by MSHA or PSSI's contractors) documentation of such inspections. (Emphasis added). Secretary's Amended Motion at 3.

On April 11, 1994, the parties were ordered to provide clarifying information in support of their proposed settlement. Specifically, the parties were ordered to explain whether security personnel continued to remain in their stationary vehicles with the motor and heater running after Garrett's March 1, 1993, death. The parties were also requested to state whether there were any alternative means of warmth and shelter available to security guards at Madison's Job No. 3 mine site. In addition, the Secretary was requested to address whether PSSI's reported vehicle inspection program and PSSI's admonitions, presumably on behalf of Madison, to security guards not to fall asleep or leave their vehicle windows tightly closed, were effective measures for reducing the carbon monoxide hazard presented by the cited violations.

On May 16, 1994, the respondents filed a Joint Response to the Order Requesting Clarification and the Secretary filed a

Second Amended Motion to Approve Settlements. In response to the requested clarifying information, Madison stated, "there are no structures on the site of its Job No. 3 which can be accessed by security personnel to provide warmth and shelter." Parties' Joint Response at 7. Madison also stated that "security personnel did continue to use their vehicles for shelter and heat during the winter after March 1, 1993... ." *Id.*

PSSI responded that it has "voluntarily agreed to designate one employee to inspect exhaust systems of all automobiles used by employees once every ninety (90) days." *Id.* at 11. PSSI did not identify the employee, his qualifications to inspect vehicles, or, the method of inspection.

PSSI's response included an attachment that is instructions issued to its security personnel. These instructions provide in section 3.12:

At no time will any employee be required to stay in a vehicle while on a job assignment without getting out of the vehicle at least every 20 minutes to be sure not to be overcome by carbon monoxide fumes. In fact, you are required to get out of your vehicle at least every 20 minutes to check your job assignments. This will also help you stay awake.³ (Emphasis added).

With respect to the information and comments solicited from the Secretary, the Secretary stated PSSI's purported vehicle inspection program, for which it provided no details, was "welcomed by MSHA" because "it demonstrates the operator's willingness to take measures to prevent a hazard without specific legal requirements to do so." Parties' Joint Response at 3. The Secretary did not explain whether instructing employees not to tightly close their car windows and not to fall asleep in their vehicles constituted adequate hazard training. *See Id.* at 4.

In view of the inadequacy of the parties' responses concerning the purported vehicle inspection program and hazard training, I issued Orders on June 8, July 22, and August 29,

³ These exculpatory instructions, when considered in context, seek to encourage employees to stay awake so that they can exit their vehicles every 20 minutes to avoid being overcome by carbon monoxide. As discussed *infra*, these instructions are contrary to the provisions of the cited section 48.31(a) training standard that require employees to receive training in "hazard avoidance" and "safe working procedures."

1994, denying the parties' Motions for Approval of Settlement and the parties' Motion for Summary Decision. The question of the appropriate civil penalty to be assessed was set for hearing in order to resolve material issues of fact concerning the adequacy of the hazard training and the vehicle inspection program. See August 29th Order at 2; see also *Tazco, Inc.*, 3 FMSHRC 1895, 1898 (August 1981).

The August 29th Order incorporated by reference the July 22nd Order which enumerated the following five unresolved issues of material fact to be resolved at the hearing:

1. The nature of carbon monoxide intoxication and the correlation between the level of toxicity and the period of exposure;
2. Given the characteristics of carbon monoxide, whether the risk of carbon monoxide intoxication to individuals who seek warmth and shelter in stationary vehicles for extended periods of time can be effectively alleviated by the methods proposed by the respondents;
3. Whether remaining in a stationary vehicle for prolonged periods with the engine and heater running is a "recognized hazard" that is prohibited by section 5(a)(1) or section 5(a)(2) of the Occupational Safety and Health Act of 1970, 20 U.S.C. ' 654(a)(1) and (a)(2);
4. The qualifications of the individual assigned by PSSSI to inspect employee vehicle exhaust systems and the methods of such inspection; and
5. The requisite qualifications, equipment and procedures for performing an adequate vehicle exhaust system inspection.

The July 22nd Order noted that Dr. Irvin Sofer, Chief Medical Examiner of the West Virginia Department of Health and Human Services, would be called upon by the court as an expert witness. The parties were further informed that Dr. Sofer's testimony would include pertinent publications written by Dr. Sofer on the subject of carbon monoxide poisoning. By Order dated September 9, 1994, a hearing was scheduled for September 22, 1994, in Charleston, West Virginia. In preparation for hearing, the parties were provided the following articles co-authored by Dr. Sofer: Susan P. Baker, M.P.H., et al.,

Fatal Unintentional Carbon Monoxide Poisoning in Motor Vehicles, American Journal of Public Health, , Vol. 62, No. 11, 1463 (November 1977); and, Sofer & Masemore, *The Investigation of Vehicular Carbon Monoxide Fatalities*, *supra*.

The hearing in these matters was stayed by the Commission on September 20, 1994, after Madison petitioned for interlocutory review. 16 FMSHRC 1934. On June 12, 1995, the Commission remanded these matters for appropriate disposition.

In its remand, the Commission, citing *Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 509-11 (April 1989), narrowly construed the respondents' abatement obligations given the restrictive language of the citations in issue. 17 FMSHRC at 865. Thus, the Commission concluded that abatement of the defective equipment violation of section 77.404(a) was accomplished by removal of Garrett's vehicle from mine property.

Id. at 866. With respect to the training violation of section 48.31(a), the Commission determined that no further training was required for abatement as the citation only cited the lack of training of the deceased. *Id.* Consequently, the Commission decided that I erred to the extent that I declined to approve the proposed settlement because the parties had failed to provide facts demonstrating the requisite good faith of the person charged in attempting to achieve rapid compliance after notification of the subject violations. 17 FMSHRC at 867.

However, the Commission directed me to consider the adequacy of the proposed settlement amounts by affording the appropriate weight to the other statutory penalty criteria in section 110(i) of the Act "in light of the planned inspection program's contribution to compliance." *Id.* at 867-68. In addition, the Commission, citing legislative history, urged me to consider whether the proposed penalties "will accomplish the underlying purpose of a civil penalty--to encourage and induce compliance with the Mine Act and its standards." *Id.* at 867.

In light of the Commission's remand decision, on June 19, 1995, I issued an Order On Remand giving the parties an opportunity to resubmit settlement motions with supporting arguments and/or documentation. In the alternative, the order provided that the parties could request that these cases proceed to hearing.

Counsel for Madison replied on June 21, 1995, indicating that Madison became a Chapter 7 debtor under the U.S. Bankruptcy Code on May 19, 1995. Counsel indicated the June 19, 1995, Order was forwarded to the court appointed bankruptcy trustee.

PSSI responded through counsel on July 3, 1995. The response consisted of correspondence from George L. Mathis, President of PSSI wherein Mathis stated he was uncertain if PSSI was financially capable of paying the \$3,000 proposed civil penalty, not to mention an increased civil penalty.

Despite PSSI's repeated assurances throughout this proceeding, credited by the Secretary, that it had instituted a vehicle inspection program by designating an employee to perform exhaust system inspections every 90 days, PSSI now states that it requires security guards to certify that their vehicles are in proper working order without any affirmative efforts on the part of PSSI to inspect vehicles. PSSI's employee certification form continues to warn its employees that "if" employees remain in their vehicles, they should not stay in their vehicles for more than 20 minutes at a time and they should "get out of the vehicle on a regular basis for fresh air..." Employees are also cautioned to "leave windows partially open." I construe PSSI's response as a request for a disposition based on the record.

The Secretary replied on July 11, 1995, stating that neither the Secretary nor Madison had any additional information to submit in support of the proposed settlement. The Secretary stated that both the Secretary and Madison were requesting a decision based upon the record evidence.

Further Findings and Conclusions

It is well settled that an Administrative Law Judge of this Commission has the responsibility and authority to make *de novo* determinations concerning the propriety of the Secretary's proposed civil penalties by applying the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. ' 820(i). See *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147 (7th Cir. 1984). Consequently, in its remand the Commission, citing *Knox County Stone Co.*, 3 FMSHRC 2478, 2479-81 (November 1981) and relying on the provisions of section 110(k) of the Act, 30 U.S.C. ' 820(k), directed me "to consider the weight to be given to each of the statutory penalty criteria in light of the planned inspection program's contribution to compliance."⁴ 17 FMSHRC at 867-68.

⁴ Section 110(k) provides, in pertinent part, "[n]o proposed penalty which has been contested before the Commission under

section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission."

Negligence

The lethal nature of exposure to automobile fumes is commonly known. In the instant case, Garrett's job duties, which involved his prolonged presence in a stationary vehicle, cannot be equated with those of cab drivers or truck drivers who drive about, thus dissipating any potential for carbon monoxide exposure. There is no evidence that PSSI or Madison, knowing that Garrett would remain in his stationary vehicle for 8 to 12 hour shifts in sub-freezing inclement weather and subject to fatigue, took any action to ensure that Garrett's vehicle was in safe operating condition. The respondents' failure to appreciate the danger posed to Garrett constituted a reckless disregard indicative of an exceptionally high degree of negligence.

Turning to the negligence associated with Madison's section 48.31(a) violation, while there are serious questions whether any hazard training short of warning security personnel not to stay in their stationary vehicles would be effective, the issue of the adequacy of hazard training as it relates to the degree of negligence is not in issue as Madison failed to provide any pertinent training to Garrett. Having exposed Garrett to the possibility of carbon monoxide intoxication, it was incumbent on Madison to provide him with proper training against such dangers.

The failure to provide Garrett with any carbon monoxide hazard training given Madison's awareness of Garrett's long-term exposure in his stationary vehicle at Madison's mine site without any alternative means of warmth and shelter likewise demonstrates a high degree of culpability.

Gravity

Gravity as a section 110(i) penalty criteria relates to the seriousness of a violation. Gravity must be viewed in the context of the importance of the violated mandatory safety standard and the operator's conduct in relation to the Mine Act's purpose of ensuring that operators make every reasonable effort to prevent unsafe or unhealthful conditions. *Quinland Coals, Inc*, 9 FMSHRC 1614, 1622 n. 11 (September 1987); *see also Harlan Cumberland Coal Company*, 12 FMSHRC 134, 140-41 (January 1990) (ALJ Fauver). Here, the unsafe condition or practice was readily apparent. Yet the respondents failed to provide Garrett with the benefit of any meaningful vehicle inspection or hazard training to address Garrett's potential exposure to carbon monoxide fumes. These omissions constitute violative conduct indicative of serious gravity.

Planned Vehicle Inspection and

and Hazard Training Programs'
Contribution to Compliance With
the Cited Mandatory Standards

In its remand, the Commission noted the subject citations were narrow in scope and did not trigger a broad duty of abatement because they were limited to Garrett's defective vehicle and his lack of hazard training. However, good faith abatement is only one of several non-exclusive statutory guidelines to be considered when determining the appropriate civil penalty. Another fundamental consideration, discussed in the legislative history of section 110(i), is whether the amount of the proposed penalty is sufficient to encourage compliance with the cited mandatory standard.⁵ Consequently, in penalty assessment, it is proper to evaluate the respondents' continuing operations to determine if the respondents are exposing others to the identical hazards contributed to by the cited violative conduct, particularly in this instance where that conduct contributed to a fatality.

In other words, the Act is a remedial rather than a revenue raising statute. The purpose of the Act is "to provide for the protection and health and safety of persons working in the coal mining industry of the United States..." 30 U.S.C. ' 801 Note. The imposition of a civil penalty is a means intended to "effectuate the purposes of the Mine Act." 17 FMSHRC at 873.

⁵ Section 110(i) of the Act states that, "[i]n assessing civil monetary penalties, the Commission shall consider..." the six penalty criteria contained therein (emphasis added). Although application of these statutory guidelines is almost always adequate to determine the proper civil penalty, the language of section 110(i) does not preclude consideration of other relevant factors in extraordinary cases, particularly when such factors are consistent with the legislative history and assist the trier of fact in assessing penalties that are in the public interest.

The imposition of civil penalties for violations of mandatory safety standards that expose miners to hazards jeopardizing life and health without regard to whether or not these hazards continue to exist would be a futile gesture that would trivialize the Mine Act. In this regard, the Commission noted in its remand decision that the Commission and its judges have a duty "to protect the public interest by ensuring that all settlements... are consistent with the...Act's objectives." 17 FMSHRC at 867, *citing Knox County*, 3 FMSHRC at 2479.

Consistent with the above discussion, Congress specifically expressed its concern in the legislative history of section 110(i) of the Act that the objective of the imposition of a civil penalty must be to encourage compliance with the cited standard rather than raise revenue. Senate Subcommittee on Labor, 2d Sess., *Legislative History of the Mine Safety and Health Act of 1977*, at 632 (1978). The drafters of the Act stated, "a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance." *Id.* at 629.

Therefore, given the purpose of the Act, if PSSSI and Madison insist on exposing personnel to the potential of carbon monoxide poisoning, they must bear the burden of ensuring vehicles are in safe operating condition and of ensuring that personnel are properly trained in hazard avoidance. Unfortunately, as noted below, the post-fatality conduct of PSSSI and Madison demonstrates the penalties proposed by the Secretary are inadequate to encourage the respondents' compliance with sections 77.404 and 48.31(a).

Despite PSSSI's repeated assurances that it had initiated its own vehicle inspection program, in its latest July 3, 1995, submission, PSSSI now reports that it has shifted the burden of exhaust system inspections to its security guards who are subjected to the hazards of carbon monoxide on a nightly basis. PSSSI's attempt to superimpose its responsibility for ensuring that vehicles are maintained in safe operating condition on its employees subverts the basic legislative intent of the Act, which provides that it is the mine operator and its contractors that "have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices" in the Nation's mines. 30 U.S.C. " 801(d), 801(e), 802(d); see also *Eagle Nest Incorporated*, 14 FMSHRC 1119 (July 1992). Thus, PSSSI's attempt to shift the burden of vehicle inspection is an aggravating rather than mitigating factor with respect to its degree of culpability and the appropriate civil penalty.

Evaluation of Madison's reliance on PSSI's warnings to its employees to "partially" open car windows and not fall asleep as the method of achieving compliance with the hazard training requirements of section 48.31(a) raises interesting questions because automobiles are not primarily designed for the purpose of providing warmth and shelter. Automobile manufacturers caution against remaining in stationary vehicles for even short periods of time. For example, the 1991 *Ford Motor Company Owner's Guide*, provided to the parties with my August 29, 1994, Order denying summary decision, warns:

Carbon monoxide, although colorless and odorless, is present in exhaust fumes. Take precautions to avoid its dangerous effects.

Never idle the engine in closed areas. Never sit in a parked or stopped vehicle for more than a short period of time with the engine running. Exhaust fumes, particularly carbon monoxide, may build up. These fumes are harmful and could kill you. (Emphasis added).

Moreover, the efficacy of open car windows as a life saving measure is questionable. In studies involving seven of 39 instances of carbon monoxide deaths in vehicles, Dr. Sofer and his colleagues found:

Seven cars [of the 39 vehicles studied] had at least 1 window open for a distance of 1/2" to 4", which many people think is an adequate precaution against CO poisoning. Two of these cars were subjected to carbon monoxide tests while parked with the engine running and accumulated potentially fatal CO concentrations with the window in the same position as when the bodies were discovered. One of them, with the window open 1/2", built up a 0.1% CO level in 30 minutes. This level produces a fatal carboxyhemoglobin saturation in the blood in 3-4 hours. The other tested car had a window open about 4", and exhaust fumes may actually have entered through this window as well as the trunk. Baker *et al.*, *supra* at 1465.

Madison has failed to demonstrate any effective training measures taken after Garrett's death to protect security guards from the hazards of carbon monoxide exposure. In fact, the training proposed by PSSI, and apparently endorsed by Madison, would accentuate the potential dangers from carbon monoxide

exposure by suggesting ineffective remedial measures such as reminders to stay awake. Such training measures disregard the provisions of section 48.31(a) which mandate training in "hazard recognition and avoidance." Rather than achieve compliance, the training program advanced by the respondents ignores hazard recognition and pays lip service to avoidance. Such conduct is also an aggravating rather than a mitigating factor.

Ultimate Conclusions

PSSI has presented no objective evidence that it is financially incapable of paying an increased penalty in this matter. In view of the extremely high negligence and serious gravity associated with the violations in issue, as well as the failure to adequately remedy the hazards created by the cited mandatory standards to ensure that future fatalities do not occur, I would normally be inclined to impose significantly higher penalties in these cases.

However, I acknowledge that both the Secretary and the dissenting Commissioners on remand support the proposed settlement. Therefore, in an exercise of restraint, a civil penalty of \$7,500 is assessed for PSSI's violation of section 77.404(a) cited in Citation No. 3976646. Similarly, civil penalties of \$4,000 for Madison's violation of section 77.404(a) cited in Citation No. 3976644 and \$1,500 for Madison's section 48.31(a) violation cited in Citation No. 3976647 are also hereby assessed in this matter. While these penalties represent significant percentage increases over the small initial proposed assessments, the penalties are mild given the circumstances herein.⁶ The small size of PSSI and Madison's bankruptcy have also been considered in the assessment of these penalties.

Finally, my statutory jurisdiction in this matter is limited to the appropriate civil penalty to be assessed. Imposition of remedial measures to prevent carbon monoxide death is beyond the scope of my authority. However, the paramount purpose of the Act is to prevent the existence of "unsafe and unhealthful conditions and practices." Potentially exposing employees to a deadly

⁶ It is not uncommon for the Commission to impose civil penalties considerably larger than those proposed by the Secretary when there are factors aggravating an operator's culpability. For example, the Court recently affirmed the Commission's increase in proposed penalties from \$25,000 to \$65,000 in a matter involving two fatalities. *W.S. Frey Company, Incorporated v. FMSHRC*, No. 94-1869, (4th Cir. June 13, 1995).

odorless, colorless gas, night after frigid night, in direct contravention of automobile manufacturer warnings, is an unsafe and unhealthful practice. Assuming *arguendo*, this practice does not violate the Act, the respondents have an affirmative duty to protect such employees from the hazards of carbon monoxide through meaningful vehicle maintenance and hazard training programs.

While not dispositive of these civil penalty proceedings, I note MSHA has reported that on Sunday, April 9, 1995, under apparent circumstances similar to the fatality of Allen Garrett, Melvin Brian Day, a security guard in a mine located in McDowell County, West Virginia, was found dead from asphyxiation in his vehicle. At the time he was discovered, Day's vehicle was parked on mine property with the motor running. See *Mine Regulation Reporter*, Vol. 8, No. 9, May 5, 1995, at 223. I urge MSHA to take appropriate enforcement measures to prevent similar loss of life.

ORDER

In view of the above, 107(a) Order No. 3976643 and 104(a) Citation Nos. 3976644 and 3976647 issued to Madison Branch Management **ARE AFFIRMED**. Consequently, Madison Branch Management's related contests in Docket Nos. WEVA 93 218-R, WEVA 93-219-R and WEVA 93-220-R **ARE DENIED**.

Accordingly, **IT IS ORDERED** that Madison Branch Management pay a total civil penalty of \$5,500 for the citations in issue. The Secretary may assert a claim for payment of this civil penalty in Madison's Bankruptcy proceeding. Upon receipt of payment, Docket Nos. WEVA 93-373 and Docket No. WEVA 93-412 **ARE DISMISSED**.

Citation No. 3976646 issued to Protective Security Services and Investigations, Inc., **IS AFFIRMED**. **IT IS FURTHER ORDERED** that Protective Security Services and Investigations, Inc., pay a civil penalty of \$7,500 in satisfaction of this citation. Payment is to be made within 30 days of the date of this decision. Upon timely receipt of payment, the civil penalty proceeding in Docket No. WEVA 93-415 **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution:

Helen M. Morris, Esq., Bankruptcy Trustee, Madison Branch Management, Bear, Colburn & Morris, 731 5th Avenue, Huntington, WV 25701 (Certified Mail)

Christopher B. Power, Esq., Robinson & McElwee, P.O. Box 1791, Charleston, WV 25326 (Certified Mail)

Ronald Gurka, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Suite 516, Arlington, VA 22203 (Certified Mail)

James A. Walker, Esq., White & Browning Building, Suite 201, 201-1/2 Stratton Street, P.O. Box 358, Logan, WV 25601 (Certified Mail)

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